No. 16-1140	
Title:	**National Institute of Family and Life Advocates, dba NIFLA, et al., Petitioners** **v.** **Xavier Becerra, Attorney General of California, et al.**
Docketed:	March 21, 2017
Lower Ct:	United States Court of Appeals for the Ninth Circuit
Case Numbers:	(16-55249)
Decision Date:	October 14, 2016
Rehearing Denied:	December 20, 2016
Questions Presented	

DATE	PROCEEDINGS AND ORDERS
Mar 20 2017	Petition for a writ of certiorari filed. (Response due April 20, 2017)
Apr 13 2017	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioners.
Apr 13 2017	Waiver of right of respondent Morgan Foley to respond filed.
Apr 14 2017	Order extending time to file response to petition to and including May 24, 2017.
Apr 17 2017	Brief amicus curiae of Liberty, Life and Law Foundation filed.
Apr 20 2017	Brief amici curiae of Freedom X and Crisis Pregnancy Clinic of Southern California filed.

Apr 20 2017	Brief amicus curiae of Charlotte Lozier Institute filed.
Apr 20 2017	Brief amicus curiae of Care Net filed.
Apr 20 2017	Brief amici curiae of United States Justice Foundation, et al. filed.
Apr 20 2017	Brief amicus curiae of Cato Institute filed.
Apr 20 2017	Brief amici curiae of National Association of Evangelicals, Christian Legal Society, et al. filed. VIDED
May 24 2017	Brief of respondents State Respondents in opposition filed. VIDED.
Jun 05 2017	Reply of petitioners National Institute of Family and Life Advocates, dba NIFLA, et al. filed.
Jun 06 2017	DISTRIBUTED for Conference of June 22, 2017.
Jun 19 2017	Record Requested.
Jun 19 2017	Record received from the U.S.C.A. 9th Circuit. The record is electronic and available on PACER.
Jun 21 2017	DISTRIBUTED for Conference of September 25, 2017.
Sep 21 2017	Rescheduled.
Oct 02 2017	DISTRIBUTED for Conference of 10/6/2017.
Oct 10 2017	DISTRIBUTED for Conference of 10/13/2017.
Oct 23 2017	DISTRIBUTED for Conference of 10/27/2017.
Oct 30 2017	DISTRIBUTED for Conference of 11/3/2017.

Nov 02 2017	Letter of November 2, 2017, from counsel for petitioner received. (Distributed)
Nov 02 2017	Letter of November 2, 2017, from counsel for respondents received. VIDED (Distributed)
Nov 06 2017	DISTRIBUTED for Conference of 11/9/2017.
Nov 13 2017	Petition GRANTED limited to the following question: Whether the disclosures required by the California Reproductive FACT Act violate the protections set forth in the Free Speech Clause of the First Amendment, applicable to the States through the Fourteenth Amendment.
Nov 29 2017	Blanket Consent filed by Petitioners, NIFLA, et al.. **Blanket Consent**
Dec 20 2017	Joint motion of the parties for an extension of time filed. **Main Document**
Dec 22 2017	Joint motion of the parties to file their opening briefs on the merits is granted and the time to file the joint appendix and petitioner's brief on the merits is extended to and including January 8, 2018, and the time to file respondents' brief on the merits is extended to and including February 20, 2018.
Dec 26 2017	Brief amicus curiae of Cato Institute filed. **Main Document** **Proof of Service** **Certificate of Word Count**
Jan 08 2018	Brief of petitioners NIFLA, et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 08 2018	Joint appendix filed. (Statement of costs filed.) **Main Document** **Proof of Service**
Jan 11 2018	Brief amici curiae of Twenty-Three Illinois Pregnancy Care Centers filed. **Main Document** **Certificate of Word Count** **Proof of Service**

Jan 11 2018	Brief amici curiae of 13 Women and The Catholic Association Foundation filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 12 2018	Brief amici curiae of Massachusetts Citizens for Life, et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 12 2018	Brief amicus curiae of Justice and Freedom Fund filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 12 2018	Brief amici curiae of Charlotte Lozier Institute, et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 12 2018	Brief amicus curiae of Jews for Religious Liberty filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 15 2018	Brief amicus curiae of Care Net filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 15 2018	Brief amici curiae of 41 Family Policy Organizations filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 15 2018	Brief amici curiae of Pregnancy Care Centers in Texas filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 15 2018	Brief amicus curiae of Human Coalition filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 15 2018	Brief amicus curiae of Institute for Justice filed. **Main Document** **Certificate of Word Count** **Proof**

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Jan 16 2018	Brief amici curiae of U.S. Conference of Catholic Bishops, et al. filed. **Main Document** **Proof of Service** **Certificate of Word Count**
Jan 16 2018	Brief amici curiae of American Association of Pro-Life Obstetricians & Gynecologists, et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 16 2018	Brief amici curiae of State of Texas, et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 16 2018	Brief amicus curiae of United States Supporting Neither Party filed. **Proof of Service** **Main Document**
Jan 16 2018	Brief amici curiae of The Scharpen Foundation, Inc., Advocates for Faith & Freedom, and National Pro-Life Alliance filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 16 2018	Brief amicus curiae of First Resort, Inc. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 16 2018	Brief amici curiae of Operation Outcry, Texas Justice Foundation, and Priests for Life filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 16 2018	Brief amici curiae of C12 Group, CEO Forum, Inc., Christian Employers Alliance, Marketplace Leaders filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 16 2018	Brief amicus curiae of Foundation for Moral Law filed. **Main Document** **Certificate of Word Count** **Proof**

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Jan 16 2018	Brief amici curiae of 144 Members of Congress filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 16 2018	Brief amici curiae of Legal Scholars filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 16 2018	Brief amici curiae of Mountain Right to Life, Inc., dba Pregnancy and Family Resource Center, Birth Choice of the Desert and His Nesting Place filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 16 2018	Brief amici curiae of American Center for Law & Justice, et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 16 2018	Brief amici curiae of Freedom X and Crisis Pregnancy Clinic of Southern California filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 16 2018	Brief amicus curiae of Alpha Center, A Pregnancy Help Center Registered Under the Laws of South Dakota filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 16 2018	Brief amici curiae of Conservative Legal Defense and Education Fund, et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 16 2018	Brief amicus curiae of David Boyle filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 16 2018	Brief amicus curiae of Heartbeat International, Inc. filed. **Main Document** **Certificate of Word Count** **Proof**

	of Service
Jan 16 2018	Brief amici curiae of National Association of Evangelicals, et al. filed. **Main Document Certificate of Word Count Proof of Service**
Jan 24 2018	SET FOR ARGUMENT ON Tuesday, March 20, 2018
Jan 30 2018	Proposal of amici curiae The Sharpen Foundation, Inc., et al. to lodge copies of record material in related case, and copy of legislative history of the Reproductive FACT Act, 2-15 Cal. Stats. Ch. 700.
Feb 07 2018	CIRCULATED
Feb 20 2018	Brief of respondent Thomas E. Montgomery filed. (Distributed) **Main Document Certificate of Word Count Other Proof of Service**
Feb 20 2018	Brief of respondents Becerra, Att'y Gen. of CA, et al. filed. (Distributed) **Main Document Certificate of Word Count Proof of Service**
Feb 20 2018	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed. **Proof of Service Main Document**
Feb 23 2018	Brief amicus curiae of Compassion & Choices filed. (Distributed) **Main Document Proof of Service Certificate of Word Count**
Feb 26 2018	Brief amici curiae of Legal Ethicists filed. (Distributed) **Main Document Certificate of Word Count Proof of Service**
Feb 26 2018	Brief amicus curiae of Public Citizen, Inc. filed. (Distributed) **Main Document Certificate of Word**

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Feb 27 2018	Brief amici curiae of Members of Congress filed. (Distributed) **Main Document Certificate of Word Count Proof of Service**
Feb 27 2018	Brief amici curiae of American Academy of Pediatrics, et al. filed. (Distributed) **Main Document Certificate of Word Count Proof of Service**
Feb 27 2018	Brief amici curiae of Planned Parenthood Federation of America and Physicians for Reproductive Health filed. (Distributed) **Main Document Certificate of Word Count Proof of Service**
Feb 27 2018	Brief amici curiae of Black Women for Wellness, et al. filed. (Distributed) **Main Document Certificate of Word Count Proof of Service**
Feb 27 2018	Brief amici curiae of California Women's Law Center, et al. filed. (Distributed) **Main Document Certificate of Word Count Proof of Service**
Feb 27 2018	Brief amici curiae of Equal Rights Advocates, et al. filed. (Distributed) **Main Document Certificate of Word Count Proof of Service**
Feb 27 2018	Brief amicus curiae of American Medical Association filed. (Distributed) **Main Document Certificate of Word Count Proof of Service**
Feb 27 2018	Brief amici curiae of the States of New York, et al. filed. (Distributed) **Main Document Certificate of Word Count Proof of Service**

Feb 27 2018	Brief amici curiae of 51 Reproductive Rights, Civil Rights and Social Justice Organizations filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Feb 27 2018	Brief amici curiae of City and County of San Francisco, et al. filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Feb 27 2018	Brief amici curiae of National League of Cities, et al. filed. (Distributed) **Main Document** **Proof of Service** **Certificate of Word Count**
Feb 27 2018	Brief amici curiae of Social Science Researchers filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Mar 05 2018	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Mar 13 2018	Reply of petitioners NIFLA, et al. filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Mar 16 2018	Letter of respondents Becerra, Att'y Gen. of CA, et al. filed. (Distributed) **Main Document**
Mar 20 2018	Argued. For petitioners: Michael P. Farris, Washington, D. C. For United States, as amicus curiae, in support of neither party: Jeffrey B. Wall, Deputy Solicitor General, Department of Justice, Washington, D. C. For respondents: Joshua A. Klein, Deputy Solicitor General, San Francisco, Cal.

NAME	ADDRESS	PHONE
Attorneys for Petitioners		

David Andrew Cortman Counsel of Record	Alliance Defending Freedom 1000 Hurricane Shoals Road, NE Suite D-1100 Lawrenceville, GA 30043 dcortman@adflegal.org	7703390774

Party name: NIFLA, et al.

Attorneys for Respondents

Thomas Dale Bunton Counsel of Record	Office of County Counsel 1600 Pacific Highway Room 355 San Diego, CA 92101 thomas.bunton@sdcounty.ca.gov	619-531-6456

Party name: Thomas E. Montgomery

Joshua Aaron Klein Counsel of Record	California Department of Justice 455 Golden Gate Ave., Suite 11000 San Francisco, CA 94102-7004 joshua.klein@doj.ca.gov	415-703-2543

Party name: Becerra, Att'y Gen. of CA, et al.

Carrie L. Mitchell Counsel of Record	McDougal, Love, Boehmer, Foley, Lyon & Canlas 8100 La Mesa Blvd., Suite 200 La Mesa, CA 91942 cmitchell@mcdougallove.com	(619) 440-4444

Party name: Morgan Foley

Other

Steven Henry Aden Counsel of Record	Americans United for Life 2101 Wilson Blvd. Suite 525 Arlington, VA 22201 Steven.Aden@aul.org	202-741-4917

Party name: American Association of Pro-Life Obstetricians & Gynecologists; Christian Medical & Dental Association; American College of Pediatricians

John Michael Baker Counsel of Record	Greene Espel, PLLP 222 South Ninth Street	6123738344

Suite 2200
Minneapolis, MN 55402

jbaker@greeneespel.com

Party name: National League of Cities, United States Conference of Mayors, International City/County Management Association, and International Municipal Lawyers Association

William Becker Jr.
Counsel of Record
Freedom X
1500 Olympic Blvd.
Suite 400
Los Angeles, CA 90064

freedomxlaw@gmail.com

310-636-1018

Party name: Freedom X and Crisis Pregnancy Clinic of Southern California

Thomas Bennigson
Counsel of Record
Public Good Law Center
1950 University Ave., Ste. 200
Berkeley, CA 94704

tbennigson@publicgoodlaw.org

510-336-1899

Party name: Black Women for Wellness, et al.

Dorinda C. Bordlee
Counsel of Record
Bioethics Defense Fund
3422 Cleary Avenue
Metairie, LA 70002

dbordlee@bdfund.org

5042317234

Party name: Charlotte Lozier Institute

David Christopher Boyle
Counsel of Record
PO Box 15143
Long Beach, CA 90815

dbo@boyleslaw.org

(734)-904-6132

Party name: David Boyle

John J. Bursch
Counsel of Record
Bursch Law PLLC
9339 Cherry Valley SE, #78
Caledonia, MI 49316

jbursch@burschlaw.com

(616) 450-4235

Party name: Care Net

Harold J. Cassidy
Counsel of Record
The Cassidy Law Firm
750 Broad Street

7327473999

Shrewsbury, NJ 07702

hjc@haroldcassidy.com

Party name: Alpha Center, A Pregnancy Help Center Registered Under the Laws of South Dakota

Jonathan David Christman Counsel of Record	Fox Rothschild LLP 10 Sentry Parkway, Suite 200 P.O. Box 3001 Blue Bell, PA 19422 jchristman@foxrothschild.com	610-397-6500

Party name: Human Coalition

Matthew James Clark Counsel of Record	Foundation for Moral Law, Inc. 1 Dexter Avenue Montgomery, AL 36104 matt@morallaw.org	301-503-6329

Party name: Foundation for Moral Law

Frederick W. Claybrook Jr. Counsel of Record	Claybrook, LLC 1001 Pa. Ave., N.W., 8th Floor Washington, DC 20004 rick@claybrooklaw.com	202-250-3883

Party name: National Association of Evangelicals, et al.

Dwight Gerard Duncan Counsel of Record	University of Massachusetts School of Law 333 Faunce Corner Road North Dartmouth, MA 02747 dduncan@umassd.edu	508-985-1124

Party name: Massachusetts Citizens for Life, et al.

Michael Lee Francisco Counsel of Record	MRD Law 620 N Tejon St Suite 101 Colorado Springs, CO 80903 michael.francisco@mrd.law	3033257843

Party name: C12 Group, CEO Forum, Inc., Christian Employers Alliance, Marketplace Leade

Noel J. Francisco
Counsel of Record
Solicitor General
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

SupremeCtBriefs@USDOJ.gov

202-514-2217

Party name: United States

David Austin French
Counsel of Record
National Review Institute
19 West 44th Street
Suite 1701
New York, NY 10036

dfrench@nationalreview.com

931-446-7572

Party name: 41 Family Policy Organizations

Albert Quoc Giang
Counsel of Record
Boies Schiller Flexner LLP
725 S. Figueroa Street
31st Floor
Los Angeles, CA 90017

agiang@bsfllp.com

2136299040

Party name: Legal Ethicists

Brianne Jenna Gorod
Counsel of Record
Constitutional Accountability Center
1200 18th Street, NW
Suite 501
Washington, DC 20036

brianne@theusconstitution.org

202 296 6889

Party name: Members of Congress

James L. Hirsen
Counsel of Record
505 S. Villa Real Drive
Suite 208
Anaheim Hills, CA 92807

james@jameshirsen.com

(714) 283-8880

Party name: Justice and Freedom Fund

Scott A. Keller
Counsel of Record
Office of the Attorney General
Solicitor General
P.O. Box 12548 (MC 059)
Austin, TX 78711-2548

scott.keller@oag.texas.gov

5125902655

Party name: State of Texas, et al.

Kenneth Alan Klukowski Counsel of Record	First Liberty Institute 2001 West Plano Parkway Suite 1600 Plano, TX 75075 kklukowski@firstliberty.org	(972) 941-4444

Party name: Legal Scholars

Mollie M. Lee Counsel of Record	San Francisco City Attorney's Office 1 Dr. Carlton B. Goodlett Place City Hall, Room 234 San Francisco, CA 94102 mollie.lee@sfcityatty.org	415.554-4290

Party name: City and County of San Francisco

Mary Elizabeth McAlister Counsel of Record	Liberty Counsel 100 Mountain View Road, Suite 2775 Lynchburg, VA 24502-2272 mary@lc.org	407-875-1776

Party name: Mountain Right to Life, Inc., dba Pregnancy and Family Resource Center, Birth Choice of the Desert and His Nesting Place

Robert James McNamara Counsel of Record	Institute for Justice 901 N Glebe Road Suite 900 Arlington, VA 22203 rmcnamara@ij.org	703-682-9320

Party name: Institute for Justice

Leonard A. Nelson Counsel of Record	American Medical Association 330 N. Wabash Ave. Suite 39300 Chicago, IL 60611 leonard.nelson@ama-assn.org	3124645532

Party name: American Medical Association

Scott Lawrence Nelson Counsel of Record	Public Citizen Litigation Group 1600 20th Street, N.W. Washington, DC 20009	202-588-1000

snelson@citizen.org

Party name: Public Citizen, Inc.

Andrea Marie Picciotti-Bayer Counsel of Record	Catholic Association Foundation 3220 N. Street NW, Suite 126 Washington, DC 20007 amariepicciotti@gmail.com	5712016564

Party name: 13 Women and The Catholic Association Foundation

Mark Leonard Rienzi Counsel of Record	The Becket Fund for Religious Liberty 1200 New Hampshire Ave., NW Suite 700 Washington, DC 20036 rienzi@law.edu	2025070834

Party name: First Resort, Inc.

Julie Rikelman Counsel of Record	Center for Reproductive Rights 199 Water Street 22nd Floor New York, NY 10038 jrikelman@reprorights.org	917-637-3600

Party name: 51 Reproductive Rights, Civil Rights and Social Justice Organizations

Sanford Jay Rosen Counsel of Record	Rosen Bien Galvan & Grunfeld, LLP 50 Fremont Street, 19th Fl. San Francisco, CA 94105 srosen@rbgg.com	415-433-6830

Party name: Equal Rights Advocates, et al.

James Christopher Rutten Counsel of Record	Munger, Tolles & Olson LLP 350 South Grand Avenue, 50th Floor Los Angeles, CA 90071-3426 james.rutten@mto.com	(213) 683-9189

Party name: Heartbeat International, Inc.

Darin Murl Sands Counsel of Record	Lane Powell 601 SW Second Avenue Suite 2100 Portland, OR 97204	(503) 778-2117

	sandsd@lanepowell.com	
Party name: Compassion & Choices		
Gene Clayton Schaerr Counsel of Record	Schaerr | Duncan 1717 K Street NW, Suite 900 Washington, DC 20006 gschaerr@schaerr-duncan.com	202-787-1060
Party name: U.S. Conference of Catholic Bishops, et al.		
Linda Boston Schlueter Counsel of Record	Trinity Legal Center 11120 Wurzbach, Suite 206 San Antonio, TX 78230 TLC4Linda@aol.com	210-697-8202
Party name: Pregnancy Care Centers in Texas		
Alan Evan Schoenfeld Counsel of Record	Wilmer, Cutler, Pickering, Hale and Dorr, LLP 7 World Trade Center, 250 World Trade Center New York, NY 10007 alan.schoenfeld@wilmerhale.com	(212)-937-7294
Party name: Planned Parenthood Federation of America and Physicians for Reproductive Health		
Jay Alan Sekulow Counsel of Record	American Center for Law and Justice 201 Maryland Avenue, N.E. Washington, DC 20002 sekulow@aclj.org	(202) 546-8890
Party name: American Center for Law & Justice, et al.		
Ilya Shapiro Counsel of Record	Cato Institute 1000 Massachusetts Ave., NW Washington, DC 20001 ishapiro@cato.org	2028420200
Party name: Cato Institute		
Catherine Wynne Short Counsel of Record	Life Legal Defense Foundation P.O. Box 1313 Ojai, CA 93024-1313	(707) 337-6880

lldfojai@earthlink.net

Party name: Operation Outcry, Texas Justice Foundation, and Priests for Life

Howard Nathan Slugh
Counsel of Record
2400 Virginia Avenue, N.W.
Apt. C619
Washington, DC 20037
954-328-9461

hslugh@cooperkirk.com

Party name: Jews for Religious Liberty

Noel Ward Sterett
Counsel of Record
Mauck & Baker, LLC
One North LaSalle Street, Suite 600
Chicago, IL 60602
312-726-1243

nsterett@mauckbaker.com

Party name: Twenty-Three Illinois Pregnancy Care Centers

Simona Gurevich Strauss
Counsel of Record
Simpson Thacher & Bartlett, LLP
2475 Hanover Street
Palo Alto, CA 94304
650-251-5203

sstrauss@stblaw.com

Party name: American Academy of Pediatrics, California; American College of Obstetricians and Gynecologists; American Medical Women's Association; American Nurses Association\California; American Society for Reproductive Medicine, et al.

Patrick Strawbridge
Counsel of Record
Consovoy McCarthy Park PLLC
Ten Post Office Square
8th Floor South PMB #706
Boston, MA 02109
2075223163

patrick@consovoymccarthy.com

Party name: 144 Members of Congress

Lois D. Thompson
Counsel of Record
Proskauer Rose LLP
2049 Century Park East
Los Angeles, CA 90067
310-557-2900

lthompson@proskauer.com

Party name: California Women's Law Center, et al.

Herbert William Titus
Counsel of Record
William J. Olson, P.C.
370 Maple Ave W
Suite 4
7033565070

Vienna, VA 22180

jmorgan@mindspring.com

Party name: Conservative Legal Defense and Education Fund, et al.

Robert H. Tyler
Counsel of Record
Tyler & Bursch, LLP
24910 Las Brisas Road
Suite 110
Murrieta, CA 92562
9516002733

rtyler@tylerbursch.com

Party name: The Scharpen Foundation, Inc., Advocates for Faith & Freedom, and National Pro-Life Alliance

Barbara Dale Underwood
Counsel of Record
Solicitor General
Office of the Attorney General
120 Broadway
New York, NY 10271-0332
212-416-8016

Barbara.underwood@ag.ny.gov

Party name: the States of New York, et al.

Steven Alan Zalesin
Counsel of Record
Patterson Belknap Webb and Tyler LLP
1133 Avenue of the Americas
New York, NY 10036
212-336-2000

sazalesin@pbwt.com

Party name: Social Science Researchers

William J. Becker Jr.
Freedom X
11500 Olympic Blvd.
Suite 400
Los Angeles, CA 90064
(310) 636-1018

freedomxlaw@gmail.com

Party name: Freedom X and Crisis Pregnancy Clinic of Southern California

John J. Bursch
Bursch Law PLLC
9339 Cherry Valley Avenue SE, #78
Caledonia, MI 49316
(616) 450-4235

jbursch@burschlaw.com

Party name: Care Net

Frederick W. Claybrook Jr.	Claybrook, LLC 1001 Pennsylvania Ave., N.W., 8th Floor Washington, DC 20004 rick@claybrooklaw.com	(202) 250-3833

Party name: National Association of Evangelicals, Christian Legal Society, et al.

Deborah Dewart	620 E. Sabiston Drive Swansboro, NC 28584-9674 debcpalaw@earthlink.net	(910)-326-4554

Party name: Liberty, Life and Law Foundation

Catherine Glenn Foster	1200 New Hampshire Ave., N.W., Suite 750 Washington, DC 20036 cfoster@lozierinstitute.org	(202) 223-8073

Party name: Charlotte Lozier Institute

Jeremiah Lee Morgan	William J. Olson, P.C. 370 Maple Avenue, West, Suite 4 Vienna, VA 22180-5615 wjo@mindspring.com	(703)-356-5070

Party name: United States Justice Foundation, et al.

Ilya Shapiro	Cato Institute 1000 Massachusetts Ave., NW Washington, DC 20001 ishapiro@cato.org	(202) 842-2000

Party name: Cato Institute

RECORD AND BRIEFS

16-1140

FILED
MAR 20 2017
OFFICE OF THE CLERK
SUPREME COURT U.S.

No. _____

IN THE
Supreme Court of the United States

NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES, D/B/A NIFLA, ET AL.,
Petitioners,

v.

XAVIER BECERRA, ATTORNEY GENERAL, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

JOHN C. EASTMAN
CENTER FOR CONSTITUTIONAL JURISPRUDENCE
Chapman University
Fowler School of Law
One University Drive
Orange, CA 92866
(877) 855-3330

ANNE O'CONNOR
NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES
5601 Southpoint Centre Blvd.
Fredericksburg, VA 22407
(540) 372-3930

DAVID A. CORTMAN
Counsel of Record
KRISTEN K. WAGGONER
KEVIN H. THERIOT
JORDAN W. LORENCE
ELISSA M. GRAVES
ALLIANCE DEFENDING FREEDOM
440 1st Street N.W.
Suite 600
Washington, D.C. 20001
(202) 393-8690
dcortman@ADFlegal.org

Counsel for Petitioners

DEAN R. BROYLES
THE NATIONAL CENTER FOR LAW AND POLICY
539 West Grand Avenue
Escondido, CA 92025
(760) 747-4529

QUESTION PRESENTED

The State of California enacted a law called the "Reproductive FACT Act." The State admits its purpose is targeting "crisis pregnancy centers" based on their viewpoint that "discourag[es]" abortion. The Act forces pro-life religious licensed centers to post notices that encourage women to contact the State to receive information on free or low cost abortions. The Act also burdens pro-life religious unlicensed centers' speech by requiring them to place extensive disclaimers in large fonts and in as many as 13 languages in their ads, which significantly burdens their ability to advertise. But the Act exempts most other licensed medical and unlicensed non-medical facilities, such as abortion providers, hospitals, and other healthcare facilities, as well as federal health care providers. The Ninth Circuit candidly admits that it upheld the Act amidst a "circuit split" with decisions by the Second and Fourth Circuits over how to scrutinize regulations of speech by medical professionals on controversial health issues. The ruling also conflicts with a recent decision by the Eleventh Circuit. The question presented is:

Whether the Free Speech Clause or the Free Exercise Clause of the First Amendment prohibits California from compelling licensed pro-life centers to post information on how to obtain a state-funded abortion and from compelling unlicensed pro-life centers to disseminate a disclaimer to clients on site and in any print and digital advertising.

PARTIES TO THE PROCEEDING

Petitioners are National Institute of Family and Life Advocates, d/b/a NIFLA, a Virginia corporation; Pregnancy Care Center, d/b/a Pregnancy Care Clinic, a California corporation; and Fallbrook Pregnancy Resource Center, a California corporation.

Respondents are Xavier Becerra, in his official capacity as Attorney General for the State of California, Thomas Montgomery, in his official capacity as County Counsel for San Diego County; Morgan Foley, in his official capacity as City Attorney for the City of El Cajon, CA; and Edmund D. Brown, Jr., in his official capacity as Governor of the State of California.

CORPORATE DISCLOSURE STATEMENT

National Institute of Family and Life Advocates, Pregnancy Care Center, and Fallbrook Pregnancy Resource Center, are non-profit corporations with no parent corporations. The corporations have no stock; accordingly, no public corporation owns 10% or more of their stock.

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INTRODUCTION

California enacted the Reproductive FACT Act ("the Act") with the stated purpose of targeting pro-life "crisis pregnancy centers" based on their viewpoint that "discourage[s]" abortion. Appendix ("App.") 7a. Petitioners are religiously-motivated non-profit centers that work to help women make choices other than abortion. The Act forces licensed pro-life medical centers to post notices informing women how to contact the State at a particular phone number for information on how to obtain state-funded abortions, directly contradicting the centers' pro-life message. Those calling the provided number will be referred to Medi-Cal and Family Planning, Access, Care, and Treatment Program ("PACT") providers, including private abortion providers such as Planned Parenthood. *See* www.plannedparenthood.org/health-center/CA); www.familypact.org/provider-search-1. The Act also forces non-medical, unlicensed pro-life organizations to give extensive disclaimers that they are not a licensed medical facility in large font and in as many as 13 languages to clients on site as well as in their ads, both print and digital, including on their own Internet websites. This compelled speech requirement drowns out the centers' pro-life messages and discourages them from speaking through advertisements because California's voluminous required statements make ads cost prohibitive.

The Petitioners come in two categories, both covered by the Act. The first group of Petitioners are licensed medical facilities ("licensed centers") that provide medical services along with pro-life

information and non-medical assistance, including diapers and parenting classes. The second group of Petitioners are not licensed and thus do not provide medical services, but only information and non-medical support to women seeking alternatives to abortion ("unlicensed centers"). Both licensed and unlicensed centers operate according to their religious views opposing abortion.

California imposes this compelled speech only on centers that oppose abortion. The Act does not impose these compelled statements across the board, but uses broad exemptions to exclude health providers that provide or promote abortion or abortifacients. Therefore, the only ones forced by the State to speak these government messages are those who oppose abortion.

The Ninth Circuit's decision conflicts with this Court's decision in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), and *Sorrell v. IMS Health*, 564 U.S. 552 (2011), by refusing to apply strict scrutiny to content- or viewpoint-based regulations of speech, despite its finding that the Act is content-based. App. 22a. The decision below also conflicts with the central holding of this Court's decisions in *In re Primus*, 436 U.S. 412 (1978), and *NAACP v. Button*, 371 U.S. 415 (1963), that restrictions on *pro bono* speech in a regulated profession triggers strict scrutiny. In upholding the compelled speech on non-medical centers, the Ninth Circuit's decision also straightforwardly conflicts with *Riley v. National Federation of the Blind of North Carolina*, 487 U.S. 781 (1988), and *Brown v. Entertainment Merchants Association*, 564 U.S. 786 (2011).

The Ninth Circuit candidly admits that it upheld the Act amidst a "circuit split" over how to scrutinize regulations of speech by medical professionals on controversial health issues. App. 25a. The Ninth Circuit's decision squarely conflicts with a Second Circuit decision that struck down a mandate forcing pro-life pregnancy centers to speak about abortion, *Evergreen Ass'n, Inc. v. City of New York*, 740 F.3d 233 (2d Cir. 2014); with a Fourth Circuit ruling that invalidated a requirement that doctors provide certain information related to abortion, *Stuart v. Camnitz*, 774 F.3d 238 (4th Cir. 2014); and with an Eleventh Circuit *en banc* decision striking down a content-based restriction on speech of medical providers regarding safety of firearms, *Wollschlaeger v. Governor of Florida*, – F.3d –, No. 12-14009, 2017 WL 632740 (11th Cir. Feb. 16, 2017).

Despite the Ninth Circuit's discussion of *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 884 (1992), the Act far exceeds the leeway this Court granted in *Casey* for states to require informed consent before performing an abortion. California imposes these statements outside the context of obtaining informed consent and even when no medical procedure occurs. And, because the law targets pro-life facilities, the compelled statements do not apply neutrally to everyone in the State whether they perform a particular medical procedure, as in *Casey*, or not.

The Act also violates the Petitioners' rights under the Free Exercise Clause, by forcing them to make statements contrary to, or that undermine, their pro-life religious convictions, while exempting other

medical and non-medical providers. This Court should grant review and reverse the decision of the Ninth Circuit.

OPINIONS BELOW

The Ninth Circuit's opinion is reported at 839 F.3d 823, and reproduced at App. 1a. The order of the Ninth Circuit denying rehearing and rehearing *en banc* is unreported but appears at App. 72a–73a. The District Court's opinion denying the motion for preliminary injunction is unreported but appears at App. 44a.

JURISDICTION

The Ninth Circuit entered its judgment on October 14, 2016. App. 1a. It denied a timely petition for rehearing *en banc* on December 20, 2016. App. 72a–73a. This Court has jurisdiction under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The text of the First Amendment to the United States Constitution is set forth in App. 74a.

The text of California's Reproductive FACT Act is set forth at App. 75a.

STATEMENT OF THE CASE

Factual Background

Petitioners are the National Institute of Family and Life Advocates (NIFLA), an organization with over 110 non-profit pro-life pregnancy center members in California, and two such centers in San Diego County, Pregnancy Care Center ("PCC") and Fallbrook Pregnancy Resource Center. App. 89a–90a. Because of the Petitioners' pro-life viewpoint, they seek to provide help and pro-life information to women in unplanned pregnancies so that they will be supported in choosing to give birth. *Id.* Petitioners, both licensed and unlicensed centers, provide all of their information and services free of charge. *Id.* Petitioners are all incorporated as religious organizations, and they pursue their activities based on their pro-life religious beliefs. *Id.*

Petitioners PCC and many of NIFLA's California member centers are licensed medical facilities that provide medical services, along with pro-life information and non-medical services. PCC provides licensed medical services free of charge and in furtherance of its pro-life religious beliefs. *Id.* About 73 of NIFLA's California member centers are similar to PCC in their medical status and activities. App. 89a. PCC is licensed by the California Department of Public Health as a free community clinic, and is a licensed clinical laboratory. App. 91a. Medical services provided by PCC include: urine pregnancy testing, ultrasound examinations, medical referrals, prenatal vitamins, information on STDs, information on natural family planning, health provider

consultation, and other clinical services. App. 91a–92a. Non-medical services provided by PCC include: peer counseling and education, emotional support, maternity clothing, baby supplies, support groups, and healthy family support. App. 92a.

Petitioner Fallbrook is an unlicensed center, and a nonprofit corporation that provides non-medical pregnancy-related information and services for free in furtherance of its pro-life religious beliefs. App. 92a. About 38 of NIFLA's California member centers are similar to Fallbrook in their unlicensed status and provision of only non-medical activities. App. 94a. Fallbrook provides free pregnancy test kits that women administer and diagnose themselves, educational programs, resources and community referrals, maternity clothing, and baby items. App.93a. Fallbrook and similar NIFLA centers advertise for their provision of free information and services, including on the Internet. App. 102a–103a.

The California Reproductive FACT Act

The State of California admits that the purpose of the Reproductive FACT Act is to target the speech of pro-life centers, specifically, "that, unfortunately, there are nearly 200 licensed and unlicensed clinics known as crisis pregnancy centers (CPCs) in California," which "aim to discourage and prevent women from seeking abortions," and that "often confuse [and] misinform" women. App. 7a. The legislative history contains no evidence that "crisis pregnancy centers" like Petitioners, actually "misinform" women. The Act does not require a showing that a center provides incorrect information

before the compelled statements apply. The Act imposes different requirements based on whether a pregnancy center is a licensed medical facility or an unlicensed center.

Licensed Centers – Required Statement

Pursuant to this purpose and justification, the Act requires licensed medical centers, such as PCC and NIFLA's licensed California members, to provide a notice to all clients stating that:

> California has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women. To determine whether you qualify, contact the county social services office at [phone number].

App. 80a. Those calling the provided number will be referred to Medi-Cal and Family PACT providers, including private abortion providers such as Planned Parenthood. *See* www.plannedparenthood.org/health-center/CA (listing Medi-Cal as a form of accepted insurance); www.familypact.org/provider-search-1 (listing a majority of Planned Parenthood's California clinics as Family PACT providers).

A "licensed covered facility" is defined as a:

> [F]acility licensed under Section 1204 or an intermittent clinic operating under a primary care clinic pursuant to subdivision (h) of

> Section 1206, whose primary purpose is providing family planning or pregnancy-related services, and that satisfies two or more of the following: (1) The facility offers obstetric ultrasounds, obstetric sonograms, or prenatal care to pregnant women. (2) The facility provides, or offers counseling about, contraception or contraceptive methods. (3) The facility offers pregnancy testing or pregnancy diagnosis. (4) The facility advertises or solicits patrons with offers to provide prenatal sonography, pregnancy test, or pregnancy options counseling. (5) The facility offers abortion services. (6) The facility has staff or volunteers who collect health information from clients.

App. 79a. The Act contains two exemptions: "(1) A clinic directly conducted, maintained, or operated by the United States or any of its departments, officers, or agencies," and "(2) A licensed primary care clinic that is enrolled as a Medi-Cal provider and a provider in the Family Planning, Access, Care, and Treatment Program ["Family PACT"]."App. 80a. Family PACT is the State's program of family planning and comprehensive "reproductive health care" providers. *See* CAL. WELF. & INST. CODE § 14132.

Participation in the Family PACT program is the method by which the State excludes all others but the pro-life centers from the Act's compelled statements. A center can avoid the compelled speech required by the Act if it joins Family PACT. But the Family PACT program provides "family planning services" that include "all FDA approved contraceptive methods and

supplies," which includes abortifacients. *See* http://www.familypact.org/Get%20Covered/what-does-family-pact-cover. Petitioners, because of their pro-life religious beliefs, cannot in good conscience participate in the Family PACT program. By tying the Act's exemption from the compelled speech requirements to agreeing to dispense all contraceptives, including abortifacients, the exemption effectively includes only centers that support California's pro-abortion policies. This forces only those centers that oppose abortion to speak the State's message in support of it.

Licensed covered facilities must post the disclosure in one of the following ways:

> (A) A public notice posted in a conspicuous place where individuals wait that may be easily read by those seeking services from the facility. The notice shall be at least 8.5 inches by 11 inches and written in no less than 22-point type.
>
> (B) A printed notice distributed to all clients in no less than 14-point type.
>
> (C) A digital notice distributed to all clients that can be read at the time of check-in or arrival, in the same point type as other digital disclosures. A printed notice as described in subparagraph (B) shall be available for all clients who cannot or do not wish to receive the information in a digital format.

App. 80a–81a.

The notice must be provided "in English and in the primary threshold languages for Medi-Cal beneficiaries as determined by the State Department of Health Care Services for the county in which the facility is located." App. 81a. For San Diego County, where PCC and Fallbrook are located, "threshold" languages include Spanish, Arabic, Vietnamese, Tagalog and Farsi. A center in Los Angeles County would have to publish the government's statement in English and 12 additional languages.[1]

Unlicensed Centers – Required Statements

The Act requires unlicensed non-medical pregnancy centers, such as Fallbrook and similar NIFLA members, to post a notice to all clients that "the facility is not licensed as a medical facility by the State of California and has no licensed medical provider who provides or directly supervises the provision of services." App. 81a. The Act defines "unlicensed covered facility" as:

> [A] facility that is not licensed by the State of California and does not have a licensed medical provider on staff or under contract who provides or directly supervises the provision of all of the services, whose primary purpose is providing pregnancy-related services, and that satisfies two or more of the following: (1) The facility offers obstetric ultrasounds, obstetric sonograms, or

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[1] *See* State of California, Department of Health Care Services, "Frequency of Threshold Language Speakers in the Medi-Cal Population by County for January 2015," dated September 2016, *available at* www.dhcs.ca.gov/dataandstats/statistics/Documents/Threshold_Language_Brief_Sept2016_ADA.pdf.

> prenatal care to pregnant women. (2) The facility offers pregnancy testing or diagnosis. (3) The facility advertises or solicits patrons with offers to provide prenatal sonography, pregnancy tests, or pregnancy options counseling. (4) The facility has staff or volunteers who collect health information from clients.

App. 79a.

The required notice for unlicensed facilities must be "disseminate[d] to clients on site and in any print and digital advertising material[] including Internet Web sites," "in English and in the primary threshold languages." App. 81a. "The onsite notice shall be a sign at least 8.5 inches by 11 inches and written in no less than 48-point type, and shall be posted conspicuously in the entrance of the facility and at least one additional area where clients wait to receive services." *Id.* The notices contained in all advertising material must be "clear and conspicuous," which "means in larger point type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from the surrounding text of the same size by symbols or other marks that call attention to the language." App. 81a–82a.

Covered facilities that violate the law "are liable for a civil penalty of five hundred dollars ($500) for a first offense and one thousand dollars ($1,000) for each subsequent offense," and the Act's requirements are enforceable by the Attorney General, city attorney, or county counsel. App. 82a.

Governor Brown signed the Reproductive FACT Act into law on October 9, 2015. It went into effect on January 1, 2016.

Petitioners filed this action on October 13, 2015, alleging violations of the Free Speech and Free Exercise Clauses of the First Amendment, the Due Process Clause of the Fourteenth Amendment, the Coates-Snow Amendment, and 42 U.S.C. § 238n. Petitioners filed their motion for preliminary injunction on October 21, 2015, asking that the Act be enjoined prior to its January 1 effective date. The District Court denied the motion, App. 44a, and the Petitioners appealed to the Ninth Circuit.

The Ninth Circuit's Decision

The Ninth Circuit panel, on October 14, 2016, upheld the District Court's ruling denying the motion for a preliminary injunction. *NIFLA v. Harris*, App. 1a.[2] Petitioners argued the Act is content-based. The Court admitted the law was "content-based," App. 22a, but concluded it was not required to apply strict scrutiny, as this Court held recently in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), because the law did not discriminate on the basis of viewpoint. The Ninth Circuit ignored this Court's direct refutation of that concept in *Reed* when it stated "a speech regulation targeted at specific subject matter is content based

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[2] The Ninth Circuit decision here also applies to two other lawsuits that challenged the Act's compelled speech provision solely for licensed facilities: *A Woman's Friend Pregnancy Resource Clinic v. Harris*, No 15-17517 (9th Cir. 2016) and *Livingwell Medical Clinic, Inc. v. Harris*, No. 15-17497 (9th Cir 2016).

even if it does not discriminate among viewpoints within that subject matter." *Reed*, 135 S. Ct at 2230. Additionally, the Ninth Circuit cited its own precedent as support for its decision to disregard this Court's opinion in *Reed*, stating "[e]ven if a challenged restriction is content-based, it is not necessarily subject to strict scrutiny." App. 23a.

The Ninth Circuit also rejected Petitioners' arguments that the Act is viewpoint discriminatory because it targets licensed and unlicensed "crisis pregnancy centers" that "discourage and women from seeking abortions." App. 7a. The Act is not viewpoint discriminatory, the Ninth Circuit claimed, because "it does not discriminate on the particular opinion, point of view, or ideology of a certain speaker," App. 20a, and because "the Act applies to all licensed and unlicensed facilities, regardless of what, if any, objections they may have to certain family-planning services." *Id.*

The opinion then pointed out that in regard to "abortion-related disclosure cases," App. 25a, "there is currently a circuit split regarding the appropriate level of scrutiny to apply." *Id.* The Ninth Circuit stated that all of the decisions rejected the standard of strict scrutiny for "abortion related disclosure cases," with the Fifth and Eighth Circuits adopting a "reasonableness" standard, and the Fourth Circuit adopting intermediate scrutiny. The Ninth Circuit held that (1) strict scrutiny was not appropriate for the review of this California law, App. 24a, 27a; (2) it could not discern any standard of review from this Court's decisions in *Planned Parenthood of*

Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992) and *Gonzales v. Carhart*, 550 U.S. 124 (2007), App. 25a; (3) that it would use intermediate scrutiny to review the requirements imposed on the licensed centers, App. 28a–36a; and (4) the required disclosure imposed on unlicensed centers satisfies any level of scrutiny, App. 36a–39a.

Licensed Centers – Required Statement

The Ninth Circuit upheld the requirement that licensed centers post information explaining how to obtain a state-funded abortion, ruling it a constitutional regulation of professional speech. App. 34a. It found that the State has a substantial interest in "the health of its citizens, including ensuring that its citizens have access to and adequate information about constitutionally-protected medical services like abortion." *Id.* It also found that the Act "is closely drawn to achieve California's interest in safeguarding public health and fully informing Californians of the existence of publicly funded medical services." App. 34a–35a.

Unlicensed Centers – Required Statements

As to the unlicensed centers, the Ninth Circuit upheld the Act's requirement that each of them disseminate a notice saying it is not a licensed medical facility, with no licensed medical provider who oversees or directly provides the services at its facility. The Ninth Circuit upheld this compelled speech under any constitutional test. App. 36a.

Although the Ninth Circuit acknowledged that the unlicensed clinics "do not offer many of the medical services available at the licensed clinics," App. 36–37a, they do "offer[] educational programs," and also "give medical referrals for ultrasounds and sonographs." App. 37a. California has a compelling state interest, the Ninth Circuit ruled, "in informing pregnant women when they are using the medical services of a facility that has not satisfied licensing standards set by the state." *Id.* It added that State's interest was "particularly compelling" because of the Legislature's findings that some crisis pregnancy centers "often present misleading information to women about reproductive medical services." *Id.* The opinion did not address the Act's requirement that it disseminate the message in multiple languages.

On December 20, 2016, the Ninth Circuit denied rehearing *en banc*. App. 72a.

REASONS FOR GRANTING THE PETITION

Government compelled speech is a constitutionally suspect enterprise, especially when it occurs in non-commercial contexts, based on viewpoint-discriminatory purposes that interfere with discussions of controversial social issues, such as abortion.

This Court has explained that the "right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'" *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (citing *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943)). Accordingly,

the Court has emphasized that the First Amendment protects not only the right of a speaker to choose what to say, but also the right of the speaker to decide "what not to say." *Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Grp. of Bos.*, 515 U.S. 557, 573 (1995), quoting *Pac. Gas & Elec. Co. v. Pub. Util. Comm'n of Cal.*, 475 U.S. 1, 16 (1986) (internal citation and quotation marks omitted).

But the State of California now forces licensed centers to communicate the government's message about state-funded abortions to everyone who walks in the door. The State, rather than using countless alternative ways to communicate its message, including its own powerful voice, instead compels only licensed facilities that help women consider alternatives to abortion to express the government's message regarding how to obtain abortions paid for by the State.

For unlicensed centers, California's compelled speech takes a different form. These centers, which offer free of charge to women in need such things as tangible support (e.g., diapers and baby formula) and counseling, now find it cost prohibitive to advertise their services. This is so because the Act requires them to provide the disclaimer that they are not a medical facility to clients on site, and it must also appear on any print or digital advertising, including on Internet websites. The notice must be in up to 13 different languages, placed in at least two locations on site, and the notice in the advertising material must be in a "clear and conspicuous" font. These burdensome requirements make ad so long that it is difficult, if not impossible, for unlicensed centers to

advocate their own pro-life message in most media, like bus or newspaper ads. In addition, these disclaimers force the unlicensed centers to begin their expressive relationship with an immediate unwanted or negative message that crowds out and confuses their intended message. The law effectively suppresses their speech based on its viewpoint opposing abortion.

The Ninth Circuit upheld this law with its speech-compelling requirements regarding licensed centers under an intermediate standard of review, even though the State admitted that the purpose of the law was to target pro-life centers because of their viewpoint opposing abortion. The Ninth Circuit excused this content-based and viewpoint discriminatory law as a permissible regulation of professional speech. This decision directly conflicts with precedent of this Court, as well as that of multiple Courts of Appeals.

I. The Ninth Circuit upheld the California law compelling speech from noncommercial entities that offer their services for free based on their pro-life viewpoint, in conflict with decisions of this Court and other circuits.

The Ninth Circuit's decision conflicts with rulings of this Court and other circuits that have limited governmental authority to compel speech in a content-based or viewpoint discriminatory manner. Compelled speech cannot be justified as regulation of a profession, as the Ninth Circuit ruled, when the licensed and unlicensed centers offer their services to

women for free, and where the compelled statements have nothing to do with informed consent for a medical procedure that the centers perform. Instead, this Act limits its application to those centers that would *not* recommend abortion or would *not* tell women how to obtain a state-funded abortion. Also, the Act discriminates based on viewpoint by targeting pro-life unlicensed centers, requiring them to disclose that they are not medical facilities, thus disparaging their abilities and resources to the very women they desire to help.

The Ninth Circuit's decision conflicts with decisions of this Court and other circuits on these important questions.

A. The Ninth Circuit's opinion conflicts with decisions of this Court on content-based and viewpoint discriminatory laws.

The Ninth Circuit admits the Act is facially "content-based." App. 22a. It requires licensed pro-life pregnancy centers to tell women: "California has public programs that provide immediate free or low-cost . . . contraception . . . and abortion," and to, "contact the county social services office at [insert telephone number]." App. 80a. Because the Act is content-based, the Ninth Circuit should have applied strict scrutiny under *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2228 (2015) ("A law that is content based on its face is subject to strict scrutiny ...."). But the Ninth Circuit refused to apply *Reed* to this case, and incorrectly applied intermediate scrutiny instead. App. 28a–36a.

The reason why the Ninth Circuit stated that it did not apply strict scrutiny under *Reed* is that it found the law to be viewpoint neutral, even though it is content-based. App. 19a–20a. But that makes no difference, according to *Reed*. This Court held that "a speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter." *Reed*, 135 S. Ct at 2230. The Ninth Circuit erred by not applying strict scrutiny.

Moreover, the Act is actually viewpoint-based and is therefore subject to strict scrutiny regardless. Yet the Ninth Circuit disregarded *Reed*'s definition of how to judge whether laws are viewpoint-based. *Reed* declares that a law can be content or viewpoint-based either "on its face or when the purpose and justification" are viewpoint-based. 135 S. Ct. at 2228. In addition to the Act being facially viewpoint-based, the State baldly concedes, that the "purpose and justification" of the Act is to target "crisis pregnancy centers," that is, centers whose "principal aim is to discourage or prevent women from seeking abortions." App. 7a. The purpose and justification of the Act, as conceded by the State, is clearly viewpoint-based.

The decision further conflicts with *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 563–65 (2011), where this Court struck down a Vermont law that prohibited "pharmacies and other regulated entities from selling or disseminating prescriber-identifying information for marketing," 564 U.S. at 562. This Court found, like the California Act here, that the Vermont statute was content-based because the Legislature made findings

targeting pharmaceutical manufacturers who bought this information to help them convince doctors to prescribe their drugs. The *Sorrell* Court stated that "[t]he First Amendment requires heightened scrutiny whenever the government creates 'a regulation of speech because of disagreement with the message it conveys.'" *Sorrell v. IMS Health Inc.* 564 U.S. at 566 (2011) (quoting *Ward v. Rock Against Racism,* 491 U.S. 781, 791 (1989)).

The Ninth Circuit evaded *Sorrell's* clear ruling by claiming that the Act requires a wide range of entities to speak its compelled statements and not "a narrow class of disfavored speakers." App. 21a. But that ignores the significant exemptions and limitations in the Act. It applies only to those entities whose "primary purpose is providing family planning or pregnancy-related services," App. 78a, and contains two large exemptions for clinics operated by the United States, and any "licensed primary care clinic that is enrolled as a Medi-Cal provider and a provider in the Family Planning, Access, Care, and Treatment Program ["Family PACT"]." App. 80a. (Family PACT is the State's program of family planning and comprehensive "reproductive health care" providers. *See* CAL. WELF. & INST. CODE § 14132.).

The Family PACT exemption shows that the Act targets centers that oppose abortion. In order to participate in Family PACT and get the compelled speech exemption, a center would have to agree to provide "family planning services" that include "all FDA approved contraceptive methods and supplies,"

including abortifacients."[3] Petitioners here, because of their pro-life religious beliefs, cannot in good conscience provide contraception they believe functions as abortifacients. However, entities who have no objections to these requirements can readily join Family PACT and get the exemption.

For example, virtually all Planned Parenthood centers in California are listed on the Family PACT website, www.familypact.org/Home/home-page, and are Medi-Cal providers, www.plannedparenthood.org /health-center/CA. The Family PACT program's requirements limit eligibility to those who support abortion. They are the only ones who can be exempted from the Act's compelled statements. Consequently, the Act's compelled speech requirements apply only to pro-life licensed centers that oppose the State's pro-abortion message.

Targeting licensed and unlicensed pro-life centers is clear viewpoint discrimination, contrary to what the Ninth Circuit ruled here.

B. The Ninth Circuit's ruling conflicts with decisions by this Court and the Fourth Circuit on whether regulations of pro bono professional speech are subject to strict scrutiny.

The Ninth Circuit decision conflicts with rulings of this Court and the Fourth Circuit: whether professional speech receives the protection of strict scrutiny, rather than intermediate scrutiny, if it is

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[3] *See* discussion page 14 *supra*.

conducted on a pro bono basis. App. 32a. Contrary to the Ninth Circuit, both courts have ruled that the regulation of professional speech is subject to strict scrutiny if that speech is offered for free.

In *In re Primus*, 436 U.S. 412 (1978), this Court held that even though the practice of law is a profession licensed by the State, regulations of attorney speech are subject to strict—not intermediate—scrutiny, if the attorney is offering her services pro bono for public interest purposes. *Id.* at 437–38 & n. 32. This holding applies to the licensed centers in this case. The *In re Primus* Court explained that "prophylactic" speech regulations can govern attorney speech made "for pecuniary gain," but "significantly greater precision" is required for regulations of attorneys engaged in public interest advocacy. *Id.* at 434, 438.

Similarly, in *NAACP v. Button*—which also dealt with restrictions on pro bono attorney speech—this Court held that "only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms." 371 U.S. 415, 438–39 (1963). Consequently, "it is no answer" to First Amendment claims to say "that the purpose of [the law] was merely to insure high professional standards and not to curtail free expression." *Id.* at 439. "[A] state may not, under the guise of prohibiting professional misconduct, ignore constitutional rights." *Id.*

Following this Court's precedent, the Fourth Circuit—in a challenge to a professional licensing

ordinance—held that "the relevant inquiry to determine whether to apply the professional speech doctrine" is based on "whether the speaker is providing personalized advice in a private setting to a paying client." *Moore-King v. Cty. of Chesterfield*, 708 F.3d 560, 569 (4th Cir. 2013). This case involved the challenge to a city licensing scheme for fortune tellers.

The Ninth Circuit cited *In re Primus* and *Moore-King*, but declared "[w]e reject this argument." App. 32a. It stated that pregnancy centers "have positioned themselves in the marketplace as pregnancy clinics." *Id.* But both the licensed and unlicensed centers charge no fee for their services and information, and do so to further their pro-life mission. App. 91a–92a. There is no relevant constitutional distinction between this activity and that of the ACLU's in *In re Primus*. If pro bono public interest services by professionals count as putting oneself in the "marketplace," it negates the holding of *In re Primus*.

In re Primus and *NAACP v. Button* protect the First Amendment rights of the licensed centers here because they offer their professional services for free. This Court should grant review because the Ninth Circuit's ruling on the licensed centers conflicts with *In re Primus* and *NAACP v. Button* that held that speech regulations of professionals offering services free of charge must meet strict scrutiny.

C. The Ninth Circuit's ruling conflicts with that of the Second Circuit on whether the State may compel pregnancy centers to recite specific disclosures promoting abortion.

The Ninth Circuit's ruling directly conflicts with a decision by the Second Circuit in *Evergreen Ass'n, Inc. v. City of New York*, 740 F.3d 233 (2d Cir. 2014), regarding whether the government can force pregnancy centers to recite disclosures specifically promoting abortion, even under the intermediate scrutiny test. The Ninth Circuit incorrectly stated that *Evergreen* subjected the disclosures to strict scrutiny, App. 35a, but *Evergreen* did not decide whether strict or intermediate scrutiny applied, and instead held that the regulations struck down there would satisfy neither. 740 F.3d at 245.

The Second Circuit in *Evergreen* considered a New York City law that required pregnancy centers to recite several disclosures. One compelled disclosure stated whether or not the facility had licensed professionals ("the Status Disclosure"), another disclosure said the City encourages women to consult a licensed provider ("the 'Government Message"), and yet another disclosure required centers to say "whether or not they 'provide or provide referrals for abortion,' 'emergency contraception,' or 'prenatal care' (the 'Services Disclosure')." *Id.* at 238.

The Second Circuit considered these three disclosures separately, *id.* at 246–51. It upheld the

Status Disclosure,[4] but struck down the other two required disclosures as violating the First Amendment.

The Second Circuit declared unconstitutional the Services Disclosure, reasoning that the "context" precluded it, namely, "a public debate over the morality and efficacy of contraception and abortion." *Id.* at 249. That court held that the "Services Disclosure will change the way in which a pregnancy services center, if it so chooses, discusses the issues," contrary to the First Amendment. *Id.* at 249–50. Notably, the court reviewed the Services Disclosure under both strict and "intermediate scrutiny," and concluded the disclosure is unconstitutional either way. *Id.* at 245. The court separately struck down the Government Message disclosure for "requir[ing] pregnancy services centers to advertise on behalf of the City." *Id.* at 250.

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[4] The Second Circuit in *Evergreen* upheld the Status Disclosure, which although similar to the provision here in California's Act that requires unlicensed centers to state that they do not have a licensed medical professional on staff and are not supervised by a licensed medical professional, 740 F.3d at 246–49, the New York City provision is distinguishable from the Act because it did not require notices in all advertisements in multiple languages, which renders advertisements cost prohibitive. Also, it is Petitioners' position that the Second Circuit, in upholding the New York City disclosure about medical licensure, did not correctly apply this Court's ruling on similar disclosures in *Riley v. National Federation of the Blind of North Carolina*, 487 U.S. 781 (1988). See discussion *infra* pp. 37–42. Moreover, this portion of the *Evergreen* decision conflicts with the district court decision in *Centro Tepeyac v. Montgomery County*, 5 F.Supp.3d 745, 748 (D. Md. 2014). *See infra* n.5.

The Ninth Circuit rejected this analysis and, in so doing, created a direct conflict with *Evergreen*. The Act in this case lists the same items contained in *Evergreen's* Services Disclosure: abortion, contraception, and prenatal care. But it also states that California offers subsidies for those services, and tells women where to get them ("contact the county social services office.") App. 80a. Thus, the Act is more constitutionally burdensome than the Services Disclosure struck down by the Second Circuit, adding elements to *Evergreen's* Government Message by "requir[ing] pregnancy services centers to advertise on behalf of" the government. *Evergreen*, 740 F.3d at 250. The Ninth Circuit ruling directly conflicts with *Evergreen's* holding regarding the Services Disclosure, which survived neither intermediate nor strict scrutiny.

Furthermore, the Ninth Circuit mistakenly claimed that when the Second Circuit reviewed the Services Disclosure it "applied strict scrutiny, which is much more stringent than the intermediate scrutiny we apply today." App. 35a. As mentioned above, this is incorrect. *Evergreen* expressly applied both scrutiny levels and held the Services Disclosure unconstitutional even "under intermediate scrutiny." *Evergreen*, 740 F.3d at 250. Notably, this makes it immaterial that the pregnancy centers in *Evergreen* were unlicensed while the medical centers here are both licensed and unlicensed. Both courts explicitly applied intermediate scrutiny. The Ninth Circuit upheld the compelled-speech law, whereas the Second Circuit held that it violated the First Amendment.

D. The Ninth Circuit's decision conflicts with rulings by this Court and the Fourth and Eleventh Circuits on the circumstances in which speech may be compelled or prohibited between physicians and patients.

The Ninth Circuit acknowledges that its ruling takes a position amidst "a circuit split regarding the appropriate level of scrutiny to apply" in "abortion-related disclosure cases." App. 25a.

1. This Court's Decision in *Planned Parenthood v. Casey* does not support the Ninth Circuit's decision.

Although relied upon by the Ninth Circuit, it is important to note that this Court's decision in *Planned Parenthood of Southeastern Pennsylvania. v. Casey*, 505 U.S. 833 (1992), does not support the ruling here. *Casey* allowed states to require physicians to disclose certain items to women before an abortion, but only as part of the process of obtaining their informed consent regarding surgery, and pursuant to the state's interest in protecting unborn life. 505 U.S. at 881–83. This requirement served a particularized interest in ensuring that "relevant" information is provided to the patient so that a necessary step—informed consent for a surgical procedure—is actually obtained. *Id. Casey* did not give states *carte blanche* authority to force doctors to recite information regarding abortion outside the context of obtaining informed consent before a woman undergoes a surgical abortion. Here,

the Act requires the disclosure in a situation where the recommendation is not to have a medical procedure.

The information that the Act requires licensed centers to communicate has nothing to do with informed consent in the context of a surgical procedure like an abortion, which the centers do not perform, and nothing to do with nonsurgical medical procedures that a licensed center might actually perform, such as an ultrasound. The State mandates the licensed centers to disclose the required information to all patients whether they receive any service in particular, like diapers, pamphlets or baby clothes, or no services at all. In sharp contrast, a law regulating informed consent applies in a limited situation where a patient is considering and consenting to a surgery or some other medical procedure, and the information relates to that procedure.

Second, the Act does not require disclosures before all ultrasounds are performed. The Act exempts many facilities in California where ultrasounds occur, such as hospitals, doctor's offices, abortion clinics, and other places. App. 80a. The Act's definitions gerrymander all of those facilities outside its scope, even if they provide the same pregnancy-related services. *Id.* *Casey* did not empower states to single out facilities advocating a particular viewpoint against abortion that the State opposes, and coercively impose on those facilities compelled statements that tell women where to receive free or low cost state-funded abortions. The Act finds no

support from this Court's decision in *Casey*, because *Casey* is inapplicable.

2. The Ninth Circuit's decision allowing the government to require or ban speech in the context of doctor and patient discussions of controversial topics conflicts with rulings of the Fourth and Eleventh Circuits.

The Ninth Circuit ruling conflicts with those of the Fourth and Eleventh Circuits on what speech the government can impose or forbid in the context of abortion or other controversial issues. The Ninth Circuit's opinion claims to agree with the Fourth Circuit in *Stuart v. Camnitz*, 774 F.3d 238 (4th Cir. 2014), but these two decisions are irreconcilable. *Stuart* struck down an informed consent law that required doctors to show women an ultrasound and describe the fetus before an abortion. *Id.* at 242. *Stuart* held that mere fetal facts have "ideological implications," because they all fall on one side of the abortion debate" and "promote[] a pro-life message." *Id.* at 242, 246. Therefore, the Fourth Circuit held the North Carolina law was unconstitutional.

If facts about fetal development "all fall on one side of the abortion debate," then information on how to obtain a state-funded abortion "fall[s] on one side of the abortion debate." Nonetheless, the Ninth Circuit's ruling here rejects the Fourth Circuit's approach in *Stuart*. The disclosure California requires has an unmistakable advocacy component. It requires pregnancy centers to tell women that

California has programs offering subsidized abortion, and urges them to "contact the county" for the information about them. App. 80a. But the Ninth Circuit improperly called this speech non-ideological, while saying the merely factual disclosure in *Stuart* "convey[ed] a particular opinion." App. 22a (quoting *Stuart*, 774 F.3d at 246). If telling someone how to get a free abortion does not convey a particular viewpoint on abortion, it is difficult to think of what does.

The Ninth Circuit further conflicts with the Eleventh Circuit, which recently rejected *en banc* the application of *Casey* in striking down a content-based restriction on the speech of doctors who desired to speak to patients about firearms. *Wollschlaeger v. Governor of Fla.*, –F.3d –, No. 12-14009, 2017 WL 632740 at *9. (11th Cir. Feb. 16, 2017). The Eleventh Circuit held that "State officials cannot successfully rely on a single paragraph in a plurality opinion of three justices" to justify content-based restrictions on the speech of medical professionals. *Id.*

The Ninth Circuit upheld an Act that requires licensed centers in California to post information on how to contact the county for a free abortion because it considered that requirement non-ideological. Such inconsistency is why this Court insists that "compelled statements of opinion" are constitutionally no different than "compelled statements of 'fact,' since either form of compulsion burdens protected speech." *Riley*, 487 U.S. at 797. This Court should grant review to reverse this ruling by the Ninth Circuit.

E. The Ninth Circuit's decision conflicts with decisions of this Court that invalidated efforts to compel speech by non-commercial, non-professional speakers.

The Ninth Circuit ruled that California may force unlicensed facilities to recite extensive messages even under the strict scrutiny test. App. 36a–39a. Under this Court's precedents, the strict scrutiny test should invalidate the Act's required statements for unlicensed centers, because the State has a greatly reduced interest in compelling disclosures from them.

In *Riley v. National Federation of the Blind of North Carolina*, 487 U.S. 781 (1988), this Court struck down a North Carolina law that required professional fundraisers for charities to make various disclosures before they asked for donations. The Court applied strict scrutiny to declare unconstitutional these provisions. *Id.* at 796-98. One reason was that "the compelled disclosure will almost certainly hamper the legitimate efforts" of the speakers to advance their cause because they have to start the conversation with a disclaimer that may cause the listener to stop the conversation. "[T]he disclosure will be the last words spoken as the donor closes the door or hangs up the phone." *Id.* at 800.

In Riley, this Court ruled that the First Amendment protected the speech of professional fundraisers. Here, unlike the situation with the professional fundraisers, no money changes hands, because the unlicensed centers offer their services for free. The unlicensed centers provide no medical

services, so it is unnecessary for them to say that no doctor is on hand to give women diapers and baby clothes, teach parenting classes, and talk about how the women can receive social support to give birth.[5]

The Act's regulation of unlicensed centers is incredibly burdensome. The required notice must be displayed in at least two places on site and "in any print and digital advertising material[] including Internet Web sites," not only "in English," but also "in the primary threshold languages." App. 81a. For San Diego County, where PCC and Fallbrook are located, "threshold" languages can include Spanish, Arabic, Vietnamese, Farsi and Tagalog. *See supra* note 1.

Additionally, the notice contained in an advertisement must be "in larger point type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from the surrounding text of the same size by symbols or other marks that call attention to the language. App. 81a–82a. These language and size requirements make it cost prohibitive for unlicensed centers to run ads. For example, the cost of running an

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[5] A federal court invalidated a similar compelled speech law that required non-medical pregnancy centers to post signs stating that the center did not have a licensed medical provider on staff, among other disclaimers. *Centro Tepeyac v. Montgomery Cty*, 5 F. Supp. 3d 745, 748 (D. Md. 2014). The court found that the regulation was content-based and applied strict scrutiny. *Id.* at 754, 762–69. The court held that that "the critical flaw" in the law was the "lack of any evidence that the practices of [pregnancy centers] are causing pregnant women to be misinformed which is negatively affecting their health." *Id.* at 768. The law therefore was not narrowly tailored to a compelling government interest. *Id.* at 769.

advertisement for a non-profit corporation in the San Diego Union-Tribune in the Sunday print edition is $376.00 per column inch. *See* The San Diego Union-Tribune, GENERAL PRINT RATE BOOK, *available at* http://cdn.sandiegouniontrib.com/static/utsd/v1/pdf/general.pdf. Adding a statement that "Fallbrook is not licensed as a medical facility by the State of California and has no licensed medical provider who provides or directly supervises the provision of services" *in 5 additional languages* could add several inches and hundreds (if not thousands) of dollars to the cost of each ad, a five-fold increase. In Los Angeles County, with 13 threshold languages, the costs would increase thirteen-fold. These burdensome language, font, and size requirements make widespread newspaper, and other, advertising cost prohibitive.

Internet advertising by the unlicensed centers also suffers under this compelled speech rule. It would be burdensomely expensive under this Act to run a small banner ad that states, "Pregnant? Need Help? [phone number]." Assuming the same average number of words for each of these required languages, the unlicensed Petitioners must add 145 words in a "clear and conspicuous" size and font on top of every five-word Google search ad. This would not be possible: as Petitioners testified in their complaint, it would crowd out or eliminate entirely advertising of their expressive enterprise. App. 100a. There is nothing narrowly tailored about this requirement. The Act's compelled speech effectively silences the unlicensed pregnancy centers' pro-life message.

The Ninth Circuit's decision also conflicts with this Court's decision in *Brown v. Entertainment Merchants Association*, 564 U.S. 786 (2011), because the State lacked evidence why it needed to compel the unlicensed centers to disclose that they are not medically licensed facilities. *Brown* ruled "[t]he State must specifically identify an actual problem in need of solving ... and the curtailment of free speech must be actually necessary to the solution." *Id.* at 799 (internal citations and quotation marks omitted). The State's "evidence is not compelling" if it merely shows a correlation, not a "direct causal link," between the target of its regulation and the alleged harm. *Id.* at 799–800.

California's evidence supporting the Act is weaker than the correlations this Court rejected in *Brown*. It is nonexistent. The Ninth Circuit cited, and the State relies on, no studies showing that women are actually being harmed by unlicensed pregnancy centers. They advance no evidence demonstrating that if Petitioners recite the disclosures the law requires, the alleged harm will be alleviated. In fact, the Ninth Circuit and the State cite nothing but advocacy testimony by pro-choice organizations and the legislature vaguely declaring that pregnancy centers "often present misleading information to women about reproductive medical services." App. 37a. Such bald, unsupported assertions cannot meet this constitutional standard.

Targeting "misleading information" is even more dangerous than targeting "false" speech, because misleading is a term used when statements are not serious enough to be deemed false. Yet this Court

recently struck down even an attempt to punish admittedly false speech, *United States v. Alvarez*, 132 S. Ct. 2537, 2547 (2012) ("Our constitutional tradition stands against the idea that we need Oceania's Ministry of Truth."). If a narrow ban on false speech failed in *Alvarez*, how much more does it violate the First Amendment for the Act to impose compelled speech on non-medical pro-life centers, innocent even of the "misleading" speech label?

Simply put, there is no compelling evidence that the Act's "curtailment of free speech," namely its required statements, is "actually necessary to the solution" of a real problem. *Brown*, 564 U.S. at 799.

The Act is not tailored (much less narrowly tailored) to eliminate "misleading speech." It applies without regard to whether a pregnancy center speaks anything "misleading." Rather, it applies prophylactically to centers that focus on pregnancy, offer "options counseling," or speak to pregnant women. Cal. Health & Safety Code § 123471. "Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *Riley*, 487 U.S. at 801. A speech-regulating law must "eliminate[] no more than the exact source of the 'evil' it seeks to remedy." *Frisby v. Schultz*, 487 U.S. 474, 485 (1988).

Finally, the Ninth Circuit misapplied strict scrutiny by not applying the least restrictive means prong of that test. In *Riley*, this Court required the government to show it could not achieve its interest in another way:

> For example, as a general rule, the State may itself publish the detailed [information]. This procedure would communicate the desired information to the public without burdening [the] speaker with unwanted speech during the course of a solicitation.

Id. at 800. "Alternatively, the State may vigorously enforce its antifraud laws." *Id.*

Here the same principles apply. If the unlicensed centers are allegedly "misleading" women in some way about whether they are medical facilities, the State can vigorously prosecute the unlawful practice of medicine. *See* Cal Bus. & Prof. Code § 2052. Likewise, the State itself could advocate to women about the option of abortion. The Ninth Circuit did not require the State to disprove these, or any other, less restrictive alternatives. Its decision conflicts with *Brown* and *Riley*.

II. The Ninth Circuit resolved significant questions of free exercise doctrine in conflict with this Court's precedent.

The Ninth Circuit's determination that the Act is neutral under the Free Exercise Clause conflicts with this Court's determination that an ordinance impermissibly targets religion if its practical application affects a religious group and no others. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 535-37 (1993).

In *Employment Division v. Smith*, 494 U.S. 872, 879 (1990), this Court ruled that a law that is neutral

and generally applicable does not violate the Free Exercise Clause. But this Act is not neutral or generally applicable because it exempts broad segments of the medical community that engage in many of the same activities as Petitioners here. The Act is drafted so as to apply only to entities like the Petitioners whose beliefs require them to oppose abortion. The Ninth Circuit skirts this analysis by stating: "The Act applies to all covered facilities." App. 40a. But it is within the definition of "covered facilities" where the targeting of religion takes place.

The Act defines its scope as applying only to facilities "whose primary purpose is providing pregnancy-related services." App. 78a. Thus, the Act does not apply to hospitals and clinics whose medical services cover a wide range of activities, even if they offer the exact same pregnancy services that pregnancy centers offer. The unlicensed facility definition exempts facilities that have "a licensed medical provider on staff or under contract." App. 80a.

And the Act does not apply to licensed clinics that are both Medi-Cal providers and Family Planning, Access, Care, and Treatment Program ("Family PACT") enrollees. App. 79a. This legislative requirement works to limit the Act's application to pregnancy centers that oppose abortion. Any center can avoid the Act's compelled speech requirements by joining both Medi-Cal and Family PACT. But in order to participate in the Family PACT program, a center must provide "family planning services" that include "all FDA approved contraceptive methods and supplies." *See* http://www.familypact.org/Get%20Covered/what-does-family-pact-cover.

Licensed Petitioners, because of their pro-life religious beliefs, cannot in good conscience participate in the Family PACT program because they would have to supply contraceptives they believe work as abortifacients.[6] Other facilities that have no objection to supplying all forms of contraception, including abortifacients, can escape the Act's compelled disclosures by participating in the Family PACT program, something the Petitioners cannot do consistent with their religious beliefs. Because the Act ties its exemption from the compelled speech to dispensing abortifacients, the Act's compelled speech ends up applying only to those centers that oppose abortion. "[T]he burden of the ordinance, in practical terms, falls on [pro-life pregnancy centers] but almost no others...." *See Lukumi*, 508 U.S. at 536.

As in *Lukumi*, the lack of neutrality is also shown by the "historical background" of the Act. *Id.* at 540. It is viewpoint-based on its face and also has a viewpoint discriminatory legislative purpose and justification targeting crisis pregnancy centers because their religious convictions require them to discourage abortion, which the State characterizes as supposed "[mis]information" with which the State disagrees. Like in *Lukumi*, the Act ends up covering only licensed and unlicensed centers that oppose abortion and seek to counsel women to choose a different path.

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[6]*See* www.familypact.org/provider-search-1.

III. This Case Offers a Clean Vehicle To Examine These First Amendment Issues.

This case presents a clean vehicle to examine these important First Amendment issues. The Ninth Circuit concluded that this case presented only issues of law, and there was no need for further fact finding, stating: "This action turns on a question of law. Appellants seek to enjoin the enforcement of the Act on the grounds that it is unconstitutional. We require no further factual development to address Appellants' challenge." App. 16a. The law challenged in this lawsuit directly affects Petitioners, who asked the District Court and the Ninth Circuit to enjoin its enforcement against them. Returning this case to the lower court for further proceedings would not meaningfully improve the record.

Also, this is the only petition that includes both licensed and unlicensed centers as Petitioners. The Ninth Circuit decision here also applies to two other lawsuits that challenged the Act's compelled speech provision solely for licensed facilities: *A Woman's Friend Pregnancy Resource Clinic v. Harris*, No 15-17517 (9th Cir. 2016) and *Livingwell Medical Clinic, Inc. v. Harris*, No. 15-17497 (9th Cir 2016). Because both portions of the Act apply to Petitioners, granting review would enable this Court to review both categories of compelled speech imposed by the Act.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted.

JOHN C. EASTMAN
CENTER FOR CONSTITUTIONAL JURISPRUDENCE
Chapman University
Fowler School of Law
One University Drive
Orange, CA 92866
(877) 855-3330

ANNE O'CONNOR
NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES
5601 Southpoint Centre Blvd.
Fredericksburg, VA 22407
(540) 372-3930

DEAN R. BROYLES
THE NATIONAL CENTER FOR LAW AND POLICY
539 West Grand Avenue
Escondido, CA 92025
(760) 747-4529

DAVID A. CORTMAN
Counsel of Record
KRISTEN K. WAGGONER
KEVIN H. THERIOT
JORDAN W. LORENCE
ELISSA M. GRAVES
ALLIANCE DEFENDING FREEDOM
440 1st Street N.W.
Suite 600
Washington, D.C. 20001
(202) 393-8690
dcortman@ADFlegal.org

Counsel for Petitioners

MARCH 20, 2017

APPENDIX

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES, a Virginia corporation, DBA NIFLA; PREGNANCY CARE CENTER, a California corporation, DBA Pregnancy Care Clinic; FALLBROOK PREGNANCY RESOURCE CENTER, a California corporation,
Plaintiffs-Appellants,

v.

KAMALA HARRIS, in her official capacity as Attorney General for the State of California; THOMAS MONTGOMERY, in his official capacity as County Counsel for San Diego County; MORGAN FOLEY, in his official capacity as City Attorney for the City of El Cajon, CA; EDMUND G. BROWN, JR., in his official capacity as Governor of the State of California,
Defendants-Appellees.

No. 16-55249

D.C. No.
3:15-cv-02277-
JAH-DHB

OPINION

Appeal from the United States District Court
for the Southern District of California

John A. Houston, District Judge, Presiding
Argued and Submitted June 14, 2016
San Francisco, California

Filed October 14, 2016
Before: Dorothy W. Nelson, A. Wallace Tashima, and John B. Owens, Circuit Judges.

Opinion by Judge D.W. Nelson

SUMMARY*

Civil Rights

The panel affirmed the district court's denial of a motion for a preliminary injunction sought by three religiously affiliated non-profit corporations to prevent the enforcement of the California Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act.

The Act requires that licensed pregnancy-related clinics disseminate a notice stating the existence of publicly-funded family-planning services, including contraception and abortion. The Act also requires that unlicensed clinics disseminate a notice stating that they are not licensed by the State of California. Appellants alleged that the Act violates their fundamental rights, including their First Amendment

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

guarantees to free speech and the free exercise of religion.

As a threshold matter, the panel held that appellants' claims were constitutionally and prudentially ripe. Addressing the free speech claim, the panel concluded that the proper level of scrutiny to apply to the Act's regulation of licensed clinics was intermediate scrutiny, which the Act survived. With respect to unlicensed clinics, the panel concluded that the Act survived any level of scrutiny.

The panel also rejected appellants' arguments that they were entitled to a preliminary injunction based on their free exercise claims. The panel held that the Act is a neutral law of general applicability, which survived rational basis review. The panel concluded that appellants were unable to demonstrate a likelihood of success on the merits of their First Amendment claims.

COUNSEL

Matthew Bowman (argued) and David A. Cortman, Alliance Defending Freedom, Washington, D.C.; Dean R. Broyles, National Center for Law and Policy, Escondido, California; Kristen K. Waggoner, Kevin H. Theriot, and Elissa M. Graves, Alliance Defending Freedom, Scottsdale, Arizona; Anne O'Connor, National Institute of Family and Life Advocates, Fredericksburg, Virginia; for Plaintiffs-Appellants.

Jonathan M. Eisenberg (argued), Office of the Attorney General, Los Angeles, California, for

Defendants-Appellees Kamala Harris and Edmund G. Brown, Jr.

Thomas D. Bunton (argued), Senior Deputy; Thomas E. Montgomery, County Counsel; Office of County Counsel, San Diego, California; for Defendant-Appellee Thomas Montgomery.

Carrie L. Mitchell, McDougal Love Eckis Boehmer & Foley, La Mesa, California, for Defendant-Appellee Morgan Foley.

Deborah J. Dewart, Swansboro, North Carolina; James L. Hirsen, Anaheim Hills, California; for Amicus Curiae Justice and Freedom Fund.

Kristen Law Sagafi and Martin D. Quiñones, Tycko & Zavareei LLP, Oakland, California, for Amicus Curiae Physicians for Reproductive Health.

Priscilla Joyce Smith, Brooklyn, New York, for Amicus Curiae Information Society Project at Yale Law School.

OPINION

D.W. NELSON, Senior Circuit Judge:

The National Institute of Family and Life Advocates, et al. appeal from the district court's denial of their motion for a preliminary injunction to prevent the enforcement of the California Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act (the FACT Act or the Act). The Act requires that licensed pregnancy-related clinics disseminate a notice stating

the existence of publicly funded family-planning services, including contraception and abortion. The Act also requires that unlicensed clinics disseminate a notice stating that they are not licensed by the State of California. Appellants allege that the Act violates their fundamental rights, including their First Amendment guarantees to free speech and the free exercise of religion.

We affirm the district court's denial of Appellants' motion for a preliminary injunction. For the free speech claim, we conclude that the proper level of scrutiny to apply to the Act's regulation of licensed clinics is intermediate scrutiny, which it survives. With respect to unlicensed clinics, we conclude that the Act survives any level of scrutiny. For the free exercise claim, we conclude that the Act is a neutral law of general applicability, and that it survives rational basis review. Appellants, therefore, are unable to show the "most important" factor under *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008): likelihood of success on the merits. *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015) (en banc).

BACKGROUND

I. The FACT Act

The FACT Act was created for the stated purpose of ensuring that "[a]ll California women, regardless of income, . . . have access to reproductive health services." Assem. Bill No. 775 § 1(a). It was enacted after the California Legislature found that a great number of California women were unaware of the

existence of state-sponsored healthcare programs. *See id.* at § 1(a)–(c). These programs, which expanded under the Patient Protection and Affordable Care Act to include millions of California women, provide "low income women . . . immediate access to free or low-cost comprehensive family planning services and pregnancy related care." *Id.* at § 1(c); *see also* Assem. Comm. on Health, Analysis of Assembly Bill No. 775. Specifically, the Legislature found that:

> Millions of California women are in need of publicly funded family planning services, contraception services and education, abortion services, and prenatal care and delivery. In 2012, more than 2.6 million California women were in need of publicly funded family planning services. More than 700,000 California women become pregnant every year and one-half of these pregnancies are unintended. In 2010, 64.3 percent of unplanned births in California were publicly funded. Yet, at the moment they learn that they are pregnant, thousands of women remain unaware of the public programs available to provide them with contraception, health education and counseling, family planning, prenatal care, abortion, or delivery.

Id. at § 1(b).

The Legislature also found that the ability of California women to receive accurate information

about their reproductive rights, and to exercise those rights, is hindered by the existence of crisis pregnancy centers (CPCs). CPCs "pose as full-service women's health clinics, but aim to discourage and prevent women from seeking abortions" in order to fulfill their goal of "interfer[ing] with women's ability to be fully informed and exercise their reproductive rights." Assem. Comm. on Health, Analysis of Assembly Bill No. 775 at 3. The Legislature found that CPCs, which include unlicensed and licensed clinics, employ "intentionally deceptive advertising and counseling practices [that] often confuse, misinform, and even intimidate women from making fully-informed, time-sensitive decisions about critical health care." *Id.* There are approximately 200 CPCs in California. *Id.*

Because "pregnancy decisions are time sensitive, and care early in pregnancy is important," the Legislature found that the most effective way to ensure that women are able to receive access to family planning services, and accurate information about such services, was to require licensed pregnancy-related clinics unable to enroll patients in state sponsored programs to state the existence of these services. Assem. Bill No. 775 § 1(c)–(d).

Thus, as required under the Act, all licensed covered facilities must disseminate a notice (the Licensed Notice) stating, "California has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women. To determine whether you qualify, contact the county social services office at [insert the

telephone number]." Cal. Health & Safety Code § 123472(a)(1). The Act defines a licensed covered facility as "a facility licensed under Section 1204 or an intermittent clinic operating under a primary care clinic pursuant to subdivision (h) of Section 1206, whose primary purpose is providing family planning or pregnancy-related services," and that also satisfies two or more of the following criteria:

> (1) The facility offers obstetric ultrasounds, obstetric sonograms, or prenatal care to pregnant women. (2) The facility provides, or offers counseling about, contraception or contraceptive methods. (3) The facility offers pregnancy testing or pregnancy diagnosis. (4) The facility advertises or solicits patrons with offers to provide prenatal sonography, pregnancy tests, or pregnancy options counseling. (5) The facility offers abortion services. (6) The facility has staff or volunteers who collect health information from clients.

Id. § 123471. The Act requires that the Licensed Notice be disclosed by licensed facilities in one of three possible manners:

> (A) A public notice posted in a conspicuous place where individuals wait that may be easily read by those seeking services from the facility. The notice shall be at least 8.5 inches by 11 inches and written in no less than 22-point type. (B) A printed notice

> distributed to all clients in no less than 14-point type. (C) A digital notice distributed to all clients that can be read at the time of check-in or arrival, in the same point type as other digital disclosures.

Id. § 123472(a)(2).

The Act also covers unlicensed facilities. An unlicensed clinic is "a facility that is not licensed by the State of California and does not have a licensed medical provider on staff or under contract who provides or directly supervises the provision of all of the services, whose primary purpose is providing pregnancy-related services" and that also satisfies two of the following criteria:

> (1) The facility offers obstetric ultrasounds, obstetric sonograms, or prenatal care to pregnant women. (2) The facility offers pregnancy testing or pregnancy diagnosis. (3) The facility advertises or solicits patrons with offers to provide prenatal sonography, pregnancy tests, or pregnancy options counseling. (4) The facility has staff or volunteers who collect health information from clients.

Id. § 123471(b). Unlicensed clinics must disseminate a notice (the Unlicensed Notice) stating, "[t]his facility is not licensed as a medical facility by the State of California and has no licensed medical provider who provides or directly supervises the

provision of services." *Id.* § 123472(b)(1). The Unlicensed Notice must be "disseminate[d] to clients on site and in any print and digital advertising materials including Internet Web sites." *Id.* § 123472(b). Information in advertising material must be "clear and conspicuous," and the onsite notice must be "at least 8.5 inches by 11 inches and written in no less than 48-point type, and . . . posted conspicuously in the entrance of the facility and at least one additional area where clients wait to receive services." *Id.* § 123472(b)(2)–(3).

All violators of the Act "are liable for a civil penalty of five hundred dollars . . . for a first offense and one thousand dollars . . . for each subsequent offense." *Id.* § 123473(a).

II. Procedural History

Appellants are three religiously-affiliated non-profit corporations.[1] The National Institute of Family and Life Advocates (NIFLA) is a national organization composed of numerous pregnancy centers, 111 of which are located in California. Seventy-three of the centers are licensed by the State of California, and thirty-eight provide non-medical services. Pregnancy Care Clinic is a licensed clinic that provides medical services such as ultrasounds, medical referrals, and education on family planning. Its staff includes two doctors of obstetrics and

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[1] In addition to this appeal, this panel also heard argument in related cases *A Woman's Friend Pregnancy Resource Clinic v. Harris*, No. 15- 17517, __ Fed. Appx. __ (9th Cir. 2016), and *Livingwell Medical Clinic, Inc. v. Harris*, No. 15-17497, __ Fed. Appx. __ (9th Cir. 2016).

gynecology, one radiologist, one anesthesiologist, one certified midwife, one nurse practitioner, ten nurses, and two registered diagnostic medical sonographers. Fallbrook Pregnancy Center is an unlicensed clinic. It offers services such as free pregnancy tests that patients can take themselves, educational programs, and medical referrals. Fallbrook employs several nurses at its facility, and also contracts with a licensed medical provider for referrals for ultrasounds, which are provided in a separate mobile facility nearby. Prenatal sonographs are also offered by a contractor in a separate facility nearby.

Appellants are strongly opposed to abortion. None provide abortions or referrals for abortions. NIFLA's mission is to "empower the choice for life," and Pregnancy Care Clinic "provides its services to women in unplanned pregnancies pursuant to its pro-life viewpoint, desiring to empower the women it serves to choose life for their child, rather than abortion." Fallbrook believes "that human life is a gift of God that should not be destroyed by abortion.

On October 13, 2015, Appellants brought suit against California Attorney General Kamala Harris (the AG), California Governor Edmund G. Brown, Jr., County Counsel for San Diego County Thomas Montgomery, and City Attorney of El Cajon Morgan Foley[2] in the Southern District of California.

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[2] The district court's finding that the City Attorney of El Cajon is not a proper defendant was harmless error. The Act grants the City Attorney the power to enforce the Act. *See* Cal. Health & Safety Code § 123473. The City Attorney, therefore, is a proper defendant.

Appellants alleged that the FACT Act violates their First Amendment free speech and free exercise rights.[3] Appellants brought a motion for a preliminary injunction to enjoin enforcement of the Act prior to the full litigation of the action.

The district court denied Appellants' motion for a preliminary injunction. The court found that Appellants were unable to show a likelihood of success on their free speech claim. With respect to the Licensed Notice, the court held that the Act either regulated professional conduct subject to rational basis review, or professional speech subject to intermediate scrutiny, and the Act survived both levels of review. The court also held that the Act did not constitute viewpoint discrimination. With respect to the Unlicensed Notice, the court held that it withstood any level of scrutiny. In addition, Appellants could not show a likelihood of success on the merits of their free exercise claim because, the court held, the Act is a neutral law of general applicability which survived rational basis review.

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[3] Appellants' claims for relief are (1) Violation of the free speech clause of the First Amendment of the United States Constitution; (2) Violation of the due process clause of the Fourteenth Amendment of the United States Constitution (alleged by unlicensed clinics); (3) Violation of the free exercise clause of the First Amendment of the United States Constitution; (4) Violation of the Coats-Snowe Amendment, 42 U.S.C. § 238N (alleged by licensed clinics); and (5) Violation of the free speech clause of the California Constitution. Because Appellants brought their motion for preliminary injunction only under their federal First Amendment claims, we address only those issues in this opinion.

The court then explained that even though Appellants raised "serious questions going to the merits," *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134–35 (9th Cir. 2011), they could not demonstrate that the other Winter factors weighed in favor of granting a preliminary injunction

STANDARD OF REVIEW

We review the grant or denial of a preliminary injunction for an abuse of discretion. *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003) (en banc) (per curiam). We review the district court's interpretation of underlying law de novo. *Id.*

ANALYSIS

I. Appellants' Claims Are Justiciable.

As a threshold matter, we must first decide whether Appellants' claims are justiciable. The County Counsel of San Diego argues that this action is not constitutionally ripe, and even if it were ripe, that we should decline to find jurisdiction for prudential reasons.

We reject these arguments.

A. Appellants' Claims Are Constitutionally Ripe.

"[T]he Constitution mandates that prior to our exercise of jurisdiction there exist a constitutional 'case or controversy,' that the issues presented are 'definite and concrete, not hypothetical or abstract.'"

Thomas v. Anchorage Equal Rights Comm'n, 220 F.3d 1134, 1139 (9th Cir. 1999) (en banc) (quoting *Ry. Mail Ass'n v. Corsi*, 326 U.S. 88, 93 (1945)). A plaintiff must face "a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement," not an "alleged injury [that] is too imaginary or speculative to support jurisdiction." *Id.* (internal quotation marks and citation omitted). This Court has identified three factors to assess in deciding whether a case is constitutionally ripe: (1) whether plaintiffs have articulated a concrete plan to violate the statute in question; (2) whether the prosecuting authorities have communicated a specific warning or threat to initiate proceedings; and (3) the history of past prosecution or enforcement of the challenged statute. *Id.*

These factors allow for plaintiffs to bring pre-enforcement challenges to laws that they claim infringe their fundamental rights. *See id.* at 1137 n.1. Indeed, we have long recognized that "[o]ne does not have to await the consummation of threatened injury to obtain preventive relief . . . . [p]articularly in the First Amendment-protected speech context[.]" *Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1094 (9th Cir. 2003) (citation omitted); *see also Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 393 (1988).

Appellants' claims are constitutionally ripe. Before the district court and this Court, Appellants have explicitly stated that they will not comply with the Act, even if enforced. Appellants have made this pledge of disobedience although they are aware that violators of the Act are subject to civil penalties. Cal. Health & Safety Code § 123473(a). The AG, moreover,

has not stated that she will not enforce the Act. *See Am. Booksellers Ass'n*, 484 U.S. at 393 ("The State has not suggested that the newly enacted law will not be enforced, and we see no reason to assume otherwise. We conclude that plaintiffs have alleged an actual and well founded fear that the law will be enforced against them."). A lack of enforcement history is not a compelling reason to find Appellants' claims unripe in this context.[4] The Act did not go into effect until January 1, 2016, approximately one month before the district court denied the motion for a preliminary injunction. Appellants, therefore, could not have demonstrated a significant history of enforcement. *See Wolfson v. Brammer*, 616 F.3d 1045, 1060 (9th Cir. 2010) (affording the factor of past prosecution "little weight" when the challenged law was new); *LSO Ltd. v. Stroh*, 205 F.3d 1146, 1155 (9th Cir. 2000) ("[E]nforcement history alone is not dispositive. Courts have found standing where no one had ever been prosecuted under the challenged provision.").

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[4] Moreover, we note that NIFLA filed a 28(j) letter informing the Court that, on August 16, 2016, Los Angeles City Attorney Michael Feuer sent an enforcement letter to co-counsel for NIFLA. In the letter, the City Attorney provided notice that The People of the State of California planned to make an *ex parte* application for an order to show cause why a preliminary injunction should not issue and a temporary restraining order enjoining the Pregnancy Counseling Center, a member of NIFLA, from violating the FACT Act. The City indicated it also would file a complaint containing a single cause of action—violation of California Business & Professions Code § 17200, *et seq.*—and seeking equitable relief and civil penalties. NIFLA states this chilled the speech of the Pregnancy Counseling Center.

B. Appellants' Claims Are Prudentially Ripe.

Even if a case is constitutionally ripe, we have discretionary power to decline to exercise jurisdiction. *Thomas*, 220 F.3d at 1142. When assessing prudential ripeness, we consider: (1) the fitness of the issues for judicial decision and; (2) hardship to the parties if we were to withhold jurisdiction. *Id.* at 1141.

This Court has stated that "[a] claim is fit for decision if the issues raised are primarily legal, do not require further factual development, and the challenged action is final." *Wolfson*, 616 F.3d at 1060 (quoting *U.S. W. Commc'ns v. MFS Intelenet, Inc.*, 193 F.3d 1112, 1118 (9th Cir. 1999)). When evaluating hardship "[w]e consider whether the 'regulation requires an immediate and significant change in plaintiffs' conduct of their affairs with serious penalties attached to noncompliance.'" *Stormans, Inc.* v. *Selecky*, 586 F.3d 1109, 1126 (9th Cir. 2009) (quoting *Ass'n of Am. Med. Colls.* v. *United States*, 217 F.3d 770, 783 (9th Cir. 2000)). "[A] litigant must show that withholding review would result in direct and immediate hardship and would entail more than possible financial loss." *Id.* (quoting *MFS Intelenet, Inc.*, 193 F.3d at 1118).

We conclude that both factors favor a finding of prudential ripeness.

This action turns on a question of law. Appellants seek to enjoin the enforcement of the Act on the grounds that it is unconstitutional. We require no further factual development to address Appellants' challenge. The district court's order denying the

motion for a preliminary injunction was also an appealable order. 28 U.S.C. § 1292(a)(1).

We also conclude that the parties would face immediate and significant hardships if we were to decline to exercise jurisdiction. Until we issue a decision, Appellants must routinely choose between holding fast to their firmly held beliefs about abortion, or complying with the Act. And although the San Diego County Counsel claims that he will suffer hardship if he is forced to defend the Act, we find more significant the definite and direct hardship that all parties will suffer if we were to decline to find jurisdiction. As noted, without a decision, Appellants must continually choose between obeying the law or following their strongly held convictions about abortion, and the AG will have to choose whether or not to enforce a law without the benefit of a ruling on its constitutionality.

We therefore conclude that this action is justiciable and turn to the merits of the case.

I. The District Court Did Not Abuse Its Discretion in Denying the Preliminary Injunction.

When bringing a motion for a preliminary injunction, a plaintiff must demonstrate: (1) that he is likely to succeed on the merits of his claim; (2) that he is likely to suffer irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in his favor; and (4) that an injunction is in the public interest. *Winter*, 555 U.S. at 20. A preliminary injunction can also be issued if "a plaintiff

demonstrates . . . that serious questions going to the merits were raised and the balance of hardships tips sharply in the plaintiff's favor," as well as satisfaction of the other *Winter* factors. *All. for the Wild Rockies*, 632 F.3d at 1134–35 (citation omitted).

A. Appellants Cannot Demonstrate a Likelihood of Success on their First Amendment Free Speech Claims.

Appellants argue that the Act should be subject to strict scrutiny for two main reasons. First, they argue that because the Act compels content-based speech, strict scrutiny is appropriate. Second, they contend that the Act engages in viewpoint discrimination.

We disagree. Although the Act is a content-based regulation, it does not discriminate based on viewpoint. The fact that the Act regulates content, moreover, does not compel us to apply strict scrutiny. And because we agree with the Fourth Circuit that the Supreme Court's decision in *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, 505 U.S. 833 (1992), did not announce a rule regarding the level of scrutiny to apply in abortion-related disclosure cases, we apply our precedent in *Pickup* v. *Brown*, 740 F.3d 1208 (9th Cir. 2013), and rule that the Licensed Notice regulates professional speech, subject to intermediate scrutiny.[5] The Licensed Notice survives

[5] We find unpersuasive Appellees' argument that the Act regulates commercial speech subject to rational basis review. *See Zauderer* v. *Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985). Commercial speech "does no more than propose a commercial transaction." *Coyote Pub., Inc.* v. *Miller*, 598 F.3d 592, 604 (9th Cir. 2010) (citation omitted).

intermediate scrutiny. We also conclude that the Unlicensed Notice survives any level of scrutiny. Thus, the district court did not err in finding that Appellants cannot show a likelihood of success on the merits of their free speech claims.

1. Strict Scrutiny Is Inappropriate.

A regulation discriminates based on content when "on its face," the regulation "draws distinctions based on the message a speaker conveys." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015). A regulation discriminates based on viewpoint when it regulates speech "based on 'the specific motivating ideology or the opinion or perspective of the speaker.'" *Id.* at 2230 (quoting *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995)). Thus, viewpoint discrimination is a kind of content discrimination. Indeed, viewpoint discrimination is a "'more blatant' and 'egregious form of content discrimination.'" *Id.* (quoting *Rosenberger*, 515 U.S. at 829).

Because viewpoint discrimination is a subset of content discrimination, a regulation can be content-based, but viewpoint neutral. Such is the case with the Act.

On its face, the Act compels Appellants to disseminate the Notices. *See id.* at 2228 (explaining that the "first step" in assessing whether a law is content-based or content-neutral is to "determine[ ] whether the law is content neutral on its face"). The

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The Act primarily regulates the speech that occurs within the clinic, and thus is not commercial speech.

Act therefore requires Appellants engage in speech on a particular subject matter. In so doing, the Act "[m]andat[es] speech that a speaker would not otherwise make" which "necessarily alters the content of the speech." *Riley* v. *Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988). The Act, therefore, is a content-based regulation.[6]

The Act, however, does not discriminate based on viewpoint. It does not discriminate based on the particular opinion, point of view, or ideology of a certain speaker. Instead, the Act applies to all licensed and unlicensed facilities, regardless of what, if any, objections they may have to certain family-planning services. The Act contains two narrow exceptions that do not disfavor any particular speakers. The first exemption is for clinics "directly conducted, maintained, or operated by the United States or any of its departments, officers, or agencies." Cal. Health & Safety Code § 123471(c)(1). This exemption was created in order to avoid federal preemption. The Act's second exemption is for a clinic "enrolled as a Medi-Cal provider and a provider in the Family Planning, Access, Care, and Treatment Program." *Id.* § 123472(c)(2). This exemption was created because clinics that fall under § 123472(c)(2) already provide all of the publicly-funded health services outlined in the Licensed Notice.

Appellants argue that this case is similar to *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011), in

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[6] We disagree with the district court's conclusion that the Act is content-neutral. This error, however, was harmless as it appropriately denied the motion for a preliminary injunction.

which the Supreme Court held that a law restricting the sale and use of pharmacy records discriminated based on viewpoint and was subject to more rigorous judicial scrutiny. There, the Court looked to the law's legislative findings and concluded that the law's "express purpose" was to burden specific speakers. *Id.* at 565. Appellants assert that because the California legislature also had specific speakers in mind when enacting the Act, that is, CPCs and clinics opposed to abortion, the Act engages in viewpoint discrimination. Appellants emphasize, moreover, that California has no evidence that their clinics actually misinform women.

Sorrell, however, did not rely solely on legislative intent. The Court concluded that the law "on its face burden[ed] disfavored speech by disfavored speakers," allowing use of the pharmacy records by all "but a narrow class of disfavored speakers." *Id.* at 564, 573. Thus, while "a statute's stated purpose may also be considered," Sorrell did not turn exclusively on the law's motivation or purpose. *Id.* at 565. Importantly, the law in *Sorrell* applied to the speakers that were the targets of the law, while it exempted others. In sharp contrast, as discussed, the Act applies to almost all licensed and unlicensed speakers. Other than the two narrow exceptions unrelated to viewpoint, the Act applies equally to clinics that offer abortion and contraception as it does to clinics that oppose those same services.

Appellants' reliance on *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002), is also misplaced. In Conant, we affirmed an injunction that prohibited the federal government from possibly revoking a doctor's license

based on a federal policy that "not merely prohibit[ed] the discussion of marijuana," but also "condemn[ed] expression of a particular viewpoint, i.e., that medical marijuana would likely help a specific patient." *Id.* at 637.

Conant is distinguishable. Again, other than the two exceptions, the Act applies to all clinics, regardless of their stance on abortion or contraception. Next, unlike in *Conant*, the Act does not favor or disfavor any particular viewpoint. Indeed, contrasting this case with the Fourth Circuit's recent decision in *Stuart v. Camnitz*, 774 F.3d 238 (4th Cir. 2014), confirms that the Act does not engage in viewpoint discrimination. In Stuart, the Fourth Circuit held that a statute that required doctors to perform an ultrasound, display the sonogram, and describe the fetus to women seeking abortions violated the physicians' First Amendment rights. 774 F.3d at 255–56. In so doing, the Fourth Circuit concluded that the law compelled speech that "convey[ed] a particular opinion," which was, "to convince women seeking abortions to change their minds or reassess their decisions." *Id.* at 246. Here, however, the Act does not convey any opinion. The Licensed Notice and the Unlicensed Notice do not imply or suggest any preference regarding family planning services. Instead, the Licensed Notice merely states the existence of publicly-funded family-planning services, and the Unlicensed Notice only states that the particular clinic in which it is distributed is not licensed.

We conclude that the Act is content-based, but does not discriminate based on viewpoint.

i. Even Though the Act Engages in Content Based Discrimination, Strict Scrutiny Is Inappropriate.

In arguing that content-based regulations are always subject to strict scrutiny, Appellants cite the Supreme Court's recent decision in *Reed*. In *Reed*, the Supreme Court held that a town's regulation of the manner in which outdoor signs were displayed was content-based and unable to satisfy strict scrutiny. 135 S. Ct. at 2227, 2231. In reaching this conclusion, the Court expressly stated that "[c]ontent-based laws . . . are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Id.* at 2226.

Reed, however, does not require us to apply strict scrutiny in this case. Since *Reed*, we have recognized that not all content-based regulations merit strict scrutiny. See *United States* v. *Swisher*, 811 F.3d 299, 311–13 (9th Cir. 2016) (en banc) (discussing *Reed* and noting examples that illustrate that "[e]ven if a challenged restriction is content-based, it is not necessarily subject to strict scrutiny").

Further, the Supreme Court has recognized a state's right to regulate physicians' speech concerning abortion. In *Casey*, the Supreme Court considered Pennsylvania's requirement that a physician provide abortion-related information to his or her patient, writing:

> All that is left of petitioners' argument is an asserted First Amendment right of a

> physician not to provide information about the risks of abortion, and childbirth, in a manner mandated by the State. To be sure, the physician's First Amendment rights not to speak are implicated . . . but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State . . . We see no constitutional infirmity in the requirement that the physician provide the information mandated by the State here.

505 U.S. at 884 (citations omitted) (emphasis added). Over a decade later, in *Gonzales* v. *Carhart*, the Court wrote that "the State has a significant role to play in regulating the medical profession." 550 U.S. 124, 157 (2007).

In interpreting these cases, courts have not applied strict scrutiny in abortion-related disclosure cases, even when the regulation is content-based. *See Stuart*, 774 F.3d at 248–49 (applying intermediate scrutiny); *Tex. Med. Providers Performing Abortion Servs.* v. *Lakey*, 667 F.3d 570, 576 (5th Cir. 2012) (applying a reasonableness test); *Planned Parenthood Minn., N.D., S.D.* v. *Rounds*, 530 F.3d 724, 734–35 (8th Cir. 2008) (applying a reasonableness test).

Thus, Appellants' argument that the Act, a content-based regulation, must be subject to strict scrutiny is unpersuasive. We have recognized that not all content-based regulations are subject to strict scrutiny, and courts have routinely applied a lower

level of scrutiny when states have compelled speech concerning abortion-related disclosures.

ii. *Casey* Did Not Announce a Rule Regarding the Level of Scrutiny to Apply to Abortion Related Disclosure Cases.

Although courts are in agreement that strict scrutiny is inappropriate in abortion-related disclosure cases, there is currently a circuit split regarding the appropriate level of scrutiny to apply. In interpreting *Casey* and *Gonzales*, and in particular the above quoted excerpt from *Casey*, the Fifth and Eighth Circuits have applied a "reasonableness" test when determining whether an abortion-related disclosure law violated physicians' First Amendment rights. In *Lakey*, the Fifth Circuit held that the appropriate level of scrutiny for abortion-related disclosures was "the antithesis of strict scrutiny," upholding a law requiring doctors to show pregnant women sonograms of their fetuses and make audible the fetuses' heartbeats. 667 F.3d at 575. The *Lakey* court interpreted *Casey* and *Gonzales* to mean that such laws were permissible as they "are part of the state's reasonable regulation of medical practice." Id. at 576. Similarly, in construing *Casey* and *Gonzales*, the Eighth Circuit upheld a law regulating informed consent to abortion, concluding that a state "can use its regulatory authority to require a physician to provide truthful, non-misleading information" to patients in the context of abortion-related disclosures. *Rounds*, 530 F.3d at 734–35.

The Fourth Circuit, however, disagreed that *Casey* created an entirely new standard to apply in abortion-related disclosure cases. In *Stuart*, the Fourth Circuit concluded that "[t]he single paragraph in *Casey* does not assert that physicians forfeit their First Amendment rights in the procedures surrounding abortions, nor does it announce the proper level of scrutiny to be applied to abortion regulations that compel speech[.]" 774 F.3d at 249. The court also noted that *Gonzales* did not shed light on the First Amendment standard post-*Casey*, since *Gonzales* was not a First Amendment case. *Id.* Thus, the court assessed a law requiring doctors to perform an ultrasound, sonogram, and describe the fetus to pregnant patients under a professional speech framework. *Id.* at 247–48, 252, 256. The court concluded that intermediate scrutiny was the appropriate standard and that the law failed this level of scrutiny. *Id.* Applying intermediate scrutiny, the court explained, was "consistent with Supreme Court precedent and appropriately recognizes the intersection . . . of regulation of speech and regulation of the medical profession in the context of an abortion procedure." *Id.* at 249.

We agree with the Fourth Circuit that *Casey* did not establish a level of scrutiny to apply in abortion-related disclosure cases. *Casey's* short discussion of a physician's First Amendment rights in the context of abortion means only what it says—that there was no violation of the physicians' First Amendment rights given the particular facts of *Casey*. *See* 505 U.S. at 884 ("We see no constitutional infirmity in the requirement that the physician provide the information mandated by the State *here*." (emphasis

added)). We need not "read too much," *Stuart*, 774 F.3d at 249, into *Casey's* statement that physicians are "subject to reasonable licensing and regulation by the State." 505 U.S. at 884. *Casey* did not announce an entirely new rule with this limited statement. *See Stuart*, 774 F.3d at 249 ("That particularized finding [in *Casey*] hardly announces a guiding standard of scrutiny for use in every subsequent compelled speech case involving abortion."). Nor did it render inapplicable other frameworks for assessing free speech claims when the speech at issue concerns abortion. Instead, what *Casey* did was merely confirm what we have always known, which is that professionals are subject to reasonable licensing by the state. *See, e.g., Dent v. W. Va.*, 129 U.S. 114, 122 (1889) (examining a law regulating the medical profession and writing that "[t]he power of the state to provide for the general welfare of its people authorizes it to prescribe all such regulations as in its judgment will secure or tend to secure them against the consequences of ignorance and incapacity, as well as of deception and fraud").

We also agree with the Fourth Circuit that *Gonzales* did not clearly speak to the level of scrutiny to apply to physician's First Amendment rights. *See Stuart*, 774 F.3d at 249 ("The fact that a regulation does not impose an undue burden on a woman under the due process clause does not answer the question of whether it imposes an impermissible burden on the physician under the First Amendment.").

We rule that strict scrutiny is inappropriate, and that *Casey* did not announce a level of scrutiny to apply in abortion-related disclosure cases.

2. The Licensed Notice Is Professional Speech Subject to Intermediate Scrutiny.

In *Pickup*, we assessed the level of scrutiny to apply to Senate Bill 1172, a California law that banned mental health therapists from conducting on minor patients any practice that purported to change a patient's sexual orientation. 740 F.3d at 1221. We explained that the level of protection to apply to specific instances of professional speech or conduct is best understood as along a continuum. At one end is a professional's right to engage in a "public dialogue, [where] First Amendment protection is at its greatest." *Id.* at 1227. There, "[professionals] are constitutionally equivalent to soapbox orators and pamphleteers, and their speech receives robust protection[.]" *Id.* at 1227–28. On the other end lies professional conduct, where the speech at issue is, for example, a form of treatment. *Id.* at 1229. When regulating conduct, "the state's power is great, even though such regulation may have an incidental effect on speech." *Id.* Because the law in *Pickup* involved the regulation of a specific type of therapy, we held that it regulated professional conduct subject to rational basis review. *Id.* at 1231.

Pickup also delineated professional speech that falls in the middle of the continuum. At the midpoint, "the First Amendment tolerates a substantial amount of speech regulation within the professional-client relationship that it would not tolerate outside of it" because "[w]hen professionals, by means of their state-issued licenses, form relationships with clients, the purpose of those relationships is to advance the welfare of the clients, rather than to contribute to

public debate." *Id.* at 1228. *Pickup*, however, never discussed the level of scrutiny appropriate for speech that fell at the midpoint.

We conclude that the Licensed Notice regulates speech that falls at the midpoint of the *Pickup* continuum, and that intermediate scrutiny should apply.

To begin, the Licensed Notice regulates professional speech. Underlying the *Pickup* opinion is the principle that professional speech is speech that occurs between professionals and their clients in the context of their professional relationship. In other words, speech can be appropriately characterized as professional when it occurs within the confines of a professional's practice. *See King* v. *Governor of N.J.*, 767 F.3d 216, 232 (3d Cir. 2014) ("[W]e conclude that a licensed professional does not enjoy the full protection of the First Amendment when speaking as *part of the practice of her profession.*" (emphasis added)). The idea that the speech that occurs between a professional and a client is distinct from other types of speech stems from the belief that professionals, "through their education and training, have access to a corpus of specialized knowledge that their clients usually do not" and that clients put "their health or their livelihood in the hands of those who utilize knowledge and methods with which [they] ordinarily have little or no familiarity." *Id.*; see also *Lowe* v. *SEC*, 472 U.S. 181, 232 (1985) (White, J., concurring) ("One who takes the affairs of a client personally in hand and purports to exercise judgment on behalf of the client in the light of the client's individual needs and circumstances is properly viewed as engaging in

the practice of a profession."). This is why states have the power to regulate professions, *see, e.g.*, *Barsky* v. *Bd. of Regents of Univ. of N.Y.*, 347 U.S. 442, 449 (1954) ("The state's discretion . . . extends naturally to the regulation of all professions concerned with health."), as well as the power to regulate the speech that occurs within the practice of the profession.

Licensed clinics engage in speech that occurs squarely within the confines of their professional practice. For example, Pregnancy Care Clinic provides medical services such as ultrasounds, clinical services such as medical referrals, and non-medical services such as peer counseling and education. Thus, a regular client of Pregnancy Care could easily use many of their services throughout the stages of her pregnancy, such as receiving educational information about best health practices when pregnant, relying upon Pregnancy Care for regular check-ups, or using Pregnancy Care as a resource for counseling. In all these instances, the client and Pregnancy Care engage in speech that is part of Pregnancy Care's professional practice of offering family planning services. There is no question that Pregnancy Care's clients go to the clinic precisely because of the professional services it offers, and that they reasonably rely upon the clinic for its knowledge and skill. Because licensed clinics offer medical and clinical services in a professional context, the speech within their walls related to their professional services is professional speech.

The professional nature of their speech does not change even if Appellants decide to have staff members disseminate the Licensed Notice in the

clinics' waiting rooms, instead of by doctors or nurses in the examining room. Here, the professional nature of the licensed clinics' relationship with their clients extends beyond the examining room. All the speech related to the clinics' professional services that occurs within the clinics' walls, including within in the waiting room, is part of the clinics' professional practice. Furthermore, the Licensed Notice contains information regarding the professional services offered by the clinics, and thus would constitute professional speech regardless of where within the clinic it was disseminated.

We now turn to the correct level of scrutiny to apply to the Licensed Notice and conclude that under our precedent in *Pickup*, intermediate scrutiny applies. Licensed Clinics are not engaging in a public dialogue when treating their clients, and they are not "constitutionally equivalent to soapbox orators and pamphleteers." *Pickup*, 740 F.3d at 1227. Thus, it would be inappropriate to apply strict scrutiny. And, unlike in *Pickup*, the Licensed Notice does not regulate therapy, treatment, medication, or any other type of conduct. Instead, the Licensed Notice regulates the clinics' speech in the context of medical treatment, counseling, or advertising.[7]

Because the speech here falls at the midpoint of the *Pickup* continuum, it is not afforded the "greatest" First Amendment protection, nor the least. *Id.* It

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[7] We disagree with the district court's conclusion that the Act regulates conduct. The district court's error, however, was harmless as it appropriately denied the motion for a preliminary injunction.

follows, therefore, that speech in the middle of the *Pickup* continuum should be subject to intermediate scrutiny. *See Stuart*, 774 F.3d at 249 (applying intermediate scrutiny when physicians challenged an abortion-related disclosure law they claimed violated their First Amendment rights); *King*, 767 F.3d at 237 (applying intermediate scrutiny when therapists challenged a law prohibiting therapy that purported to change patients' sexual-orientation, which it had determined was professional "speech" rather than "conduct"). Applying intermediate scrutiny is consistent with the principle that "within the confines of a professional relationship, First Amendment protection of a professional's speech is somewhat diminished," *Pickup*, 740 F.3d at 1228, but that professionals also do not "simply abandon their First Amendment rights when they commence practicing a profession." *Stuart*, 774 F.3d at 247.

Appellants cite *In Re Primus*, 436 U.S. 412 (1978), to argue that strict scrutiny should apply to professional speech when the professional services at issue are offered free of charge. We reject this argument.[8] *In In re Primus*, the Supreme Court addressed whether a lawyer's First Amendment rights were violated when a state bar punished her

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[8] We do not think a necessary element of professional speech is for the client to be a paying client. A lawyer who offers her services to a client pro bono, for example, nonetheless engages in professional speech. *But see Moore-King* v. *Cty. of Chesterfield*, 708 F.3d 560, 569 (4th Cir. 2013) ("[T]he relevant inquiry to determine whether to apply the professional speech doctrine is whether the speaker is providing personalized advice in a private setting to a paying client or instead engages in public discussion and commentary." (emphasis added)).

for writing a letter to a possible client about free legal services available at the American Civil Liberties Union, an organization with which she was affiliated, but offered her no compensation. 436 U.S. at 414–15. The Supreme Court held that the lawyer's constitutional rights were violated, writing that "[i]n the context of political expression and association . . . a State must regulate with significantly greater precision." *Id.* at 437–38. Here, however, Appellants have positioned themselves in the marketplace as pregnancy clinics. Their non-profit status does not change the fact that they offer medical services in a professional context. Nor does their non-profit status transform them into, for example, an organization that engages in "political expression and association." *Id.*

3. The Licensed Notice Survives Intermediate Scrutiny.

In order to survive intermediate scrutiny, "the State must show . . . that the statute directly advances a substantial governmental interest and that the measure is drawn to achieve that interest." *Sorrell*, 564 U.S. at 572. Intermediate scrutiny is "demanding" but requires less than strict scrutiny. *Retail Digital Network, LLC* v. *Appelsmith*, 810 F.3d 638, 648 (9th Cir. 2016). "What is required is 'a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served; that employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective.'" *Id.* at 649 (quoting

Bd. of Trustees of the State Univ. of N.Y. v. *Fox*, 492 U.S. 469, 480 (1989)).

We conclude that the Licensed Notice satisfies intermediate scrutiny. California has a substantial interest in the health of its citizens, including ensuring that its citizens have access to and adequate information about constitutionally-protected medical services like abortion. The California Legislature determined that a substantial number of California citizens may not be aware of, or have access to, medical services relevant to pregnancy. *See* Assem. Bill No. 775 § 1(b). This includes findings that in 2012, 2.6 million California women were in need of publicly-funded family planning services, and that thousands of pregnant California women remain unaware of the state-funded programs that offer an array of services, such as health education and planning, prenatal care, and abortion. *Id.* As we have long recognized, "[s]tates have a compelling interest in the practice of professions within their boundaries, and . . . as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for . . . regulating the practice of professions." *Am. Acad. of Pain Mgmt.* v. *Joseph*, 353 F.3d 1099, 1109 (9th Cir. 2004) (quoting *Fla. Bar* v. *Went For It, Inc.*, 515 U.S. 618, 625 (1994)).

We conclude that the Licensed Notice is narrowly drawn to achieve California's substantial interests. The Notice informs the reader only of the existence of publicly-funded family-planning services. It does not contain any more speech than necessary, nor does it encourage, suggest, or imply that women should use those state-funded services. The Licensed Notice is

closely drawn to achieve California's interests in safeguarding public health and fully informing Californians of the existence of publicly-funded medical services. And given that many of the choices facing pregnant women are time-sensitive, such as a woman's right to have an abortion before viability, *Casey*, 505 U.S. at 846, we find convincing the AG's argument that because the Licensed Notice is disseminated directly to patients whenever they enter a clinic, it is an effective means of informing women about publicly-funded pregnancy services.

Appellants argue that because California could find other ways to disseminate the information in the Licensed Notice to the public, such as in an advertising campaign, the Act cannot survive heightened scrutiny. The Second and Fourth Circuits used similar reasoning to strike down provisions of abortion-related regulations. *See Evergreen Ass'n, Inc. v. City of N.Y.*, 740 F.3d 233, 250 (2d Cir. 2014) (stating that "the City can communicate this message through an advertising campaign");*Centro Tepeyac* v. *Montgomery Cty.*, 722 F.3d 184, 191 (4th Cir. 2013) (en banc) (stating that the government had "several options less restrictive than compelled speech" such as "launch[ing] a public awareness campaign" (internal quotation marks and citation omitted)).

But *Evergreen* and *Centro Tepeyac* applied strict scrutiny, which is much more stringent than the intermediate scrutiny we apply today. Unlike when evaluating a law under strict scrutiny, under intermediate scrutiny, a law need not be the least restrictive means possible. *See Appelsmith*, 810 F.3d at 649. Thus, even if it were true that the state could

disseminate this information through other means, it need not prove that the Act is the least restrictive means possible.[9]

Further, unlike the portions of the regulations before the Second and Fourth Circuits, the Licensed Notice does not use the word "encourage," or other language that suggests the California Legislature's preferences regarding prenatal care. *See Evergreen*, 740 F.3d at 250 (striking down the portion of the regulation that required clinics to state that "the New York City Department of Health and Mental Hygiene encourages women who are or who may be pregnant to consult with a licensed provider"); *Centro Tepeyac*, 722 F.3d at 191 (striking the portion of the regulation that mandated clinics to state that "the Montgomery County Health Officer encourages women who are or may be pregnant to consult with a licensed health care provider").

4. The Unlicensed Notice Survives Any Level of Review.

We now address the speech regulated by the Unlicensed Notice. While we acknowledge that unlicensed clinics do not offer many of the medical

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[9] We note that, given the preliminary stage of this case, it is unclear whether California actually could have disseminated this information as effectively in an advertising campaign, as Appellants argue. At oral argument, the AG noted that California has advertised its publicly-funded programs, but many women were still unaware of their existence given the expansion of certain health programs. Oral Argument at 28:44, A *Woman's Friend Pregnancy Resource Clinic* v. *Harris*, No. 15-17517, http://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000009827.

services available at licensed clinics, they nonetheless offer some professional services. Fallbrook Pregnancy Center, for example, offers educational programs. They also give medical referrals for ultrasounds and sonographs, which are offered nearby. Indeed, the Act covers unlicensed clinics like Fallbrook precisely because their "primary purpose is [to provide] pregnancy-related services" and those services can include collecting health information, offering prenatal care, or pregnancy tests and diagnosis. Cal. Health & Safety Code § 123471(b).

We need not resolve the question, however, of whether the Unlicensed Notice regulates professional speech because it is clear to us that the Unlicensed Notice will survive even strict scrutiny.

In order to survive strict scrutiny, a regulation must be "narrowly tailored to serve a compelling interest." *Williams Yulee* v. *Fla. Bar*, 135 S. Ct. 1656, 1665 (2015).

California has a compelling interest in informing pregnant women when they are using the medical services of a facility that has not satisfied licensing standards set by the state. And given the Legislature's findings regarding the existence of CPCs, which often present misleading information to women about reproductive medical services, California's interest in presenting accurate information about the licensing status of individual clinics is particularly compelling.

We conclude that the Unlicensed Notice is narrowly tailored to this compelling interest. By

stating that the clinic in which it is disseminated is not licensed by the State of California, the Unlicensed Notice helps ensure that women, who may be particularly vulnerable when they are searching for and using family-planning clinical services, are fully informed that the clinic they are trusting with their well-being is not subject to the traditional regulations that oversee those professionals who are licensed by the state. The Unlicensed Notice is also only one sentence long. It merely states that the facility in which it appears is not licensed by California and has no state-licensed medical provider. It says nothing about the quality of service women may receive at these clinics, and in no way implies or suggests California's preferences regarding unlicensed clinics.

The Second and Fourth Circuits held that regulations with provisions similar to the Unlicensed Notice survived strict scrutiny. In *Evergreen*, the Second Circuit concluded that the portion of the regulation that required clinics to state if they "have a licensed medical provider on staff who provides or directly supervises the provision of all of the services" survived strict scrutiny because it was not overly broad, and was "the least restrictive means to ensure that a woman [was] aware of whether or not a *particular* pregnancy services center ha[d] a licensed medical provider." 740 F.3d at 246–47 (emphasis in original). Similarly, in *Centro Tepeyac*, the Fourth Circuit held that the portion of the regulation that stated "the Center does not have a licensed medical professional on staff," survived strict scrutiny because it "merely notifie[d] patients that a licensed medical professional [was] not on staff, d[id] not require any other specific message, and in neutral language

state[d] the truth." 722 F.3d at 190 (internal quotation marks and citation omitted). The surviving portions of the regulations in *Evergreen* and *Centro Tepeyac* merely state whether or not the clinics had licensed providers, which is exactly what the Unlicensed Notice does.

We therefore hold that the district court did not abuse its discretion in finding that Appellants cannot demonstrate a likelihood of success on their free speech claim. The Licensed Notice regulates professional speech, subject to intermediate scrutiny, which it survives. The Unlicensed Notice survives any level of review.[10]

B. Appellants Cannot Demonstrate a Likelihood of Success on their First Amendment Free Exercise Claim.

Courts have long recognized that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" *Empl't Div., Dep't. of Human Res. of Or.* v. *Smith*, 494 U.S. 872, 879 (1990) (quoting *United States* v. *Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in judgment)). A neutral and generally applicable law is subject to only rational basis review. *Stormans, Inc.* v. *Wiesman*, 794 F.3d 1064, 1075–76 (9th Cir. 2015).

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[10] To be clear, we do not conclude that strict scrutiny is the correct level of scrutiny to apply to the Unlicensed Notice. We only conclude that it can survive strict scrutiny.

The Act is facially neutral. "A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernable from the language or context." *Id.* at 1076 (citation omitted). The Act references no religious practice and is thus facially neutral.

The Act is also operationally neutral. It "prescribe[s] and proscribe[s] the same conduct for all, regardless of motivation." *Id.* at 1077. The Act applies to all covered facilities, and is indifferent to the basis for any objection. Thus, contrary to Appellants' assertion, this case is distinguishable from *Church of Lukumi Babalu Aye, Inc.* v. *City of Hialeah*. There, the Supreme Court found non-neutral a law that banned animal sacrifices for only a particular religion while sacrifices "that [were] no more necessary or humane in almost all other circumstances [went] unpunished." 508 U.S. 520, 536 (1993). But, unlike in *Lukumi*, the Act applies to all licensed and unlicensed facilities, regardless of any objection, religious or otherwise. The fact that Appellants' objections are grounded in their religious beliefs does not affect the Act's neutrality. *See Stormans,* 794 F.3d at 1077 ("The Free Exercise Clause is not violated even if a particular group, motivated by religion, may be more likely to engage in the proscribed conduct.").

The Act is generally applicable. "[I]f a law pursues the government's interest only against conduct motivated by religious belief but fails to include in its prohibitions substantial, comparable secular conduct that would similarly threaten the government's interest, then the law is not generally applicable." *Id.* at 1079 (internal quotation marks and citation

omitted). A law is not generally applicable if it "in a selective manner impose[s] burdens only on conduct motivated by religious belief[.]" *Lukumi*, 508 U.S. at 543.

The Act has two exemptions, and neither renders the Act not generally applicable. As noted, the Act's first exemption exists to avoid federal preemption, and its second exemption is for clinics that already provide all of the publicly-funded services outlined in the Act. *See supra* section II.A.1. Because the Act's exemptions are "tied directly to limited, particularized, business-related, objective criteria," the Act is generally applicable. *Stormans*, 794 F.3d at 1082.

And finally, this action is not a "hybrid-rights" case in which a free exercise plaintiff has made out a "colorable claim that a companion right has been violated." *San Jose Christian Coll.* v. *City of Morgan Hill*, 360 F.3d 1024, 1032 (9th Cir. 2004). Appellants have not shown a likelihood of success on the merits of their free speech claim. Thus, there is no "colorable claim" for "a companion right." *Id.*

We conclude that the Act is a neutral law of general applicability, subject to only rational basis review. *See Stormans*, 794 F.3d at 1075–76. Because the Licensed Notice survives intermediate scrutiny, and the Unlicensed Notice survives any level of

review, the Act necessarily also survives rational basis review.[11]

CONCLUSION

Appellants have failed to demonstrate that the first, most important, *Winter* factor favors granting their motion for a preliminary injunction. *Garcia*, 786 F.3d at 740. We reject Appellants' arguments that they are entitled to a preliminary injunction based on their free speech claims. The Act is a content-based regulation that does not discriminate based on viewpoint. And because *Casey* did not announce a new rule regarding the level of scrutiny to apply to abortion-related disclosure cases, we apply this Court's professional speech framework and conclude that the Licensed Notice is subject to intermediate scrutiny, which it survives. The Unlicensed Notice survives any level of review.

We also reject Appellants' arguments that they are entitled to a preliminary injunction based on their free exercise claims. The Act is a neutral law of general applicability, which survives rational basis review. Appellants, therefore, are unable to

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[11] We also find that Appellants have not raised "serious questions" going to the merits of their claims; thus, the alternate test set forth in Alliance *for the Wild Rockies* does not apply. The district court's conclusion that there were serious questions going to the merits was harmless error because the district court appropriately denied the motion for a preliminary injunction. Because Appellants cannot show a likelihood of success on the merits or "serious questions" going to the merits of their First Amendment claims, we need not discuss the remaining *Winter* factors.

demonstrate likelihood of success on the merits of their First Amendment claims.

AFFIRMED.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

National Institute of Family and Life Advocates, a Virginia corporation, DBA NIFLA; PREGNANCY CARE CENTER, a California corporation, DBA Pregnancy Care Clinic; FALLBROOK PREGNANCY RESOURCE CENTER, a California corporation, *Plaintiffs*, v. Kamala Harris, *et. al.*, *Defendants.*	Civil No. 15-cv-2277-JAH(DHB) **ORDER DENYING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION [Doc. No.3]**

INTRODUCTION

Currently pending before this Court is the motion for preliminary injunction filed by Plaintiffs National Institute of Family and Life Advocates d/b/a NIFLA ("NIFLA"), Pregnancy Care Center d/b/a Pregnancy Care Clinic, and Fallbrook Pregnancy Resource Center (collectively "Plaintiffs"). The parties fully briefed the motion and appeared before this Court for hearing on the motion on January 28, 2016. After a thorough review of the parties' submissions,

consideration of the argument presented at the hearing and for the reasons discussed below, the Court DENIES Plaintiffs' motion for a preliminary injunction.

BACKGROUND

The plaintiffs in this case are two non-profit pro-life pregnancy centers located in this judicial district and one national network of similar centers. Plaintiffs filed the instant complaint on October 13, 2015, against Defendants Kamala Harris, in her official capacity as Attorney General for the State of California ("Harris") and Edmund D. Brown, in his official capacity as Governor of the State of California ("Brown")(collectively "the State Defendants"), Thomas Montgomery in his official capacity as County Counsel for San Diego County ("the County Defendant"), and Morgan Foley, in his official capacity as attorney for the City of El Cajon ("the City Defendant"). They allege Plaintiffs will be subject to various civil rights violations when California Assembly Bill 775, known as "the Reproductive FACT Act" ("the Act"), which was signed into law on October 9, 2015, becomes effective.[1] The Act imposes two professional notice requirements on clinics that provide pregnancy-related services such as Plaintiffs. The first applies to any clinic that is a "licensed covered facility" and the second applies to any "unlicensed covered facility." Cal. Health & Safety Code § 123471(a) & (b).

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[1] The Act became effective on January 1, 2016, after the filing of the complaint and the pending motion, but prior to the hearing on Plaintiff's motion for a preliminary injunction.

Section 123471(a) requires licensed covered facilities to provide the following notice:

> California has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women. To determine whether you qualify, contact the county social services office at [insert the telephone number]. Cal. H&S § 123471(a)(1). This notice must be either posted at the facility, printed for distribution to clients, or provided digitally to be read by clients upon arrival.

Cal. Health & Safety Code §§ 123472(a)(2)(A)-(C).

Section 123471(a) also requires unlicensed covered facilities to clearly and conspicuously "disseminate to clients on site and in any print and digital advertising materials including Internet Web sites" the following notice:

> This facility is not licensed as a medical facility by the State of California and has no licensed medical provider who provides or directly supervises the provision of services.

Cal. Health & Safety Code § 123472(b)(2)-(3).

Facilities covered under the Act that fail to comply with these requirements "are liable for a civil penalty of five hundred dollars ($500) for the first offense and one thousand ($1,000) for each subsequent offense." Cal. Health & Safety § 123473(a). The prosecuting authority, including the Attorney General, city attorney or counsel, "may bring an action to impose a civil penalty" but only if both of the following has been done:

> (1) Providing the covered facility with reasonable notice of noncompliance, which informs the facility that it is subject to a civil penalty if it does not correct the violation within 30 days from the date the notice is sent to the facility.
>
> (2) Verifying that the violation was not corrected within the 30-day period described in paragraph (1).

Cal. Health & Safety Code § 123473(a)(1)-(2).

Plaintiffs filed the instant motion for preliminary injunction on October 21, 2015. Defendants filed their oppositions to the motion on November 13, 20152, and Plaintiffs filed a combined reply brief on November 20, 2015.[2] Plaintiffs filed a notice of supplemental

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[2] The State Defendants filed objections to certain allegations of the complaint. Because Plaintiffs did not provide any declarations in support of their motion, the Court reviewed the complaint during its analysis of the relevant documents submitted by the parties. The Court made its assessment as the relevancy and credibility of the allegations contained therein, and determined how much weight to provide to those it deemed

authority on January 8, 2016. The parties appeared before this Court for a hearing on the motion on January 28, 2016.

DISCUSSION

I. Legal Standard

A party seeking injunctive relief under Federal Rule of Civil Procedure 65 must show either (1) a combination of probable success on the merits and the possibility of irreparable harm, or (2) that serious questions are raised and the balance of hardships tips sharply in the moving party's favor. Roe v. Anderson, 134 F.3d 1400, 1402 (9th Cir. 1998). "'These two formulations represent two points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases.'" Roe, 134 F.3d at 1402 (citing United States v. Nutricology, Inc., 982 F.2d 394, 397 (9th Cir. 1992)). "[T]he greater the relative hardship to the moving party, the less probability of success must be shown." National Ctr. for Immigrants Rights v. INS, 743 F.2d 1365,1369 (9th Cir. 1984). "In cases where the public interest is involved, the district court must also examine whether the public interest favors the plaintiff." Fund for Animals, Inc. v. Lujan, 962 F.2d 1391, 1400 (9th Cir. 1992) (citing Caribbean Marine Servs. Co. v. Baldrige, 844 F.2d 668, 674 (9th Cir. 1988)).

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relevant in reaching its decision. Accordingly, the objections are overruled as moot.

II. Analysis

Plaintiffs, who are entities that offer free information and services to women to "empower them to make choices other than abortion," argue "their right to freedom of speech and religion will be violated when the Act becomes effective because it forces them to recite government messages promoting abortion and deterring women from speaking with them." Motion at 1 (Doc. No. 3-1). Plaintiffs contend these potential violations require this Court to enter a preliminary injunction enjoining the enforcement of the Act until such time as Plaintiffs' claims can be adjudicated.

A. Likelihood of Success on the Merits

Plaintiffs contend they have demonstrated a likelihood of success on the merits of their First Amendment free speech and free exercise of religion claims because the Act, by definition, impacts Plaintiffs' rights and fails to survive strict scrutiny.

In opposition, all Defendants separately contend no preliminary injunction should issue because Plaintiffs' claims are not ripe for review. The State Defendants also contend Plaintiffs fail to demonstrate a likelihood of success on the merits of either of their First Amendment claims. Further, the City Defendant argues, in addition to an "as applied" challenge and facial challenge both failing for no injury in fact and therefore not ripe for review, a facial

challenge against him also fails because he did not write or enact the Act.[3]

1. Ripeness

All Defendants contend Plaintiffs cannot demonstrate a likelihood of success on the merits of their First Amendment claims on the grounds the claims are not ripe for review. A federal court's judicial power is limited to "cases" or "controversies." U.S. Const., Art. III § 2. A necessary element of Article III's "case" or "controversy" requirement is that a litigant must have "'standing' to challenge the

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[3] The State Defendants also argue the complaint is unverified and, therefore, the motion is unsupported by any evidence. They contend Plaintiffs' verifications which include a qualification that the declarant is testifying to the truth of the allegations to the best of his/her knowledge nullifies the evidentiary value of the complaint. Plaintiffs argue the case the State Defendants rely on in support of this argument was reversed on appeal and multiple other courts find "to the best of my knowledge" complies with the requirements of 28 U.S.C. section 1746. Section 1746 calls for, in any matter required to be supported by evidence or proved by sworn declaration and verification, may be established by declaration "in substantially the following form: I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct." Plaintiffs submit no declarations in support of their motion. Instead, they rely on the allegations of their complaint which provides the following verification, "I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge." Complaint at 34. Although the verification is not precisely as presented in section 1746, Plaintiffs declare under penalty of perjury the allegations are true. Accordingly, the Court finds Plaintiffs' verification sufficiently complies with section 1746. See Schroeder v. McDonald, 55 F.3d 454, 460 n. 10 (9th Cir. 1995).

action sought to be adjudicated in the lawsuit." Valley Forge College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 471 (1982); LSO, Ltd. v. Stroh, 205 F.3d 1146, 1152 (9th Cir. 2000). The "irreducible constitutional minimum" of Article III standing has three elements. LSO, 205 F.3d at 1152 (internal quotations omitted). First, the plaintiff must have suffered "an injury in fact — an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual and imminent, not conjectural or hypothetical." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992)(internal citations and quotations omitted). Second, the plaintiff must show a causal connection between the injury and the conduct complained of; i.e., "the injury has to be fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." Id. (quoting Simon v. Eastern Ky. Welfare Rights Organization, 426 U.S. 26, 41-42 (1976))(alterations in original). Third, it must be "likely," and not merely "speculative," that the plaintiff's injury will be redressed by a favorable decision. Id. at 561.

The Ninth Circuit has found that "ripeness is peculiarly a question of timing, designed to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements" Thomas v. Anchorage Equal Rights Comm'n, 220 F.3d 1134, 1138 (9th Cir. 2000) (citations omitted). In addition, in the Ninth Circuit, a plaintiff must "articulate a concrete plan to engage in conduct subject to the law" in order to pass Constitutional muster. Lopez v. Candaele, 630 F.3d

775, 787 (9th Cir. 2010). However, the Ninth Circuit has also found that "where protected speech may be at stake, a plaintiff need not risk prosecution in order to challenge a statute." Wolfson v. Brammer, 616 F.3d 1045, 1059-60 (9th Cir. 2010); see also Bland v. Fessler, 88 F.3d 729, 736-37 (9th Cir. 1996).

The County Defendant argues the instant complaint fails to allege a genuine threat of imminent prosecution, in that it fails to allege a "concrete plan" to violate the Act, and does not allege Defendants warned or threatened to file a civil enforcement against Plaintiffs. The County Defendant also argues Plaintiffs cannot be harmed by the mandatory disclosures if they do not make them.

The City Defendant agrees. In addition, the City Defendant argues Plaintiffs cannot demonstrate a likelihood of success on the merits on either an "as applied" basis or on a "facial challenge" to the constitutionality of the Act. The City Defendant maintain Plaintiffs do not allege an injury due to any application of the Act and, thus, any "as applied" challenge fails.

The State Defendants argue Plaintiffs fail to meet both the constitutional and prudential components of the judicial ripeness determination. Specifically, as to the constitutional considerations, the State Defendants contend Plaintiffs fail to show they face a realistic danger of sustaining a direct injury because Plaintiffs fail to identify any actual or credible threat of enforcement by any of the defendants. The State Defendants further argue Plaintiffs' "scattershot naming of defendants" belies their claim of injury

because, if there was a credible threat, Plaintiffs would know who to sue instead of "casting such wide net to catch all potential defendants." State Defendants' Opp. at 12 (Doc. No. 23).

In regards to prudential considerations, the State Defendants contend "there is a dearth of facts for this Court to analyze," rendering this case not fit for judicial review until discovery has been done. Id. In addition, the State Defendants contend Plaintiffs will suffer no hardship if the Court does not grant the preliminary injunction since the Act requires a 30-day period before any Defendant could bring an action to impose a civil penalty for failure to comply. The State Defendants claim the issues in this case echo the prudential concerns in Thomas, in which the Ninth Circuit found the case devoid of facts and therefore not ripe for review.

Lastly, the State Defendants argue Plaintiffs also fail to establish associational standing as alleged in the complaint, which the State Defendants explain is often intertwined with ripeness. They maintain there is insufficient evidence in the record to determine if "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." State Def's Opp. at 14 (quoting Hunt v. Washington State Apple Adver. Comm'n, 432 U.S. 333, 343 (1977)).

In reply, Plaintiffs argue First Amendment precedent shows that in a free speech challenge, they

need not wait until the police issue a warning or citation before they can challenge a law. Plaintiffs contend the Thomas case is inapposite because it involved a law that prohibited landlords from discriminating against non-married applicants but the plaintiffs had no such applicants and could not predict when such applicants might apply, thus providing good reason for finding no "concrete plan." Here, however, Plaintiffs argue the opposite is true, in that the only precondition was the January 1, 2016 effective date of the statute. Plaintiffs contend the complaint contains allegations showing they intend to engage in pregnancy-related speech as they have done in the past and that, alone, will be in violation of the Act.

Plaintiffs further argue they plead a desire to do what the Act bans just as in Wolfson which they maintain provides the correct application of the "concrete plan" issue.

Plaintiffs disagree with Defendants' interpretation of the Act as not requiring disclosures until a warning is given, claiming such interpretation is false. Although Plaintiffs admit the imposition of fines only occur after a warning is given, Plaintiffs maintain the failure to make disclosures are still illegal independent of the fines. Plaintiffs contend that "[r]ecently enacted statutes impose a presumably reasonable fear of prosecution" and the Court should "'relax the requirements of standing and ripeness' so that a plaintiff 'need not await prosecution to seek preventative relief.'" Plas' Reply at 5 (Doc. No. 30) (quoting Wolfson, 616 F.3d at 1060).

Plaintiffs argue prudential standing exists because the Act, by its terms, "'requires an immediate and significant change in Plaintiffs' conduct of their affairs with serious penalties attached to noncompliance." Id. at 5-6 (quoting Wolfson, 616 F.3d at 1060). Plaintiffs further argue no factual issues need be developed because the Act will stand or fall primarily based on its language and the government's justification, not enforcement.

As indicated by the parties, the Act became effective January 1, 2016. Plaintiffs express their desire not to utter the disclosures required by the Act which they allege are detrimental to their mission and undermine "the content, context and tone of the viewpoint that they wish to deliver to their pro-life messages." Complaint ¶¶ 121, 122, 131. They express their intention "to not comply with the Act" for those reasons. Id. ¶123. The Court finds Plaintiffs present a concrete plan to violate the act.

While no one has threatened to institute enforcement proceedings against Plaintiffs for their failure to comply with the Act, Defendants do not suggest the Act will not be enforced. Plaintiffs sufficiently allege a "credible threat of prosecution" for failure to comply with the Act. See Lopez, 630 F.3d at 785.

The Court also finds based upon Plaintiffs' clear intention not to comply with the Act due to their mission and pro-life views and the text of the Act, the record provides sufficient factual context to support their position that the action is ripe for judicial review.

2. Merits of Plaintiffs' Claims

The State Defendants also contend Plaintiffs fail to demonstrate a likelihood of success on the merits on each of Plaintiffs' First Amendment claims.

Additionally, the City Defendant argues an facial challenge to the Act fails against him because he did not draft or enact the Act.

a. The State Defendants

i. Free Speech Claim

The State Defendants argue there is no likelihood Plaintiffs will succeed on their free speech claim as to the two notice requirements applicable to licensed and unlicensed facilities.

A. Licensed Facilities

The State Defendants argue the notice requirement for licensed facilities regulates conduct, not speech. Relying on the holding in Pickup v. Brown, the State Defendants contend the activities at issue here concern the delivery of pregnancy-related health care services and do not concern expressive activity. 740 F.3d 1208 (9th Cir. 2013). They claim the required disclosure at issue "involves a limited informational disclosure within the context of providing those professional services" and does not prohibit Plaintiffs "'from imparting information or disseminating opinions.'" State Defs' Response at 16 (quoting Pickup, 740 F.3d at 1230). The State Defendants point out the statute does not prohibit a center from mentioning, discussing or advocating its

pro-life viewpoint or even communicating its disagreement with the statute itself. Thus, the State Defendants contend, because the Act regulates conduct, it is subject only to rational basis review.

Even if the notice requirements are considered compelled speech rather than conduct, the State Defendants argue they concern commercial speech subject to rational basis review. According to the State Defendants, it is often difficult to distinguish between commercial and non-commercial speech. They maintain discovery on the precise nature of the transactions at Plaintiffs' pregnancy centers will further inform the Court but, even at this early stage of the proceedings, it is clear the speech at issue here involves commercial speech. Id.

The State Defendants dispute Plaintiffs' argument against any commercial speech analysis, which is based on Plaintiffs' non-profit status. They argue, even if true, lack of profit is not relevant to the determination of whether speech is commercial or non-commercial. The State Defendants further argue the lack of funds exchange does not render speech non-commercial because the provision of goods and services of value is sufficient to be considered commercial.

The State Defendants maintain the notice requirement in this case for licensed facilities contain only pure factual and incontrovertible information that simply provides notice about the full spectrum of pregnancy-related public health services and a phone number for further information. They argue the required disclosure is informational and, thus, is

objective and akin to other commercial disclosures upheld by the courts as meeting constitutional muster. Therefore, they maintain, only rational basis review is required here.

Relying on Planned Parenthood of Southeastern Pa. v. Casey, the State Defendants further argue, even if the Court finds the speech at issue is not commercial speech subject to rational basis review, it should be upheld like other abortion-related disclosures have been. 505 U.S. 833, 882-84 (1992). According to the State Defendants, Casey and its progeny hold the state can use regulatory authority to require physicians to provide information regarding abortion in a non-misleading, truthful way even if the information might encourage the patient to choose something other than abortion.

The State Defendants also argue, even if the Court applies heightened scrutiny, the notice requirement would survive constitutional review. The State Defendants maintain the legislative history indicates the Act was enacted to "ensure that California residents make their personal reproductive health care decisions knowing their rights and the health care services available to them," to support their arguments for the government interests at stake. State Def's Motion at 23 (quoting Assem. Bill No. 775, § 2). They argue the interest becomes more compelling when viewed in light of the history of

"crisis pregnancy centers" as discussed in AB 775's legislative history.[4]

The State Defendants also argue the notice requirement is narrowly tailored to advance the government's interest of insuring women are informed about all their health care options in regards to pregnancy.

In reply, Plaintiffs argue the State Defendants' rationale demonstrates the Act must be subject to strict scrutiny because it is content and viewpoint discrimination. Plaintiffs explain the State defendants admit "the Act's purpose and justification are to target 'crisis pregnancy centers' that 'aim to discourage and prevent women from seeking abortions,' by 'deceptive advertising and counseling practices [that] often confuse, misinform, and even intimidate women." Plas' Reply at 7 (quoting State Defs' Response at 23). Plaintiffs argue this interpretation is clearly content and viewpoint based, in that the Act aims to counteract the crisis pregnancy centers' pro-life viewpoint. Plaintiffs cite to Sorrell v. IMS Health, Inc., in which the Supreme Court found

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[4] The author contends that, unfortunately, there are nearly 200 licensed and unlicensed clinics known as crisis pregnancy centers (CPCs) in California whose goal is to interfere with women's ability to be fully informed and exercise their reproductive rights, and that CPCs pose as full-service women's health clinics, but aim to discourage and prevent women from seeking abortions. The author concludes that these intentionally deceptive advertising and counseling practices often confuse, misinform, and even intimidate women from making fully-informed, time-sensitive decisions about critical health care. Assem. Comm. on Health, Analysis of Assembly Bill No. 775 (2015-2016 Reg. Sess.) April 14, 2015, at 3.

legislative content concerning medical/pharmaceutical regulations confirmed "that the law's express purpose and practical effect are to diminish the effectiveness of marketing by manufacturers of brand-name drugs" and, thus, the Court determined the law went "beyond mere content discrimination, to actual viewpoint discrimination." 131 S.Ct. 2654, 2663-64 (2011). Plaintiffs argue the same conclusion should be made here because the State has openly expressed disagreement with the content of Plaintiffs' speech and directly targeted that viewpoint.

Plaintiffs contend the speech cannot be considered commercial speech because they lack commercial elements as non-profit groups and provide their services and speech for free. They maintain other courts have held pregnancy centers like Plaintiffs are not commercial in nature and thus, not subject to commercial speech regulations.

Plaintiffs further argue the proper inquiry regarding commercial speech is whether there is an actual commercial purpose or sole economic interest for a transaction not whether the services have value. Plaintiffs assert they have no such purpose and disagree with the State Defendants' contentions to the contrary.

In addition, Plaintiffs argue the State Defendants misinterpret both Pickup, and Casey. They maintain Pickup banned treatment, not speech as in this case, and Casey involved "informed consent" which is not at issue here. Lastly, Plaintiffs argue the Act fails not

only strict scrutiny but also fails intermediate scrutiny as commercial speech.

The Court must first determine whether the Act, which concerns patient and medical provider relationships, regulates conduct or speech and finds the reasoning in Pickup crucial to this determination. In Pickup, the Ninth Circuit viewed the issue of regulation of a professional's conduct and speech along a continuum. 740 F.3d at 1227. It recognized at one end of the continuum, a professional engaged in a public dialogue is entitled to the greatest First Amendment protection. Id. At the midpoint of the continuum, First Amendment protection of a professional's speech within the confines of the professional relationship is somewhat diminished. Id. at 1228. At the other end of the continuum, the court recognized the state's power to regulate professional conduct is great. Id. at 1229.

The Act does not ban speech or otherwise prohibit Plaintiffs from discussing their message with patients. Instead, the Act requires medical providers to advise their patients of various types of treatment available so patients are fully informed when making decisions regarding their pregnancies. Similar to the regulation in Pickup, the Act permits discussion about treatment and expressing opinions including their messages regarding abortion. The Court finds the providers' action in informing patients of their treatment options is professional conduct subject to rational basis review. Id. at 1231. The state clearly has a legitimate interest in ensuring pregnant woman are fully advised of their rights and treatment options when making reproductive health care decisions and

the required disclosure is undeniably rationally related to that interest.

Even if speech is implicated, the Court finds the Act regulates professional speech. Under the Act, licensed facilities are required to make a disclosure when providing pregnancy related services to patients. A licensed facility is defined as a facility "whose primary purpose is providing family planning or pregnancy-related services and that satisfies two or more of the following:

> (1) The facility offers obstetric ultrasounds, obstetric sonograms, or prenatal care to pregnant women.
>
> (2) The facility provides, or offers counseling about, contraception or contraceptive methods.
>
> (3) The facility offers pregnancy testing or pregnancy diagnosis.
>
> (4) The facility advertises or solicits patrons with offers to provide prenatal sonography, pregnancy tests, or pregnancy options counseling.
>
> (5) The facility offers abortion services.(6) The facility has staff or volunteers who collect health information from clients."

Cal. Health & Safety Code § 123471 (a)

The Act clearly addresses the medical provider-patient relationship, and is therefore, properly classified as professional speech. See Wollschlaeger v. Governor of the State of California, -- F.3d --, 2015 WL 8639875 (11th Cir. 2015). This Court disagrees with Plaintiffs that this case differs from Casey because it does not involve informed consent. In Casey, the United States Supreme Court upheld a Pennsylvania statute requiring physicians performing abortions make certain disclosures regarding the nature of the procedure, the availability of printed materials describing the unborn child and include a list of agencies offering alternatives to abortion, among other things. 404 U.S. at 882-84. The plurality in Casey explained:

> All that is left of petitioners' argument is an asserted First Amendment right of a physician not to provide information about the risks of abortion, and childbirth, in a manner mandated by the State. To be sure, the physician's First Amendment rights not to speak are implicated [internal citations omitted], but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State [citation omitted]. We see no constitutional infirmity in the requirement that the physician provide the information mandated by the State here.

Id. at 884.

As evidenced by the legislative history, the purpose of the Act's disclosure requirement is to ensure pregnant women receive non-misleading information so they are fully-informed when making decisions regarding critical health care. As such, the Court finds if the disclosure required by the Act is considered speech, it is professional speech.

The court in Pickup recognized "the First Amendment tolerates a substantial amount of speech regulation within the professional-client relationship that it would not tolerate outside of it." 740 F.3d at 1228. Because it ultimately found the regulation at issue in Pickup, regulated conduct, the court did not discuss the proper level of scrutiny for professional speech. However, the court did recognized the protection afforded professional speech was diminished. See id. This suggests intermediate scrutiny is the proper level of scrutiny for professional speech.

The Court finds the Act survives intermediate scrutiny. The Act's disclosure requirement directly advances the government's substantial interest in ensuring pregnant women are fully advised of their rights and available services when making reproductive health care decisions. Additionally, the statute is not a broad, content-based restriction of speech. To the contrary, the required notice is neutral as to any particular view or opinion and merely provides information regarding the various health care options available. Further, the Act does not preclude Plaintiff from providing all manner of beneficial advice, including alternatives to abortion. Nor does the Act express a particular view or make a

recommendation and, as such is not more than necessary to serve the state's interest. Importantly, the Act does not preclude Plaintiffs from openly expressing disagreement with the required disclosure.

Therefore, Plaintiffs fail to demonstrate a likelihood of success on the merits of their free speech claim with respect to the licensed facilities notice requirement.

B. Unlicensed Facilities

The State Defendants also argue the notice requirement applicable to unlicensed facilities meets constitutional muster. As with the licensed facilities' notice requirement, the State Defendants maintain the requirement requires only rational basis review because it "simply directs unlicensed covered facilities to disseminate to 'clients on site' and in any 'advertising materials' a short, neutral statement advising of its status as a facility not licensed as a medical facility by the State of California." State Def's Opp. at 26. (quoting Cal. Health & Safety Code § 123472(b)(1)). The State Defendants contend the notice requirement in this case is similar to those upheld by the Second Circuit in Evergreen Ass'n, Inc. v. City of New York, 740 F.3d 233, (2d Cir.), *cert.* denied sub nom., 135 S.Ct. 435 (2014), and the Fourth Circuit in Centro Tepeyac v. Montgomery Cnty., 722

F.3d 184, 189-90 (4th Cir. 2013), and argue it likewise withstands any level of scrutiny, even strict scrutiny.[5]

Plaintiffs argue, to the extent Evergreen held a disclosure required unlicensed facilities to declare they do not have medical providers survives strict scrutiny, the holding is not persuasive.

The Court agrees the notice requirement for unlicensed facilities withstands any level of scrutiny. The state's interest in ensuring pregnant women know when they are receiving medical care from licensed professions and when they are not is compelling. Further, the Act which merely requires a notice that a facility is not licensed and has no licensed medical provider on staff is narrowly tailored

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[5] In Evergreen, the Second Circuit found the disclosure to be the "least restrictive means to ensure that a woman is aware of whether or not a particular pregnancy services center has a licensed medical provider at the time that she first interacts with it. 740 F.3d at 246. Such law is required to ensure that women have prompt access to the type of care they seek." Id. at 247. The Evergreen court also explained that the alternative measures suggested by the plaintiffs, such as, City-sponsored advertisements and signs posted outside of the centers "will not accomplish the City's compelling interest." Id. In addition, the court rejected the argument that the statute is over-inclusive because not all pregnancy centers engage in deception. Id.

The Fourth Circuit, in Centro Tepeyac, concluded the district court properly refused to preliminarily enjoin enforcement of a county ordinance requiring pregnancy centers post a sign stating no licensed medical professional was on staff. 722 F.3d at189-90. The Court concluded the district court properly found the requirement served the county's compelling interest in "preserving public health" and was narrowly tailored to meet that interest. Id. at 190.

to achieve that compelling interest. Accordingly, Plaintiffs fail to demonstrate a likelihood of success on the merits of their free speech claim as to the unlicensed facilities notice requirement.

ii. Free Exercise of Religion Claim

The State Defendants argue Plaintiffs' free exercise of religion claim lacks merit because "the requirements of the Act 'appl[y] throughout the [State of California], and there is not even a hint that [Plaintiffs were] targeted on the basis of religion for varying treatment' in the application of the law.'" State Def's Opp. at 30 (quoting San Jose Christian College v. City of Morgan Hill, 360 F.3d 1024, 1032 (9th Cir. 2004). They maintain this conclusion is apparent from the plain text and legislative history of the Act. Therefore, they argue, the burden on Plaintiffs' free exercise of religion does not violate the First Amendment.

Plaintiffs do not address Defendants' contentions in reply.

The Free Exercise Clause of the First Amendment, made applicable to the states through the Fourteenth Amendment, Cantwell v. Connecticut, 310 U.S. 296, 303 (1940),"forbids all laws 'prohibiting the free exercise' of religion." McDaniel v. Paty, 435 U.S. 618, 620 (1978) (quoting U.S. Const. amend. I). Laws that are neutral and of general applicability "need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice. Church of the Lukumi Bablu Aye, Inc. v. City of Hialeah, 508

U.S. 520, 531 (1993) (quoting Employment Division, Department of Human Resources of Ore. v. Smith, 494 U.S. 872, 879 (1990)). The rational basis test applies to laws meeting the neutral and general applicability criteria. See Miller v. Reed, 176 F,3d 1202, 1206 (9th Cir. 1999). "A law failing to satisfy these requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest. Church of Lukumi, 508 U.S. at 531 - 32. "[I]f the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral...." Id. at 533, 113 S.Ct. 2217. A law is not generally applicable if it, "in a selective manner [,] impose[s] burdens only on conduct motivated by religious belief." Id. at 543.

The object of the Act is to ensure pregnant women are fully informed of their health care options and when they are obtaining treatment from licensed providers. Thus, the Act is neutral. Additionally, the Act is generally applicable. While clinics operated by the United States and clinics enrolled as a Medi-Cal provider and a provider in the Family Planning, Access Care and Treatment Program are exempt from the licensed facility required notice because they already provide the entire spectrum of services required of the notice, in that Plaintiffs contend discovery is not necessary to rule on the instant motion, this Court finds there is no evidence to suggest the Act burdens only conduct motivated by religious belief.

As discussed in detail above, the Court finds the Act survives not only rational basis but strict scrutiny review. Accordingly, Plaintiffs fail to demonstrate a

likelihood of success on the merits of their free exercise claim.

b. The City Defendant

The City Defendant argues any facial challenge cannot be brought against him because he did not draft or enact the Act. This Court agrees. As such, Plaintiff fails to show a likelihood of success on any facial challenge against the City Defendant.

Although the Court finds Plaintiffs fail to demonstrate a likelihood of success on the merits of their claims, the Court finds serious questions are raised. Therefore, this Court must address the balance of hardships. See Anderson, 134 F.3d at 1402.

B. Irreparable Harm, Balance of Hardships and Public Interest

Plaintiffs argue they clearly will suffer irreparable harm absent an injunction because any loss of a constitutional right is presumed to be irreparable injury. They further argue the balance of hardships tips in their favor because their free speech and free exercise rights will be burdened if an injunction does not issue. They maintain the State will suffer little if any harm because it could serve its interests by other means. Plaintiff also contend the public interest is served by an injunction because "free speech serves societal interests. . . by protecting those who wish to enter the marketplace of ideas from government attack." Plas' Motion at 25 (quoting Pacific Gas & Electric Co. v. Pub. Utils. Comm'n of Cal., 475 U.S. 1, 8 (1986)).

The County Defendant argues Plaintiffs fail to show irreparable harm because a civil enforcement action can only be filed against Plaintiffs 30 days after a notice of noncompliance is filed and no notice has been issued. Additionally, the County Defendant maintains Plaintiffs' argument that any loss of a constitutional right is presumed to be irreparable injury fails because Plaintiffs allege they intend not to comply with the Act, and therefore, cannot be harmed by the mandatory disclosures they do not make.

The State Defendants argue Plaintiffs fail to meet their burden of demonstrating irreparable injury because their constitutional claim is unsupported and fails as a matter of law. They also argue if this Court enjoins the Act it will harm millions of California women who are in need of publicly funded family planning services, education, support and prenatal care, but are unaware of the programs and services available. They further argue an injunction will also prevent pregnant women in California from knowing when they are getting medical care from licensed professionals. The State Defendants also maintain Plaintiffs will remain free, if the Act is not enjoined, to advance their pro-life viewpoint because nothing in the Act prohibits such expression.

The City Defendant argues because there are no allegations that the City Defendant issued a specific

warning or threat to initiate proceedings against Plaintiffs, they fail to show irreparable injury.[6]

The Court finds Plaintiff fails to demonstrate irreparable harm. They rely on the violation of their First Amendment rights to support irreparable harm, but, as discussed in detail above, Plaintiff fail to support their argument of a constitutional violation. Additionally, the Court finds the balance of hardships tips in favor of the state, city and county and the interest in protecting its citizens. Finally, public policy favors denial of the motion for preliminary injunction.

CONCLUSION AND ORDER

Based on the foregoing, IT IS HEREBY ORDERED Plaintiff's motion for a preliminary injunction is **DENIED.**

Dated: February 8, 2016

JOHN A. HOUSTON
United States
District Judge

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[6] In addition, the City Defendant argues there is no history of enforcement because the Act has yet to be effective to render Plaintiffs' fear of prosecution reasonable. In that the Act is now effective, this argument is moot.

Filed: December 20, 2016

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES, DBA NIFLA, a Virginia corporation; et al., Plaintiffs-Appellants, v. KAMALA HARRIS, in her official capacity as Attorney General for the State of California; et al., Defendants-Appellees.	No. 16-55249 D.C. No. 3:15-cv-02277-JAH-DHB Southern District of California, San Diego ORDER

Before: D.W. NELSON, TASHIMA, and OWENS, Circuit Judges.

The members of the panel that decided this case voted unanimously to deny the petition for rehearing. Judge Owens voted to deny the petition for rehearing en banc. Judge Nelson and Judge Tashima recommended denial of the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. (Fed.R. App. P. 35.)

The petition for rehearing and the petition for rehearing en banc are DENIED.

Relevant Constitutional Provisions

First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I.

Fourteenth Amendment, Section I

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

Assembly Bill No. 775

CHAPTER 700

An act to add Article 2.7 (commencing with Section 123470) to Chapter 2 of Part 2 of Division 106 of the Health and Safety Code, relating to public health.

[Approved by Governor October 9, 2015. Filed with Secretary of State October 9, 2015.]

LEGISLATIVE COUNSEL'S DIGEST

AB 775, Chiu. Reproductive FACT Act.

Existing law, the Reproductive Privacy Act, provides that every individual possesses a fundamental right of privacy with respect to reproductive decisions. Existing law provides that the state shall not deny or interfere with a woman's right to choose or obtain an abortion prior to viability of the fetus, as defined, or when necessary to protect her life or health. Existing law specifies the circumstances under which the performance of an abortion is deemed unauthorized.

This bill would enact the Reproductive FACT (Freedom, Accountability, Comprehensive Care, and Transparency) Act, which would require a licensed covered facility, as defined, to disseminate a notice to all clients, as specified, stating, among other things, that California has public programs that provide immediate free or low-cost access to comprehensive family planning services, prenatal care, and abortion, for eligible women. The bill would also require an

unlicensed covered facility, as defined, to disseminate a notice to all clients, as specified, stating, among other things, that the facility is not licensed as a medical facility by the State of California.

The bill would authorize the Attorney General, city attorney, or county counsel to bring an action to impose a specified civil penalty against covered facilities that fail to comply with these requirements.

The people of the State of California do enact as follows:

SECTION 1. The Legislature finds and declares that:

(a) All California women, regardless of income, should have access to reproductive health services. The state provides insurance coverage of reproductive health care and counseling to eligible, low-income women. Some of these programs have been recently established or expanded as a result of the federal Patient Protection and Affordable Care Act.

(b) Millions of California women are in need of publicly funded family planning services, contraception services and education, abortion services, and prenatal care and delivery. In 2012, more than 2.6 million California women were in need of publicly funded family planning services. More than 700,000 California women become pregnant every year and one-half of these pregnancies are unintended. In 2010, 64.3 percent of unplanned births in California were publicly funded. Yet, at the moment they learn that they are pregnant, thousands

of women remain unaware of the public programs available to provide them with contraception, health education and counseling, family planning, prenatal care, abortion, or delivery.

(c) Because pregnancy decisions are time sensitive, and care early in pregnancy is important, California must supplement its own efforts to advise women of its reproductive health programs. In California, low-income women can receive immediate access to free or low-cost comprehensive family planning services and pregnancy-related care through the Medi-Cal and the Family PACT programs. However, only Medi-Cal providers who are enrolled in the Family PACT program are authorized to enroll patients immediately at their health centers.

(d) The most effective way to ensure that women quickly obtain the information and services they need to make and implement timely reproductive decisions is to require licensed health care facilities that are unable to immediately enroll patients into the Family PACT or Presumptive Eligibility for Pregnant Women Medi-Cal programs to advise each patient at the time of her visit of the various publicly funded family planning and pregnancy-related resources available in California, and the manner in which to directly and efficiently access those resources.

(e) It is also vital that pregnant women in California know when they are getting medical care from licensed professionals. Unlicensed facilities that advertise and provide pregnancy testing and care must advise clients, at the time they are seeking or

obtaining care, that these facilities are not licensed to provide medical care.

SEC. 2. The purpose of this act is to ensure that California residents make their personal reproductive health care decisions knowing their rights and the health care services available to them.

SEC. 3. Article 2.7 (commencing with Section 123470) is added to Chapter 2 of Part 2 of Division 106 of the Health and Safety Code, to read:

Article 2.7. Reproductive FACT Act

123470. This article shall be known and may be cited as the Reproductive FACT (Freedom, Accountability, Comprehensive Care, and Transparency) Act or Reproductive FACT Act.

123471. (a) For purposes of this article, and except as provided in subdivision (c), "licensed covered facility" means a facility licensed under Section 1204 or an intermittent clinic operating under a primary care clinic pursuant to subdivision (h) of Section 1206, whose primary purpose is providing family planning or pregnancy-related services, and that satisfies two or more of the following:

(1) The facility offers obstetric ultrasounds, obstetric sonograms, or prenatal care to pregnant women.

(2) The facility provides, or offers counseling about, contraception or contraceptive methods.

(3) The facility offers pregnancy testing or pregnancy diagnosis.

(4) The facility advertises or solicits patrons with offers to provide prenatal sonography, pregnancy tests, or pregnancy options counseling.

(5) The facility offers abortion services.

(6) The facility has staff or volunteers who collect health information from clients.

(b) For purposes of this article, subject to subdivision (c), "unlicensed covered facility" is a facility that is not licensed by the State of California and does not have a licensed medical provider on staff or under contract who provides or directly supervises the provision of all of the services, whose primary purpose is providing pregnancy-related services, and that satisfies two or more of the following:

(1) The facility offers obstetric ultrasounds, obstetric sonograms, or prenatal care to pregnant women.

(2) The facility offers pregnancy testing or pregnancy diagnosis.

(3) The facility advertises or solicits patrons with offers to provide prenatal sonography, pregnancy tests, or pregnancy options counseling.

(4) The facility has staff or volunteers who collect health information from clients.

(c) This article shall not apply to either of the following:

(1) A clinic directly conducted, maintained, or operated by the United States or any of its departments, officers, or agencies.

(2) A licensed primary care clinic that is enrolled as a Medi-Cal provider and a provider in the Family Planning, Access, Care, and Treatment Program.

123472. (a) A licensed covered facility shall disseminate to clients on site the following notice in English and in the primary threshold languages for Medi-Cal beneficiaries as determined by the State Department of Health Care Services for the county in which the facility is located.

(1) The notice shall state:

"California has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women. To determine whether you qualify, contact the county social services office at [insert the telephone number]."

(2) The information shall be disclosed in one of the following ways:

(A) A public notice posted in a conspicuous place where individuals wait that may be easily read by those seeking services from the facility. The notice shall be at least 8.5 inches by 11 inches and written in no less than 22-point type.

(B) A printed notice distributed to all clients in no less than 14-point type.

(C) A digital notice distributed to all clients that can be read at the time of check-in or arrival, in the same point type as other digital disclosures. A printed notice as described in subparagraph (B) shall be available for all clients who cannot or do not wish to receive the information in a digital format.

(3) The notice may be combined with other mandated disclosures.

(b) An unlicensed covered facility shall disseminate to clients on site and in any print and digital advertising materials including Internet Web sites, the following notice in English and in the primary threshold languages for Medi-Cal beneficiaries as determined by the State Department of Health Care Services for the county in which the facility is located.

(1) The notice shall state: "This facility is not licensed as a medical facility by the State of California and has no licensed medical provider who provides or directly supervises the provision of services."

(2) The onsite notice shall be a sign at least 8.5 inches by 11 inches and written in no less than 48-point type, and shall be posted conspicuously in the entrance of the facility and at least one additional area where clients wait to receive services.

(3) The notice in the advertising material shall be clear and conspicuous. "Clear and conspicuous"

means in larger point type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from the surrounding text of the same size by symbols or other marks that call attention to the language.

123473. (a) Covered facilities that fail to comply with the requirements of this article are liable for a civil penalty of five hundred dollars ($500) for a first offense and one thousand dollars ($1,000) for each subsequent offense. The Attorney General, city attorney, or county counsel may bring an action to impose a civil penalty pursuant to this section after doing both of the following:

(1) Providing the covered facility with reasonable notice of noncompliance, which informs the facility that it is subject to a civil penalty if it does not correct the violation within 30 days from the date the notice is sent to the facility.

(2) Verifying that the violation was not corrected within the 30-day period described in paragraph (1).

(b) The civil penalty shall be deposited into the General Fund if the action is brought by the Attorney General. If the action is brought by a city attorney, the civil penalty shall be paid to the treasurer of the city in which the judgment is entered. If the action is brought by a county counsel, the civil penalty shall be paid to the treasurer of the county in which the judgment is entered.

SEC. 4. The provisions of this act are severable. If any provision of this act or its application is held

invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

DAVID J. HACKER
California Bar No. 249272
Illinois Bar No. 6283022
HEATHER GEBELIN HACKER
California Bar No. 249273
Arizona Bar No. 024167
ALLIANCE DEFENDING FREEDOM
101 Parkshore Drive, Suite 100
Folsom, California 95630
Phone: (916) 932–2850
dhacker@ADFlegal.org
hghacker@ADFlegal.org
Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN
DISTRICT OF CALIFORNIA

NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES, d/b/a NIFLA, a Virginia corporation; **PREGNANCY CARE CENTER, d/b/a PREGNANCY CARE CLINIC**, a California corporation; **FALLBROOK PREGNANCY RESOURCE CENTER**, a California corporation; **Plaintiffs,** **v.**	Case No. **'15CV2277 JAH DHB** **VERIFIED COMPLAINT FOR DECLARATORY, INJUNCTIVE AND OTHER RELIEF**

KAMALA HARRIS, in her official capacity as Attorney General for the State of California; **THOMAS MONTGOMERY**, in his official capacity as County Counsel for San Diego County; **MORGAN FOLEY**, in his official capacity as City Attorney for the City of El Cajon, CA; and **EDMUND G. BROWN, JR.**, in his official capacity as Governor of the State of California;

Defendants.

Come now the Plaintiffs, by and through their attorneys, and for their causes of action against Defendants aver the following:

INTRODUCTION

1. This case is a federal civil rights action brought pursuant to 42 U.S.C. § 1983 challenging the constitutionality of California Assembly Bill 775, the Reproductive FACT Act (hereinafter the "Act"), which was signed by California Governor Edmund Gerald Brown on October 9, 2015. A copy of the Act is attached hereto as Exhibit A.

2. Plaintiffs are a national non-profit pro-life membership organization with 111 affiliates in

California, and two of those affiliates in San Diego County. They seek to provide help and pro-life information to women in unplanned pregnancies so that they will be supported in choosing to give birth, and practical medical or non-medical support free of charge in support of Plaintiffs' pro-life viewpoint.

3. The Act, however, imposes government compelled speech upon the Plaintiff pregnancy centers due to their support for pregnant women, and in ways that undermine the centers' messages.

4. It requires licensed medical pregnancy centers such as Plaintiff Pregnancy Care Clinic (PCC) and other similar members of Plaintiff National Institute of Family and Life Advocates (NIFLA) to post a disclosure saying the State of California provides free or low-cost abortion and contraception services and providing a phone number to refer or arrange for such services.

5. The Act also requires unlicensed non-medical pregnancy centers, such as Plaintiff Fallbrook Pregnancy Resource Center (Fallbrook) and other similar NIFLA members, to post disclaimers within their facilities and in all their advertising materials negatively emphasizing that they do not have a licensed medical provider on staff.

6. Such disclaimers must be posted merely because the Plaintiffs serve pregnant women, and not with any prerequisite that a center has engaged in improper behavior or has suggested they have a licensed medical provider.

7. The Act is therefore unconstitutional under the First Amendment to the United States Constitution. It is a classic example of compelled speech in violation of the Free Speech Clause. The law is expressly content-based both because it compels the content of speech and because it regulates only speakers who wish to discuss the subject of pregnancy rather than any other health topic. The law is also viewpoint based for forcing licensed facilities to promote abortion, and by exempting facilities that offer certain family planning or Medi-Cal services. For similar reasons the Act violates the free speech clause of the California Constitution, Art. I, Sec. 2(a).

8. The law is also impermissibly vague under the Due Process Clause of the Fourteenth Amendment with respect to various terms applicable to unlicensed centers.

9. The Act also violates federal statutory law, the Coats-Snowe Amendment, 42 U.S.C. § 238n, that protects licensed health care entities from being required to refer for abortion or make arrangements for such referrals.

10. Accordingly, preliminary and permanent injunctive and declaratory relief against the Act are warranted.

11. PCC and Fallbrook are directly regulated by the Act.

12. NIFLA asserts organizational standing on behalf of its California members, which are licensed or unlicensed centers throughout the State of

California that, just like PCC and Fallbrook, the Act regulates and compels to speak in violation of their views and mission. As discussed below, NIFLA's claims fit comfortably within the Supreme Court's organizational standing to allow it to obtain judicial relief for its members.

13. The Act goes into effect January 1, 2016.

14. Therefore preliminary injunctive relief is needed before that date in order to prevent irreparable harm to the rights of Plaintiffs and NIFLA's California members.

JURISDICTION AND VENUE

15. This Court has jurisdiction over the federal claims by operation of 28 U.S.C. §§ 1331 and 1343. This Court has authority to grant the requested injunctive relief under 28 U.S.C. § 1343; the requested declaratory relief under 28 U.S.C. §§ 2201 and 2202; and costs and attorneys fees under 42 U.S.C.§ 1988(b). This Court has supplemental jurisdiction over the Plaintiffs' claim under the free speech clause of the California Constitution pursuant to 28 U.S.C.§ 1367.

16. Venue lies in the Federal District Court for the Southern District of California pursuant to 28 U.S.C. § 1391(b). A substantial part of the actions or omissions giving rise to this case occurred within the District, and at least one Defendant resides in this District.

IDENTIFICATION OF THE PARTIES

Plaintiffs

17. Plaintiff National Institute of Family and Life Advocates is a religious not-for-profit corporation duly incorporated under the laws of Virginia, with its principal place of business at 5610 Southpoint Ctr. Blvd., #103, Fredericksburg, VA 22407.

18. It is comprised of member pregnancy centers from across the nation, including 111 in the state of California, that provide medical or non-medical information and services without charge to their clients, and are therefore regulated by the Act.

19. Seventy-three of NIFLA's California members provide licensed medical services, while thirty-eight provide only non-medical services.

20. Plaintiff Pregnancy Care Clinic is a religious not-for-profit corporation duly incorporated under the laws of California, with its principal place of business at 677 S. Magnolia Avenue, El Cajon, CA, 92020.

21. It provides pregnancy-related licensed medical as well as nonmedical information and services without charge to its clients under the supervision of its executive director, Josh McClure, and in furtherance of its religious beliefs.

22. Plaintiff Fallbrook Pregnancy Center is a religious not-for-profit corporation duly incorporated under the laws of California, with its principal place of business at 113 E. Hawthorne Street, Fallbrook, CA 92028, where it provides pregnancy-related non-

medical information and services without charge to its clients under the supervision of its executive director, Carolyn Koole, and in furtherance of its religious beliefs.

Defendants

23. Defendant Kamala Harris is the Attorney General for the State of California and is sued in her official capacity. She is responsible under the Act for enforcing its provisions against entities in violation thereof including the Plaintiffs and NIFLA's California Members.

24. Defendant Thomas Montgomery is the County Counsel for San Diego County, California and is sued in his official capacity. He is responsible under the Act for enforcing its provisions against entities in violation thereof in San Diego County, including the Plaintiff facilities and NIFLA's California Members in San Diego County.

25. Defendant Morgan Foley is the City Attorney for City of El Cajon, California and is sued in his official capacity. He is responsible under the Act for enforcing its provisions against entities in violation thereof in El Cajon, including the Plaintiff facilities and NIFLA's California Members in El Cajon.

26. Defendant Edmund G. Brown, Jr., is the Governor of the State of California, and is sued in his official capacity. He is the chief executive of the State of California and is responsible for funds that the state has received from the federal government subjecting it to 42 U.S.C. § 238n.

FACTUAL ALLEGATIONS

27. Plaintiffs provide compassionate and loving information and services to serve the medical, emotional, and material needs of women who face unplanned pregnancies to help them choose birth for their children.

Pregnancy Care Clinic

28. Pregnancy Care Clinic (hereinafter "PCC") exists to serve women and their unborn children.

29. PCC provides both medical and non-medical pro-life information and services for no charge to women in unplanned pregnancies as a licensed primary care provider.

30. PCC is licensed by the California Department of Public Health as a free community clinic, and is a licensed clinical laboratory.

31. PCC operates as a medically licensed primary care center in the State of California.

32. PCC provides its services to women in unplanned pregnancies pursuant to its pro-life viewpoint, desiring to empower the women it serves to choose life for their child, rather than abortion.

33. Medical services provided by PCC include: urine pregnancy testing, ultrasound examinations, medical referrals, prenatal vitamins, information on STDs, information on natural family planning, health provider consultation, and other clinical services.

34. The medical team at PCC consists of two Obstetrician/Gynecologists, one Radiologist, one Anesthesiologist, one Certified Nurse Midwife, one Nurse Practitioner, ten Nurses, and two Registered Diagnostic Medical Sonographers.

35. Non-medical services provided by PCC include: peer counseling and education, emotional support, maternity clothes, baby supplies, support groups, and healthy family support.

36. PCC is a religious organization and pursues its pro-life message and activities as an exercise of its religious belief is a gift of God that should not be destroyed by abortion.

Fallbrook Pregnancy Center

37. Fallbrook Pregnancy Center (hereinafter "Fallbrook") provides nonmedical services for no charge to women in unplanned pregnancies in furtherance of its pro-life viewpoint.

38. Fallbrook provides free pregnancy test kits that women administer and diagnose themselves, educational programs, resources and community referrals, maternity clothes, and baby items.

39. Fallbrook contracts with a separate organization that is a licensed medical provider of ultrasound services. Fallbrook refers women to that provider's separate mobile facility located nearby.

40. Fallbrook is a religious organization and pursues its pro-life message and activities as an

exercise of its religious belief that human life is a gift of God that should not be destroyed by abortion.

National Institute of Family and Life Advocates

41. NIFLA is a non-profit membership organization comprised of a network of both medical and non-medical centers providing pro-life information services to women in unplanned pregnancies.

42. NIFLA is incorporated as a religious organization.

43. NIFLA provides both medical and non-medical pro-life pregnancy centers with legal resources and counsel, with the aim of developing a network of life-affirming ministries in every community across the nation in order to achieve an abortion-free America.

44. NIFLA's mission is to empower the choice for life by: equipping pregnancy centers with legal counsel and support; enabling pregnancy centers to convert to medical clinic status; and energizing pregnancy centers with a renewed vision for the future.

45. NIFLA has 111 members in California.

46. Seventy-three of NIFLA's California members are properly licensed to provide medical services, in situations similar to PCC.

47. Thirty-eight of NIFLA's California members are not medically licensed and therefore provide only non-medical services, similar to Fallbrook.

48. Most of NIFLA's California members are religious organizations that pursue their pro-life message and activities as an exercise of their religious beliefs.

49. NIFLA's own religious mission includes helping those members advance their religious beliefs.

50. NIFLA's California members are regulated under the Act as either medical centers or non-medical centers.

51. NIFLA's California members are subject to the Act's compelled speech requirements.

52. NIFLA has organizational standing to represent all of its member pregnancy centers, both licensed and unlicensed, from the State of California. See *New York State Club Ass'n v. City of New York*, 487 U.S. 1, 9 (1988).

53. The members of NIFLA would otherwise have standing to sue in their own right in this case.

54. The interests that NIFLA seeks to protect are germane to NIFLA's purpose, including the purpose to support its pro-life pregnancy center members and enable them to carry out their missions consistent with their pro-life and religious viewpoints.

55. Neither the claims asserted nor the relief requested requires participation of all of NIFLA's individual members in this suit, but can be awarded to NIFLA's members as a group.

Assembly Bill 775, the Reproductive FACT Act

56. The Legislature indicates that the purpose of the Act "is to ensure that California residents make their personal reproductive health care decisions knowing their rights and the health care services available to them." Exhibit A.

57. The Act defines "licensed covered facility" as a

> facility licensed under Section 1204 or an intermittent clinic operating under a primary care clinic pursuant to subdivision (h) of Section 1206, whose primary purpose is providing family planning or pregnancy related services, and that satisfies two or more of the following: (1) The facility offers obstetric ultrasounds, obstetric sonograms, or prenatal care to pregnant women; (2) The facility provides, or offers counseling about, contraception or contraceptive methods; (3) The facility offers pregnancy testing or pregnancy diagnosis; (4) The facility advertises or solicits patrons with offers to provide prenatal sonography, pregnancy tests,

> or pregnancy options counseling; (5) The facility offers abortion services; (6) The facility has staff or volunteers who collect health information from clients.

Id.

58. The Act mandates that a licensed covered facility to "disseminate to clients on site the following notice in English and in the primary threshold languages for Medi-Cal beneficiaries as determined by the State Department of Health Care Services for the county in which the facility is located." *Id.*

59. The required notice for licensed covered facilities must state the following: "California has public programs that provide immediate free or low cost access to comprehensive family planning services (including all FDA approved methods of contraception), prenatal care, and abortion for eligible women. To determine whether you qualify, contact the county social services office at [insert the telephone number]." *Id.*

60. The notice must be displayed in one of the following ways: (A) A public notice placed in a conspicuous place where individuals wait that may be easily read by those seeking services from the facility. The notice shall be at least 8.5 inches by 11 inches and written in no less than 22-point type; (B) A printed notice distributed to all clients in no less than 14-point type; or (C) A digital notice distributed to all clients that can be read at the time of check-in or arrival, in the same point type as other digital disclosures. A printed notice as described in

subparagraph (B) shall be available for all clients who cannot or do not wish to receive the information in digital format. *Id.*

61. Upon information and belief, county social services in California provide or refer women for abortions.

62. Therefore the Act requires "licensed covered facilities" to provide referrals for abortion and/or arrange for referrals for abortion by requiring such centers to provide contact information for the local county social services to all clients so that they may procure an abortion.

63. PCC and NIFLA's licensed medical pregnancy center members meet the definition of licensed covered facilities for the purpose of the Act.

64. PCC is a facility licensed as a primary care clinic under Section 1204.

65. PCC's primary purpose is providing pregnancy-related information and services.

66. PCC offers obstetric ultrasounds or obstetric sonograms to pregnant women.

67. PCC offers pregnancy testing or pregnancy diagnosis.

68. PCC advertises or solicits patrons with offers to provide prenatal sonography, pregnancy tests, or pregnancy options counseling.

69. PCC has staff or volunteers who collect health information from clients.

70. NIFLA's licensed medical facility members meet the Act's definition of "licensed covered facility" for reasons substantially similar to PCC.

71. PCC and NIFLA's licensed medical pregnancy center members are subject to the Act's required disclosures as a "licensed covered facility."

72. The Act defines "unlicensed covered facility" as a

> facility that is not licensed by the State of California and does not have a licensed medical provider on staff or under contract who provides or directly supervises the provision of all of the services, whose primary purpose is providing pregnancy-related services, and that satisfies two or more of the following: (1) The facility offers obstetric ultrasounds, obstetric sonograms, or prenatal care to pregnant women; (2) The facility offers pregnancy testing or pregnancy diagnosis; (3) The facility advertises or solicits patrons with offers to provide prenatal sonography, pregnancy tests, or pregnancy options counseling; (4) The facility has staff or volunteer who collect health information from clients.

Id.

73. An unlicensed covered facility "shall disseminate to clients on site and in any print and digital advertising materials including Internet Web sites, [a notice] in English and in the primary threshold languages for Medi-Cal beneficiaries as determined by the State Department of Health Care Services for the county in which the facility is located." *Id.*

74. The notice shall state: "This facility is not licensed as a medical facility by the State of California and has no licensed medical provider who provides or directly supervises the provision of services." *Id.*

75. The onsite notice must be "at least 8.5 inches by 11 inches and written in no less than 48-point type, and shall be posted conspicuously in the entrance of the facility and at least one additional area where clients wait to receive services." *Id.*

76. The notice in the advertising material must be "clear and conspicuous. 'Clear and conspicuous' means in larger point type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from the surrounding text of the same size by symbols or other marks that call attention to the language." *Id.*

77. The Act does not define "digital advertising materials" beyond saying it includes "Internet Web Sites."

78. The Act is vague about what kinds of materials count as "digital advertising materials"

because the meaning of the term is arbitrary and causes ordinary people to guess as to its meaning.

79. Advertisements placed on "Internet Web Sites" have limits on their size, such as in the number of characters that can be used.

80. For example, Google limits the number of characters posted in a headline, URL, or description line.

81. Inserting the disclosures into Plaintiffs' advertisements would severely restrict, or preclude altogether, the space and number of characters they could use to recite their own messages in some advertisements placed on "Internet Web Sites."

82. Fallbrook, and NIFLA's non-medical pregnancy center members in California, appear to qualify as unlicensed covered facilities for the purpose of the Act.

83. Fallbrook is not licensed by the State of California.

84. Fallbrook does not have a licensed medical provider on staff or under contract who provides or directly supervises provision of all its services.

85. Fallbrook has a licensed medical provider under contract to take referrals from Fallbrook of women who want an ultrasound, and then to provide such ultrasounds in a separate nearby mobile facility owned by the contractor.

86. Fallbrook does not contract with licensed medical providers to provide all of "the services" Fallbrook provides, because none of Fallbrook's other services are medical.

87. Fallbrook has a nurse employee and several nurses among its volunteer counselors.

88. Fallbrook's nurses do not provide medical services onsite, but are available to provide information about specific topics such as breastfeeding, diet, or printed brochures that discuss medical studies, or to refer clients to externally provided services.

89. Fallbrook does not itself provide obstetric ultrasounds or obstetric sonograms.

90. Fallbrook contracts with an outside provider, which provides ultrasound services in a nearby separate facility.

91. The Act is vague about which "services" Fallbrook's nurses need to "provide[] or directly supervise[]" in order to disqualify Fallbrook from the definition of an "unlicensed covered facility."

92. The Act is vague about whether Fallbrook offers "obstetric ultrasounds, obstetric sonograms, or prenatal care to pregnant women."

93. Fallbrook does not offer medical prenatal care.

94. Fallbrook offers non-medical care to pregnant women in various forms.

95. Fallbrook does not test bodily fluids to determine pregnancy, nor does it diagnose pregnancy or pregnancy tests.

96. Fallbrook offers free pregnancy test kits that women self-administer and self-diagnose themselves.

97. The Act does not define "offers pregnancy testing or pregnancy diagnosis."

98. The Act is vague about the meaning of "offers pregnancy testing or pregnancy diagnosis" because the meaning of the term is arbitrary and causes ordinary people to guess as to its meaning.

99. Fallbrook advertises that prenatal sonography is available,

100. The sonography that Fallbrook advertises is provided by nearby separate licensed medical provider with whom Fallbrook contracts.

101. Fallbrook advertises that it provides non-medical pregnancy options counseling.

102. Fallbrook advertises that it distributes free pregnancy test kits, which the women self-administer.

103. Fallbrook does not offer to engage in testing or diagnosis of pregnancy.

104. Fallbrook has staff or volunteers who collect information from clients that relates to their possible pregnancies.

105. The Act does not define "health information."

106. The Act is vague about what kind of information constitutes "health information" because the meaning of the term is arbitrary and causes ordinary people to guess as to its meaning.

107. Fallbrook may qualify as an "unlicensed covered facility" under the Act.

108. The Act does not clearly define "unlicensed covered facility."

109. The Act is vague about whether Fallbrook or a similar center qualifies as "unlicensed covered facility" because the meaning of the term is arbitrary and causes ordinary people to guess as to its meaning.

110. Fallbrook has a reasonable fear that it does qualify and is subject to the Act.

111. NIFLA's non-medically licensed members in California may qualify as an "unlicensed covered facility" under the Act.

112. The Act is vague about whether they qualify, for reasons substantially similar to those involving Fallbrook.

113. The Act does not apply to the following: (1) A clinic directly conducted, maintained, or operated by the United States or any of its departments, officers, or agencies; (2) A licensed primary care clinic that is enrolled as a Medi-Cal provider and a provider in the Family Planning, Access, Care, and Treatment Program. *Id.* (hereinafter "the Exemption").

114. Neither PCC, Fallbrook, nor NIFLA's California members are clinics directly conducted, maintained, or operated by the United States or any of its departments, officers, or agencies, nor licensed primary care clinics that are enrolled as a Medi-Cal provider and a provider in the Family Planning, Access, Care, and Treatment Program.

115. Upon information and belief, the Act's Exemption, in purpose and effect, applies to facilities which provide abortion services, freeing them from the Act's disclosure requirements, while leaving pro-life facilities subject to them.

116. Covered facilities which fail to comply with the Act are liable for a civil penalty of $500 for a first offense and $1000 for each subsequent offense. *Id.*

117. The Attorney General, city attorney, or county counsel is empowered to bring an action to impose a civil penalty pursuant to the Act after: (1)

"Providing the covered facility with reasonable notice of noncompliance, which informs the facility that it is subject to a civil penalty if it does not correct the violation within 30 days from the date the notice is sent to the facility"; and (2) "Verifying that the violation was not corrected" within the 30-day period. *Id.*

118. Fallbrook and NIFLA's non-licensed California members engage in speech, services and advertising that cannot be changed, have disclosures added, or corrected to comply with the Act in less than

30 days after receiving notice of a warning of violation under the Act.

119. The Act compels PCC, Fallbrook, and NIFLA's California members (hereinafter "Plaintiff Facilities") to engage in government-mandated speech.

120. The pregnancy discussions and help provided by Plaintiff Facilities are of an ideologically sensitive nature.

121. Forcing the Act's disclosures on Plaintiff Facilities' speech is detrimental to their mission of counseling and helping women from their viewpoint.

122. Plaintiff Facilities desire not to utter the disclosures required by the Act.

123. Plaintiff Facilities intend to not comply with the Act.

124. Plaintiff Facilities desire to continue engaging in their speech and expressive services while refusing to post, distribute, or otherwise communicate the required compelled statements.

125. Plaintiff Facilities' refusal to comply with the Act would subject them to fines and prosecution by Defendants under the Act.

126. Plaintiff Facilities fear the harms of prosecution under the Act if they fail to comply.

127. Plaintiff Facilities are non-profit organizations with limited funding and relatively small budgets.

128. The Act's penalties would significantly harm Plaintiff Facilities' ability to continue their expressive operations.

129. The Act imposes three untenable choices on Plaintiff Facilities: succumb to their fear of prosecution and comply with the Act in violation of their expressive views and religious beliefs; continue their speech and services without complying with the Act and be prosecuted, penalized, and injured in their ability to pursue their expressive operations; or cease their expressive activities and services altogether.

130. Plaintiffs face a credible threat of adverse state action due to the Act.

131. Requiring Plaintiff Facilities to utter the Act's disclosures forces Plaintiff Facilities to undermine the content, context and tone of the viewpoint that they wish to deliver in their pro-life messages.

132. Requiring the religious Plaintiff Facilities to utter the Act's disclosures imposes a burden on their exercise of their religious beliefs by requiring them to promote abortion and/or to undermine their pro-life message of love and support which they pursue because of their religious beliefs.

133. The Act imposes an impermissible penalty and chill on Plaintiff Facilities' speech, subjecting Plaintiff Facilities to irreparable harm.

134. The Act's regulation of unlicensed facilities imposes penalties on unlicensed Plaintiff Facilities based on vague terms that do not provide adequate notice of whether or how the law applies and what entities must comply.

135. The Act's requirement of "clear and conspicuous" disclosure language on unlicensed Plaintiff Facilities' "digital advertising materials including Internet Web sites" is vague regarding the location and manner in which the disclosures must be placed.

136. The Act's requirement of disclosure language on unlicensed Plaintiff Facilities' advertising materials burdens the size, content, viewpoint and tone of their message.

137. The Act's disclosure requirements for licensed Plaintiff Facilities requires that they "provide referrals for . . . abortions" or "make arrangements" for such referrals, in the meaning of 42 U.S.C. § 238n.

138. The licensed medical Plaintiff Facilities are health care entities protected under 42 U.S.C. § 238n.

139. The health providers in Plaintiff Facilities responsible for compliance with the Act include individual physicians.

140. The State of California receives federal funding including "governmental payments provided as reimbursement for carrying out healthrelated activities" that subject it to 42 U.S.C. § 238n.

141. 42 U.S.C. § 238n is an "Act of Congress providing for the protection of civil rights" belonging to the Plaintiff Facilities, under 28 U.S.C. § 1343.

142. Licensed Plaintiff Facilities have both individual rights under 42 U.S.C. § 238n and remedies under 28 U.S.C. § 1343 and 42 U.S.C. § 1983 to bring this action for the violation of their rights under 42 U.S.C. § 238n.

143. Enforcement of the Act will irreparably harm Plaintiff Facilities by infringing upon their First Amendment rights to free speech and religious exercise; the Fourteenth Amendment right to due process for the unlicensed facilities and freedom from uncabined government discretion; and the individual rights contained in 42 U.S.C. § 238n for the licensed facilities.

144. Defendants are vested with enforcing the Act against Plaintiff Facilities.

145. Passage of the Act into law represents an imminent, concrete and reliable threat that Defendants will enforce the Act against Plaintiff Facilities.

146. Enjoining Defendants from enforcing the Act is necessary to protect Plaintiff Facilities from the chill and punishment imposed on their rights.

147. Each and all of the real and threatened enforcement actions alleged of the Defendants, their officers, agents, servants, employees, or persons acting at their behest or direction, were done and are continuing to be done under the color of state law, including the statutes, regulations, customs, policies, and usages of the State of California.

148. Plaintiffs have no adequate remedy at law.

CLAIMS FOR RELIEF

FIRST CLAIM: VIOLATION OF THE FREE SPEECH CLAUSE OF THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION

149. Paragraphs 1–148 are incorporated as if fully set forth herein.

150. The First Amendment to the United States Constitution provides in relevant part: "Congress shall make no law . . . abridging the freedom of speech."

151. The First Amendment is applicable to state and local governments by incorporation in the Fourteenth Amendment.

152. The Act unconstitutionally restricts Plaintiff Facilities' rights of free speech, which includes the right to refrain from speaking, to choose how and when to deliver particular messages, and the right to refuse to speak a government-dictated message.

153. The Act unconstitutionally forces Plaintiff Facilities, on pain of government penalty, to engage in government disclaimers that Plaintiff Facilities would not otherwise recite, that undermine Plaintiff Facilities' message, and that contradict Plaintiff Facilities' viewpoint from which they speak.

154. The Act is unconstitutionally and substantially overbroad.

155. The Act's imposition of disclosures on unlicensed Plaintiff Facilities' advertisements is an unjustified restriction of their ability to advertise their messages.

156. The Act is unconstitutionally underinclusive, because by its Exemption it omits many centers that provide pregnancy related services.

157. The Act imposes an unconstitutional chill and penalty on Plaintiff Facilities' speech, and without declaratory and injunctive relief, will continue to do so.

158. The Act is a content-based regulation of speech.

159. The Act unconstitutionally discriminates against Plaintiff Facilities' speech based on their viewpoint, including because it requires licensed facilities to promote abortion options, and it exempts from the Act's requirements facilities that provide certain family planning or Medi-Cal services.

160. The Act poses an unconstitutional risk of viewpoint discrimination by conferring unfettered

discretion on government officials to interpret the Act's provisions in deciding which unlicensed facilities must comply.

161. The Act is subject to strict scrutiny.

162. The Act does not promote any legitimate, or compelling, government interest, and Defendants lack any evidence or sufficient evidence to demonstrate the existence of such an interest.

163. The Act is not tailored at all, much less narrowly tailored, to further any governmental interest, and it does not do so by a means least restrictive of Plaintiff Facilities' speech.

164. Defendants have ample alternative channels to achieve any alleged interest without imposing the Act's burdens on the speech of Plaintiffs.

165. The Act is an unconstitutional restriction of speech under any standard applicable to the licensed Plaintiff Facilities.

166. The Act is unconstitutional not only as applied to Plaintiff Facilities, but on its face as applied to any facility.

167. Accordingly, the Act violates the First Amendment of the United States Constitution.

168. Therefore, the Act and Defendants' enforcement thereof unconstitutionally infringes on Plaintiffs' rights, thereby entitling Plaintiffs to the relief requested below, pursuant to 42 U.S.C. §1983.

169. WHEREFORE, Plaintiffs respectfully request that the Court grant the relief set forth hereinafter in the prayer for relief.

SECOND CLAIM: VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION; ALLEGED BY THE NON-LICENSED PLAINTIFF FACILITIES

170. Paragraphs 1–148 are incorporated as if fully set forth herein.

171. The Fourteenth Amendment of the United States Constitution's right to due process protects against the government's imposition of penalties such as fines based on vague terms that do not give regulated entities adequate notice of whether or how the law applies and what entities can do to comply.

172. The Act defines "unlicensed covered facility" as a:

> [F]acility that is not licensed by the State of California and does not have a licensed medical provider on staff or under contract who provides or directly supervises the provision of all of the services, whose primary purpose is providing pregnancy-related services, and that satisfies two or more of the following: (1) The facility offers obstetric ultrasounds, obstetric sonograms, or prenatal care to pregnant women; (2) The facility

> offers pregnancy testing or pregnancy diagnosis; (3) The facility advertises or solicits patrons with offers to provide prenatal sonography, pregnancy tests, or pregnancy options counseling; (4) The facility has staff or volunteers who collect health information from clients.

Exh. A.

173. The Act's unlicensed facility definition is vague because it does not adequately define: (a) which "services" a nurse or contract medical provider must provide or directly supervise to disqualify a facility from the definition; (b) "directly supervise"; (c) "offers" obstetric ultrasounds, when the ultrasounds are performed separately by a contract licensed provider; (d) "offers pregnancy testing or diagnosis" when the facility distributes pregnancy test kits that women self-administer but the facility does not test or diagnose pregnancy; or (e) "health information."

174. Fallbrook, and NIFLA's unlicensed facility members in California, appear to fit the definition of "unlicensed covered facility," but they cannot know for sure because of the Act's vagueness.

175. The Act by appearance and intent targets pro-life pregnancy centers like Plaintiff Facilities, and therefore they reasonably believe that they fall under the definitions and requirements of the Act, despite its vagueness.

176. This vagueness chills the speech of Fallbrook and the other unlicensed Plaintiff Facilities, who must assume that the Act applies to them and accept the Act's burdens on their speech for fear that the Act's penalties will be applied to them if they do not.

177. The Act's vagueness gives government officials unbridled discretion to determine whether the unlicensed Plaintiff Facilities are covered under the Act or not, implicating the risk of viewpoint discrimination in violation of Fallbrook's and NIFLA's unlicensed members' rights under the Fourteenth Amendment in conjunction with the First Amendment.

178. Accordingly, the Act violates Fallbrook's and NIFLA's unlicensed members' Fourteenth Amendment guarantees of due process.

179. WHEREFORE, Plaintiffs respectfully request that the Court grant the relief set forth hereinafter in the prayer for relief.

THIRD CLAIM: VIOLATION OF THE RIGHTS OF PLAINTIFF FACILITIES UNDER THE FIRST AMENDMENT'S FREE EXERCISE OF RELIGION CLAUSE

180. Paragraphs 1–148 are incorporated as if fully set forth herein.

181. Plaintiff Facilities exercise their religion in their provision of pro-life information and services,

and in the way in which they choose to speak and not speak during the same.

182. Plaintiff Facilities are religious organizations that can and do exercise religion, including in promoting their pro-life message and services.

183. Forcing Plaintiff Facilities to recite the Act's disclosures substantially burdens the exercise of religious beliefs of Plaintiff Facilities, undermining their pro-life message and the way in which they promote that message in pursuit of their religious beliefs.

184. The Act is not neutral or generally applicable, including because it exempts certain facilities that offer particular family planning or Medi-Cal services.

185. Defendants cannot offer sufficient justification to burden Plaintiff Facilities' free exercise of religion by means of the Act.

186. The Act therefore violates Plaintiff Facilities' rights under the Free Exercise of Religion Clause.

187. The Act also violates Plaintiff Facilities' "hybrid" rights under the Free Exercise of Religion Clause in conjunction with their freedom of speech.

188. The First Amendment's Free Exercise of Religion Clause requires the government to satisfy strict scrutiny before it may burden an organization's exercise of religion in conjunction with exercising its rights of speech.

189. The Act infringes on the hybrid of Plaintiffs' Free Exercise of Religion and Free Speech rights.

190. Defendants cannot show a compelling interest for imposing the Act on Plaintiff Facilities, nor can they demonstrate that the Act pursues its goals in a means least restrictive of Plaintiff Facilities' rights.

191. Accordingly, the Act violates the Plaintiff Facilities' First Amendment hybrid rights of Free Exercise of Religion and Free Speech.

192. WHEREFORE, Plaintiffs respectfully request that the Court grant the relief set forth hereinafter in the prayer for relief.

FOURTH CLAIM: VIOLATION OF THE COATS-SNOWE AMENDMENT, 42 U.S.C. §238N, ALLEGED BY THE LICENSED MEDICAL PLAINTIFF FACILITIES

193. Paragraphs 1–148 are incorporated as if fully set forth herein.

194. Defendants violated, and continue to violate, 42 U.S.C. § 238n by requiring licensed pregnancy centers to provide referrals for abortion and/or to make arrangements for referrals for abortion by requiring such licensed centers to provide contact information for the local county social services office in order to procure abortion services.

195. By requiring licensed pregnancy centers to provide contact information to local county social

services offices for abortion services, Defendants have violated Plaintiffs' rights under 42 U.S.C. § 238n.

196. Plaintiffs have suffered and continue to suffer injury and irreparable harm by Defendants' actions, thereby giving rise to the need for injunctive, declaratory and other forms of relief against Defendants.

197. WHEREFORE, Plaintiffs respectfully request that the Court grant the relief set forth hereinafter in the prayer for relief.

FIFTH CLAIM: VIOLATION OF THE FREE SPEECH CLAUSE OF THE CALIFORNIA CONSTITUTION, ART. I, SEC. 2(A). ALLEGED BY ALL PLAINTIFF FACILITIES

198. Paragraphs 1–148 are incorporated as if fully set forth herein.

199. The free speech clause of the California Constitution, Art. I, Sec. 2(a), provides that "[e]very person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press."

200. The free speech clause of the California Constitution provides even "broader" and "greater" protections for speech than the First Amendment to the U.S. Constitution. *Gerawan Farming, Inc. v. Lyons*, 101 Cal. Rptr. 2d 470, 486 (Cal. 2000).

201. The Act unconstitutionally restricts Plaintiff Facilities' rights of free speech, which includes the right to refrain from speaking, to choose how and when to deliver particular messages, and the right to refuse to speak a government-dictated message.

202. The Act unconstitutionally forces Plaintiff Facilities, on pain of government penalty, to engage in government disclaimers that Plaintiff Facilities would not otherwise recite, that undermine Plaintiff Facilities' message, and that contradict Plaintiff Facilities' viewpoint from which they speak.

203. The Act is unconstitutionally and substantially overbroad.

204. The Act's imposition of disclosures on unlicensed Plaintiff Facilities' advertisements is an unjustified restriction of their ability to advertise their messages.

205. The Act is unconstitutionally underinclusive, because by its Exemption it omits many centers that provide pregnancy related services.

206. The Act imposes an unconstitutional chill and penalty on Plaintiff Facilities' speech, and without declaratory and injunctive relief, will continue to do so.

207. The Act is a content-based regulation of speech.

208. The Act unconstitutionally discriminates against Plaintiff Facilities' speech based on their viewpoint, including because it requires licensed

facilities to promote abortion options, and it exempts from the Act's requirements facilities that provide certain family planning or Medi-Cal services.

209. The Act poses an unconstitutional risk of viewpoint discrimination by conferring unfettered discretion on government officials to interpret the Act's provisions in deciding which unlicensed facilities must comply.

210. The Act is subject to strict scrutiny.

211. The Act does not promote any legitimate, or compelling, government interest, and Defendants lack any evidence or sufficient evidence to demonstrate the existence of such an interest.

212. The Act is not tailored at all, much less narrowly tailored, to further any governmental interest, and it does not do so by a means least restrictive of Plaintiff Facilities' speech.

213. Defendants have ample alternative channels to achieve any alleged interest without imposing the Act's burdens on the speech of Plaintiffs.

214. The Act is an unconstitutional restriction of speech under any standard applicable to the licensed Plaintiff Facilities.

215. The Act is unconstitutional not only as applied to Plaintiff Facilities, but on its face as applied to any facility.

216. Accordingly, the Act violates the free speech clause of the California Constitution, Art. I, Sec. 2(a).

217. WHEREFORE, Plaintiffs respectfully request that the Court grant the relief set forth hereinafter in the prayer for relief.

PRAYER FOR RELIEF

Plaintiffs respectfully request the following relief:

A. Declare the Act unconstitutional under the United States and California Constitutions and in violation of federal statute on its face, and as applied to Plaintiffs;

B. Enter preliminary and permanent injunctions against enforcement of the Act;

C. Award Plaintiff the costs of the litigation, including reasonable attorneys' fees and expenses under 42 U.S.C. § 1988;

D. Enter preliminary and permanent injunctions ordering Defendant Brown to disgorge federal funds the State of California has received from United States Department of Health and Human Services and other federal offices in an appropriate amount and in excess of $75,000, penalizing them for the injury they threaten to cause Plaintiffs and others, and prohibiting the receipt of further funding until they have remedied that injury, and until they have brought state law into compliance with 42 U.S.C. § 238n; and

E. Award any and all other relief the Court deems just and proper.

Plaintiffs demand a jury for all issues so triable

Respectfully submitted on this 12th day of October, 2015

s/David J. Hacker
DAVID J. HACKER
California Bar No. 249272
Illinois Bar No. 6283022
HEATHER GEBELIN HACKER
California Bar No. 249273
Arizona Bar No. 024167
ALLIANCE DEFENDING FREEDOM
101 Parkshore Drive, Suite 100
Folsom, California 95630
(916) 932–2850
dhacker@ADFlegal.org
hghacker@ADFlegal.org
MATTHEW S. BOWMAN*
D.C. Bar No. 993261
Michigan Bar No. P66239
ALLIANCE DEFENDING FREEDOM
440 First Street, NW, Suite 600
Washington, DC 20001
(202) 393-8690
mbowman@adflegal.org

KEVIN H. THERIOT*
Arizona Bar No. 030446
Florida Bar No. 0136761
Georgia Bar No. 373095

Kansas Bar No. 21565
Missouri Bar No. 55733
Tennessee Bar No. 015049
Texas Bar No. 00788908
Virginia Bar No. 38324
ELISSA M. GRAVES*
Arizona Bar No. 030670
Texas Bar No. 24090135
ALLIANCE DEFENDING FREEDOM
15100 N. 90th St.
Scottsdale, AZ 85260
(480) 444-0020
ktheriot@adflegal.org
egraves@adflegal.org

DEAN R. BROYLES**
California Bar No. 179535
THE NATIONAL CENTER FOR LAW AND POLICY
539 West Grand Avenue
Escondido, California 92025
(760) 747-4529
dbroyles@nclplaw.org

ANNE O'CONNOR**
California Bar No. 135341
New Jersey Bar No. 7371997
NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES
5601 Southpoint Centre Blvd.
Fredericksburg, VA 22407
(540) 372-3930

AOConnor@nifla.org
Attorneys for Plaintiffs
*Application for Admission Pro Hac Vice forthcoming
** Notice of Appearance forthcoming

VERIFICATION OF COMPLAINT

PURSUANT TO 28 U.S.C. § 1746

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed on October 12, 2015

s/ Thomas Glessner
THOMAS GLESSNER, J.D.
President
National Institute of Family and Life Advocates

VERIFICATION OF COMPLAINT

PURSUANT TO 28 U.S.C. § 1746

I declare under penalty of perjury that the foregoing *National Institute of Family and Life Advocates v. Harris* complaint is true and correct to the best of my knowledge.

Executed on October 12, 2015

s/ Josh McClure
JOSH MCCLURE
Executive Director
Pregnancy Care Clinic

VERIFICATION OF COMPLAINT

PURSUANT TO 28 U.S.C. § 1746

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed on October 12, 2015

s/ Carolyn Koole
CAROLYN KOOLE
Executive Director
Fallbrook Pregnancy Resource Center

KAMALA J. HARRIS
Attorney General of California
STEPHAN A. HAYTAYAN
Supervising Deputy Attorney General
ANTHONY R. HAKL
Deputy Attorney General
State Bar No. 197335
1300 I Street Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 322-9041
Fax: (916) 324-883
Email: Anthony.Hakl@doj.ca.gov
Attorneys for Defendants
Attorney General Kamala D. Harris and
Governor Edmund G. Brown Jr.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN
DISTRICT OF CALIFORNIA

NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES d/b/a NIFLA, a Virginia corporation, et al., Plaintiffs, **v.** **KAMALA HARRIS, in her official capacity as**	Case No. 3:15-cv-02277-JAH-DHB **DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

VERIFICATION OF COMPLAINT

PURSUANT TO 28 U.S.C. § 1746

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed on October 12, 2015

s/ Carolyn Koole
CAROLYN KOOLE
Executive Director
Fallbrook Pregnancy Resource Center

KAMALA J. HARRIS
Attorney General of California
STEPHAN A. HAYTAYAN
Supervising Deputy Attorney General
ANTHONY R. HAKL
Deputy Attorney General
State Bar No. 197335
1300 I Street Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 322-9041
Fax: (916) 324-883
Email: Anthony.Hakl@doj.ca.gov
Attorneys for Defendants
Attorney General Kamala D. Harris and
Governor Edmund G. Brown Jr.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN
DISTRICT OF CALIFORNIA

NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES d/b/a NIFLA, a Virginia corporation, et al., Plaintiffs, v. **KAMALA HARRIS, in her official capacity as**	Case No. 3:15-cv-02277-JAH-DHB **DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

Attorney General for the State of California, et al., Defendants.	Date: January 11, 2016 Time: 2:30 p.m. Dept.: 13B Judge: John A. Houston Trial Date: None Case Filed: October 13, 2015

***

With respect to the governmental interests at stake, AB 775 explains that the Legislature enacted it "to ensure that California residents make their personal reproductive health care decisions knowing their rights and the health care services available to them." *See* Assem. Bill No. 775, § 2. Even when viewed in isolation, ensuring that pregnant women are fully advised of the range of health care options available to them in California is not only a legitimate state interest, but a compelling one. *See Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 767 (1994) ("[T]he State has a strong interest in protecting a woman's freedom to seek lawful medical or counseling services in connection with her pregnancy."); *Am. Life League, Inc. v. Reno*, 47 F.3d 642,656 (4th Cir. 1995) ("sufficiently compelling governmental interests" exist where law "protects public health by promoting unobstructed access to reproductive health facilities"); *see also Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975) ("States have a compelling interest in the practice of professions within their boundaries, and that as part of their power to protect

the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions").

The interest is even more compelling when viewed in light of the history of 19 so-called "crisis pregnancy centers" in California and across the country, as 20 documented in AB 775's legislative history:

> The author contends that, unfortunately, there are nearly 200 licensed and unlicensed clinics known as crisis pregnancy centers (CPCs) in California whose goal is to interfere with women's ability to be fully informed and exercise their reproductive rights, and that CPCs pose as full-service women's health clinics, but aim to discourage and prevent women from seeking abortions. The author concludes that these intentionally deceptive advertising and counseling practices often confuse, misinform, and even intimidate women from making fully informed, time-sensitive decisions about critical health care.

Assem. Com. on Health, Analysis of Assembly Bill No. 775 (2015-2016 Reg. Sess.) April14, 2015, at 3.

***

RECORD AND BRIEFS

Supreme Court, U.S.
FILED
MAY 24 2017
OFFICE OF THE CLERK

Nos. 16-1140, 16-1146, 16-1153

In the
Supreme Court of the United States

NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES, ET AL.,

Petitioners,

v.

XAVIER BECERRA, ET AL.,

Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE STATE RESPONDENTS IN OPPOSITION

XAVIER BECERRA
Attorney General of California
EDWARD C. DUMONT
Solicitor General
JOSHUA A. KLEIN*
Deputy Solicitor General
JONATHAN M. EISENBERG
ANTHONY R. HAKL
NOREEN P. SKELLY
Deputy Attorneys General
STATE OF CALIFORNIA
DEPARTMENT OF JUSTICE
455 Golden Gate Ave., Suite 11000
San Francisco, CA 94102
(415) 703-2543
joshua.klein@doj.ca.gov
**Counsel of Record*

(Additional Captions Listed on Inside Cover)

A WOMAN'S FRIEND PREGNANCY RESOURCE CLINIC, ET AL.,

Petitioners,

v.

XAVIER BECERRA,

Respondent.

LIVINGWELL MEDICAL CLINIC, INC., ET AL.

Petitioners,

v.

XAVIER BECERRA, ET AL.,

Respondents.

QUESTION PRESENTED

Whether three district courts abused their discretion in deciding not to preliminarily enjoin, before discovery in each case and before any record of enforcement, the implementation of a California statute that (1) requires licensed medical clinics to notify patients that information about state-funded prenatal care, family planning, and abortion services may be accessed by calling a county health department phone number and (2) requires facilities providing services such as pregnancy testing and ultrasound imaging to inform clients if the facility does not employ a licensed medical professional.

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STATEMENT

States play a "significant role ... in regulating the medical profession." *Gonzales v. Carhart*, 550 U.S. 124, 157 (2007). Like other States, California maintains a comprehensive system for licensing and regulating healthcare institutions and professionals. *See, e.g.*, Cal. Bus. & Prof. Code §§ 2000 et seq. (physicians); *id.* §§ 2700 et seq. (nurses); *id.* §§ 4000 et seq. (pharmacists); Cal. Health & Safety Code §§ 1200 et seq. (clinics). This case concerns disclosures that are mandated as part of that system by California's Reproductive FACT (Freedom, Accountability, Comprehensive Care, and Transparency) Act, 2015 Cal. Stats. ch. 700, codified at Cal. Health & Safety Code §§ 123470 et seq.

1. Some 700,000 California women become pregnant each year, and over half of those pregnancies are unintended. NIFLA Pet. App. 76a-77a.[1] The Act addresses two problems that pregnant Californians can face.

a. First, many women cannot afford medical care on their own, and are unaware of the public programs that are available to them. NIFLA Pet. App. 76a-77a. Medi-Cal and the Medi-Cal Access Program provide low-cost prenatal care, delivery care, and

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[1] This brief is a combined response to three petitions. Citations to a particular petition or lower court document include the petitioner's name, abbreviating National Institute for Family and Life Advocates as NIFLA and A Woman's Friend as AWF. Unless otherwise indicated, statutory references are to the California Health & Safety Code.

newborn pediatric care.[2] The Medi-Cal Family Planning, Access, Care, and Treatment (Family PACT) Program provides family planning services, including contraception, preconception counseling, limited infertility services, sexually transmitted infection testing and treatment, and cancer screening.[3] And Medi-Cal covers abortion services.[4] "[C]are early in pregnancy is important," and "pregnancy decisions are time sensitive." NIFLA Pet. App. 77a. The state Legislature concluded that "[t]he most effective way to ensure that women quickly obtain the information and services they need" is to require licensed health care facilities that are unable to immediately enroll patients into state-funded programs to advise each patient at the time of her visit that the programs exist and give information on how they may be accessed. *Id.*

As a result, the Act imposes a notice requirement on "licensed covered facilit[ies]." A "licensed covered facility" is a clinic licensed under California Health & Safety Code Section 1204 (covering "primary care" clinics, "community" clinics, "free" clinics, and "specialty" clinics such as "surgical" clinics and "alternative birth center[s]"), whose "primary purpose is providing family planning or pregnancy-related services" and that satisfies two of six enumerated criteria. § 123471(a). The enumerated criteria are that

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[2] *See* http://mcap.dhcs.ca.gov/My_MCAP/Important_Information_Applicants.aspx.

[3] *See* http://www.familypact.org/Get%20Covered/what-does-family-pact-cover.

[4] *See Committee to Defend Reproductive Rights v. Myers*, 29 Cal. 3d 252 (1981).

the facility (1) "offers obstetric ultrasounds, obstetric sonograms, or prenatal care," (2) "provides, or offers counseling about, contraception or contraceptive methods," (3) "offers pregnancy testing or pregnancy diagnosis," (4) "advertises or solicits patrons with offers to provide prenatal sonography, pregnancy tests, or pregnancy options counseling," (5) "offers abortion services," and (6) "has staff or volunteers who collect health information from clients." § 123471(a).[5]

The definition's cross-reference to section 1204 means that licensed covered facilities provide "[d]iagnostic, therapeutic, radiological, laboratory [or] other services for the care and treatment of patients for whom the clinic accepts responsibility," Cal. Code. Regs. tit. 22, § 75026, and that they must have "a licensed physician designated as the professional director" and have a physician, physician's assistant, or registered nurse present whenever medical services are provided, *id.* § 75027. The Act excludes from coverage clinics that are operated by the federal government. § 123471(c)(1). The Act also excludes Medi-Cal Family PACT providers, § 123471(c)(2), which are capable of enrolling pregnant women in state-sponsored programs on the spot, NIFLA Pet. App. 77a.

The Act requires licensed covered facilities to provide clients with a notice stating that:

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[5] An off-site, limited-hour "intermittent" clinic affiliated with a licensed primary care clinic is also a licensed covered facility if it has the primary purpose of providing family planning or pregnancy-related services and meets two of these criteria. §§ 123471(a), 1206(h).

> California has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women. To determine whether you qualify, contact the county social services office at [insert the telephone number].

§ 123472(a)(1).

Clinics may choose how to provide this information: by handing patients a printed notice in 14-point or larger type, providing a digital notice at the time of check-in or arrival, or posting a notice in the waiting room. § 123472(a)(2). Clinics may issue the notice separately, or combined with other disclosures. § 123472(a)(3). However provided, the notice must be in English and in the county's primary threshold languages for Medi-Cal beneficiaries. § 123472(a). For clinics that choose to comply with the requirement by posting the notice in the waiting room, the posting must be at least 8.5 inches by 11 inches and written in 22-point or larger font. § 123472(a)(2)(A).

Violations are punishable by a civil fine of $500 for a first offense or $1,000 for subsequent offenses. § 123473(a). No enforcement proceeding may occur unless the government attorney has previously notified the facility of noncompliance and given it 30 days to correct the violation. *Id.*

b. The second problem the law responds to is confusion among certain women as to whether the care and advice they receive comes from medical professionals. Licensed medical professionals and insti-

tutions are required, by professional standards and governmental regulation, to give medically accurate information. Laypeople and unlicensed organizations, however, are not under similar mandates. The Legislature reviewed evidence about so-called "crisis pregnancy centers," finding that they frequently provide women with medically inaccurate information.[6] At the same time, some facilities offer services such as pregnancy testing and ultrasound examinations, which can lead women to believe they are receiving treatment in a medical setting. These circumstances caused the Legislature to conclude that it is "vital" for pregnant women to know if they are receiving pregnancy-related services from a facility or individual that is not licensed to provide actual medical care. NIFLA Pet. App. 77a.

The Act therefore imposes a separate notice requirement on "unlicensed covered facilit[ies]." Such a facility is one whose "primary purpose" is "providing pregnancy-related services," but which is not licensed by the State and where no licensed medical provider provides or supervises the clinic's services. § 123471(b). To be treated as an unlicensed covered facility, the facility must also satisfy two or more from a list of four criteria: (1) offering obstetric ultrasounds or sonograms, or prenatal care to pregnant women; (2) offering pregnancy testing or diagnosis; (3) advertising or soliciting patrons with offers to provide prenatal sonography, pregnancy tests, or "pregnancy options counseling"; or (4) collecting health information from clients. *Id.*

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[6] *See* Rep. of Cal. Assem. Health Comm. on A.B. 775, Apr. 14, 2015, at 3-4.

Such a facility must provide to clients, on site and in any print and digital advertising materials, a notice stating that:

> This facility is not licensed as a medical facility by the State of California and has no licensed medical provider who provides or directly supervises the provision of services.

§ 123472(b). The notice must be provided in English and in the county's primary threshold languages for Medi-Cal beneficiaries. *Id.* The on-site notice must be on a sign measuring at least 8.5 by 11 inches and written in 48-point or larger type, and the advertising-material notice must be "clear and conspicuous," § 123472(b)(2), (3). Violations are governed by the same penalty provisions that apply to licensed covered facilities. *See* p. 4, *supra*.

2. Before the Act's January 2016 effective date, the three sets of petitioners in these cases brought separate actions, seeking to declare the Act unlawful under the First Amendment and to enjoin its enforcement. In each case, the petitioners requested a pre-enforcement, pre-discovery preliminary injunction barring enforcement of the Act against them.

a. The NIFLA plaintiffs filed suit in the U.S. District Court for the Southern District of California against California's Governor and Attorney General, the County Counsel for San Diego County, and the City Attorney of El Cajon. NIFLA Pet. App. 84a-85a. The complaint states that one plaintiff is licensed by the State as a community clinic and clinical laboratory and employs licensed physicians and nurses. *Id.* at 91a-92a. It provides "[m]edical" and "clinical" ser-

vices such as ultrasound examinations, health provider consultation, information on natural family planning, and prenatal vitamins, as well as non-medical services such as peer counseling, maternity clothes, and support groups. *Id.* Another plaintiff is an unlicensed covered facility, which provides pregnancy test kits, educational programs, and maternity clothes, and which contracts with a licensed provider to provide ultrasound services at a separate facility. *Id.* at 92a. The final plaintiff is a non-profit organization comprised of both medical and non-medical centers that provide "pro-life information services" to women with unplanned pregnancies. *Id.* at 93a. NIFLA's motion for a preliminary injunction relied on the plaintiffs' complaint alone without any supporting declarations. *Id.* at 47a n.2. The motion relied exclusively on Free Speech and Free Exercise arguments, not on additional statutory and state constitutional claims also included in the complaint. NIFLA D. Ct. Doc. 3, at 2 n.1 (Motion); NIFLA Pet. App. 116a-117a.

The district court concluded that the NIFLA plaintiffs were not likely to succeed on the merits of their federal constitutional claims. NIFLA Pet. App. 56a-69a. With respect to the licensed facility provisions, the court noted that, while "the Act requires medical providers to advise their patients of various types of treatment available so patients are fully informed," it was "neutral as to any particular view or opinion," did not make any recommendation, and did not preclude plaintiffs from openly expressing disagreement. *Id.* at 61a, 64a-65a. Given that the definition of "licensed covered facilities" encompassed only state licensed medical institutions providing specific medical services, *id.* at 61a-62a, the court concluded

that the licensed facility requirements were no broader than necessary and survived intermediate scrutiny, *id.* at 64a-65a. The court further concluded that the Act's unlicensed facility requirements could withstand "any level of scrutiny," because disclosure of a facility's unlicensed status was narrowly tailored to achieve the compelling interest of ensuring that women know whether or not they are receiving care from a licensed professional. *Id.* at 65a-67a. With respect to the Free Exercise claim, the court found "no evidence to suggest the Act burdens only conduct motivated by religious belief." *Id.* at 68a. Rather, the Act was "neutral," "generally applicable," and constitutional. *Id.* Finally, the court found that the balance of hardships and public policy interests favored not granting an injunction. *Id.* at 69a-71a.

b. The AWF plaintiffs sued the California Attorney General in the U.S. District Court for the Eastern District of California. AWF C.A. E.R. 333 (Amended Complaint). The plaintiffs are three licensed covered facilities that are licensed as community clinics. *Id.* at 335-336. They provide "medical consultations" and services, including pregnancy testing, ultrasound examinations, referrals to other medical providers, and information on prenatal care and fetal development. *Id.* Patients typically meet with a registered nurse for administration of a pregnancy test, estimation of a due date and conception date, collection of medical history and vital signs, medical evaluation, advice on collecting health insurance benefits, instruction on prenatal care and development, and an ultrasound examination. AWF Pet. App. 19-20. AWF's motion for a preliminary injunction was based on declarations in addition to the complaint. AWF C.A. E.R. 270-305 (Declarations).

The district court concluded that the AWF plaintiffs were unlikely to succeed on the merits of their claims. AWF Pet. App. 44-89. The court reasoned that the Act's licensed clinic provision "regulates speech within the confines of a professional relationship," *id.* at 64, providing "information relevant to patients' medical decisions," *id.* at 61. Although some cases had interpreted *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), as requiring only rational basis review for government-mandated speech directed to women considering whether to terminate a pregnancy, the court applied the more demanding standard of intermediate scrutiny under the professional-speech doctrine. *Id.* at 65-68. The licensed facility requirement passed that test, given the limited nature of the required notice and given the State's interests in regulating the medical profession, assuring safe healthcare, and ensuring that pregnant women are informed of their healthcare options. *Id.* at 70-71; *id.* at 72 ("The notice provides the information in neutral language and does not incorporate ideological commentary or convey an opinion. Although it includes the word 'abortion,' the word appears in the context of a list describing the full spectrum of reproductive health care services available in California."). Indeed, given the evidence "at this stage" of the case, the court deemed it likely that the statute would pass even strict scrutiny. *Id.* at 73-78. The court also considered the balance of hardships and the public interest, concluding that neither factor would change the outcome even counting the ultimate merits question as close. *Id.* at 89-97. With respect to the Free Exercise claim, the court upheld the Act as "a neutral law of general applicability" which "'regulate[s] all

pregnancy centers,'" not just those opposed to abortion, in a "'uniform manner.'" *Id.* at 79, 86.

c. The *Livingwell* case was filed in the U.S. District Court for the Northern District of California against the California Attorney General, the Director of the California Department of Public Health, three county counsels, and three city attorneys. Livingwell C.A. E.R. 78 (First Amended Complaint). The plaintiffs are three clinics licensed as primary care, free, or community clinics. *Id.* at 79-80. They based their motion for a preliminary injunction on their complaint and on brief declarations, which together provide limited detail about the clinics' activities—such as that they are morally opposed to abortion, that they do not charge patients for their services, and that they provide both medical services (such as pregnancy testing and verification, obstetrical ultrasounds, and sexually transmitted infection testing and treatment) and non-medical services (such as post-abortion healing retreats and material support through a thrift store). *Id.* at 71, 74, 77 (Declarations).

Noting the "limited record" before it, Livingwell Pet. App. 31, 32, the district court concluded that the plaintiffs were unlikely to succeed on the merits of their claims, *id.* at 25-37. In the court's view, "further discovery [would be] needed" for the court to evaluate whether the speech at issue was commercial speech. *Id.* at 31-32. As a regulation of professional speech, however, the law was permissible, because the plaintiffs had "accept[ed] the responsibility of providing medically-supervised treatment for patients," and the statute required them to provide "only factual and incontrovertibly true information

about the range of pregnancy-related public health services available." *Id.* at 37. The court also held that the plaintiffs had not demonstrated irreparable injury and that the balance of equities did not weigh in their favor. *Id.* at 38.

2. Two motions panels of the court of appeals denied motions by the Livingwell and AWF plaintiffs seeking injunctions pending appeal, concluding that the plaintiffs were "not likely to succeed on their claim that the district court abused its discretion in holding that they do not meet the preliminary injunction standard." Livingwell Pet. App. 5-6; *see also* AWF C.A. Doc. 11.[7]

A merits panel then affirmed the district courts' denials of injunctive relief, issuing a published opinion in *NIFLA* and unpublished summary opinions in *Livingwell* and *AWF*. NIFLA Pet. App. 1a-43a; AWF Pet. App. 1-3; Livingwell Pet. App. 1-4.

In its lead opinion, the court reasoned that the Act did not discriminate based on viewpoint. NIFLA Pet. App. 20a. Indeed, "[o]ther than ... two narrow exceptions unrelated to viewpoint, the Act applies equally to clinics that offer abortion and contraception as it does to clinics that oppose those same services." *Id.* at 21a. Although the Act mandated the provision of notices with particular content, that did not require strict scrutiny under *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015). NIFLA Pet. App. 23a. With respect to professional speech, this Court had upheld certain state compelled notices by physicians

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[7] The NIFLA plaintiffs did not move for an injunction pending appeal.

in *Casey*. *Id.* at 23a-24a. Although some courts, relying on *Casey*, had imposed a mere "'reasonableness' test when determining whether an abortion-related disclosure law violated physicians' First Amendment rights," *id.* at 25a (citing Fifth and Eighth Circuit decisions), the court of appeals concluded that it was appropriate to apply here the same test that it would apply to other regulations of professional speech. *Id.* at 26a-27a; *see id.* at 28a-33a (applying professional speech test from *Pickup v. Brown*, 740 F.3d 1208 (9th Cir.), cert. denied, 134 S. Ct. 2871, and 134 S. Ct. 2881 (2014)). Application of that test was appropriate because "clients go to the clinic precisely because of the professional services it offers" and "reasonably rely upon the clinic for its knowledge and skill," and because the notice applicable to licensed clinics contained information relating to the clinics' professional services and was "part of the clinics' professional practice." *Id.* at 30a-31a.

As a regulation of professionals, the licensed clinic notice requirement was not subject to rational basis review, because it did not regulate "therapy, treatment," or other conduct. Pet. App. 31a. Nor did strict scrutiny apply, because the notice governed only professional relationships with patients—the clinics were not "engaging in a public dialog when treating their clients." *Id.* As a result, the court applied intermediate scrutiny. *Id.* at 31a-32a. The statute served the State's substantial interests in promoting health and regulating the practice of the profession. *Id.* at 34a. And the notice was "narrowly drawn," in that it did not "contain any more speech than necessary" to alert women to the existence of state-funded services, and did not "encourage, suggest, or imply that women should use those ... ser-

vices." *Id.* This last point distinguished California's law from laws struck down in *Evergreen Ass'n, Inc. v. City of New York*, 740 F.3d 233 (2d Cir.), cert. denied, 135 S. Ct. 435 (2014), and *Centro Tepeyac v. Montgomery County*, 722 F.3d 184 (4th Cir. 2013) (en banc), each of which had concerned notices that went beyond merely supplying information in a neutral manner. *See* NIFLA Pet. App. 36a ("unlike ... the regulations before the Second and Fourth Circuits, the [California notice] does not use the word 'encourage,' or other language that suggests the California Legislature's preferences regarding prenatal care").

The court also found no abuse of discretion in the *NIFLA* district court's decision to deny an injunction as to enforcement of the notice requirement that applied to unlicensed facilities. NIFLA Pet. App. 36a-39a. The court found no need to decide whether the medical nature of some of the unlicensed facilities' services (such as pregnancy tests) could make them subject to lesser scrutiny under the professional speech doctrine. *Id.* at 37a. Even if strict scrutiny applied, "California has a compelling interest in informing pregnant women when they are using the medical services of a facility that has not satisfied licensing standards set by the state." *Id.* That interest was "particularly compelling" given the Legislature's findings about the existence of clinics "which often present misleading information to women about reproductive medical services." *Id.* And the Act's one-sentence notice was "narrowly tailored" to achieve its goal—a conclusion consistent with decisions by the Second and Fourth Circuits. *Id.* at 37a-38a (citing *Evergreen*, 740 F.3d at 246-247, and *Centro Tepeyac*, 722 F.3d at 190).

Finally, the court found no merit in the plaintiffs' Free Exercise claim. NIFLA Pet. App. 40a-42a. Unlike the ordinance struck down in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), the Act did not single out clinics that were motivated by religious belief. NIFLA Pet. App. 40a. Instead, it "applies to all covered facilities, and is indifferent to the basis for any objection." *Id.* The two exemptions merely recognized the State's inability to regulate federal clinics, and the lack of any need to compel notice about public funding options at clinics that were already able and motivated to enroll patients in those options themselves. *Id.* at 41a.

The plaintiffs' petitions for rehearing en banc were denied without dissent. NIFLA Pet. App. 72a-73a; AWF Pet. App. 98; Livingwell Pet. App. 41-42.

ARGUMENT

The court of appeals' decisions upholding the district courts' denials of petitioners' requests for preliminary relief conflict neither with this Court's precedents nor with the decisions of other lower courts. The notice that licensed facilities must give under the FACT Act falls well within the First Amendment's tolerance for the regulation of the practice-related speech of licensed professionals. The notice that unlicensed facilities must give is a permissible means to ensure that women are not misled about whether they are under the care of medical professionals, as courts reviewing similar laws have concluded. And the Act poses no substantial Free Exercise question. There is no reason for review by this Court, particularly at the preliminary stage of this ongoing litigation.

1. All petitioners argue that the FACT Act's provisions requiring disclosures by licensed facilities violate the Free Speech Clause of the First Amendment. NIFLA Pet. 17-30; AWF Pet. 15-31; Livingwell Pet. 14-38. The court of appeals' decision that the petitioners were unlikely to succeed on that claim is consistent with this Court's precedents, and creates no conflict with decisions of other lower courts. NIFLA Pet. App. 18a-36a.

a. This Court has recognized that, for First Amendment purposes, requirements imposed on a licensed professional's speech in the course of professional practice present substantially different questions than similar requirements imposed on a non-professional.[8] In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) (plurality opinion), for example, the Court considered a Pennsylvania statute that, among other things, required a physician or qualified non-physician to inform women seeking abortions about the availability of state-prescribed printed materials that described the fetus and gave information about paternal child-support, adoption, and other alternatives to abortion. *Id.* at 881. *Casey* rejected a First Amendment challenge to this requirement, because "the physician's First Amendment rights not to speak are implicated, but only as part of the practice of medicine, subject to

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[8] AWF proposes (Pet. 30) that certiorari should be granted to determine whether a special category of professional speech exists at all. But AWF did not contest the existence of a special category of professional speech regulation in the lower courts. It argued only that the Act fell outside the professional speech doctrine's boundaries and that compelled speech always receives strict scrutiny. AWF C.A. Br. 18-26; AWF C.A. Reply Br. 3-6.

reasonable licensing and regulation by the State." *Id.* at 884 (citations omitted). *See also Lowe v. SEC*, 472 U.S. 181, 207-208 (1985); *id.* at 227-233 (White, J., concurring).

Petitioners suggest that *Casey*'s reasoning does not extend to the FACT Act, because California allows the delivery of the notice during check-in procedures or by a posted sign in the waiting room, rather than requiring disclosures of information in one-on-one conversations with physicians. NIFLA Pet. 27-28. But the notice requirement applies only to clinics licensed under section 1204. Such clinics provide "[d]iagnostic, therapeutic, radiological, laboratory and other services for the care and treatment of patients for whom the clinic accepts responsibility," Cal. Code. Regs. tit. 22, § 75026, thus "tak[ing] the affairs of [the patient] personally in hand and purport[ing] to exercise judgment on [the patient's behalf] in the light of [her] individual needs and circumstances," *Lowe*, 472 U.S. at 232 (White, J., concurring).[9] Nor can *Casey* support a rule limiting professional disclosures to speech by particular professionals rather than by the licensed institution at which the professionals work. The statute upheld in *Casey* required that certain disclosures be made by the physician or a qualified nonphysician. 505 U.S. at 881. Indeed, by allowing the clinic to *choose* whether to make its disclosure by a printed notice (delivered by the physician or otherwise), a digital notice, or a sign on clinic

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[9] Although NIFLA argues (Pet. 28) that the licensed clinics also engage in activities such as offering clothing and diapers, the record at this stage does not show that such services predominate over the provision of personalized medical services.

walls, California's Act imposes a lesser burden on both the speaker and the listener than would be imposed if the disclosure had to be made in a one-on-one conversation with a particular person.

Casey likewise cannot be read as limiting the regulation of medical professionals' speech to pre-surgery informed consent. NIFLA Pet. 27. Many of the disclosures at issue in *Casey* went far beyond informing a woman as to the nature and health consequences of a surgical procedure. *See, e.g.*, 505 U.S. at 883 (upholding required dissemination of information regarding "the assistance available should [the woman] decide to carry the pregnancy to full term"). Like the law at issue in *Casey*, the FACT Act recognizes that licensed medical institutions and professionals have specialized knowledge not only about the technical aspects of medicine, but also about related financial and regulatory questions.[10] Indeed, petitioners encourage their patients to depend on such expertise. *See* AWF Pet. App. 20 (AWF's nurses advise on collecting health insurance benefits). California's law seeks to ensure that pregnant women have access to information that is relevant to the variety of health decisions they face, much as the *Casey* disclosures aimed to "ensure that a woman apprehend the full consequences of her decision" so that

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[10] *See also, e.g.*, Cal. Health & Safety Code § 1204.3(a)(5) (alternative birthing centers must provide to patients a summary of state child-car-seat laws and list of public car-seat programs); Cal. Code Regs., tit. 16, § 1355.4 (physicians' offices must provide notice, by posted sign or otherwise, stating that physicians are "licensed and regulated by the Medical Board of California" and giving the Medical Board's phone number); Cal. Code Regs., tit. 16, § 1707.6 (pharmacies must post notice that interpreter services and large-font drug labels are available).

she does not "discover later, with devastating psychological consequences, that her decision was not fully informed." 505 U.S. at 882.[11]

b. NIFLA contends (Pet. 21-23) that certiorari should be granted to determine whether, under *In re Primus*, 436 U.S. 412 (1978), strict scrutiny applies whenever the State regulates the speech of professionals who do not charge for their services. In *Primus*, an attorney was disciplined for informing a forced-sterilization victim that the ACLU might represent her for free. *Id.* at 416-421. This Court concluded that the case was controlled by *In re Button*, 371 U.S. 415 (1963), which had forbidden Virginia from punishing the NAACP for soliciting potential plaintiffs to file suit with the NAACP as counsel. *Primus*, 436 U.S. at 422-426. In each case, the "solicitation of prospective litigants ... for the purpose of furthering [the organization's and its members'] objectives" fell squarely "within the right to engage in association for the advancement of beliefs and ideas."

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[11] NIFLA argues (Pet. 30) that the Ninth Circuit's application of the professional speech doctrine based on *Casey* conflicts with the Eleventh Circuit's decision in *Wollschlaeger v. Governor of Florida*, 848 F.3d 1293 (11th Cir. 2017) (en banc). As NIFLA notes, *Wollschlaeger* observed that *Casey* did not "'hold sweepingly that all regulation of speech in the medical context merely receives rational basis review.'" *Id.* at 1311 (quoting *Stuart v. Camnitz*, 774 F.3d 238, 249 (4th Cir. 2014)). But the Ninth Circuit did not apply rational basis review. Instead, although mentioning that some courts have applied such review with respect to regulations of medical professionals' speech, the Ninth Circuit rejected that standard in favor of intermediate scrutiny. NIFLA Pet. App. 25a-28a. That is consistent with *Wollschlaeger*. *See Wollschlaeger*, 848 F.3d at 1311 (rejecting rational basis review in favor of "heightened scrutiny").

Id. at 423-424 (footnote and internal quotation marks omitted). Any prohibition on that solicitation was subject to "'exacting scrutiny,'" requiring a "'compelling'" interest and a restriction "'closely drawn to avoid unnecessary abridgment of associational freedoms.'" *Id.* at 432.

Under *Primus* and *Button*, interference with a nonprofit's associational right to attract members and allies for collective action through litigation receives strict scrutiny. *See United Transp. Union v. State Bar of Michigan*, 401 U.S. 576, 585 (1971) (*Button* concerned the "right to group legal action").[12] But those cases do not hold that a State's ability to regulate professional conduct depends on whether the professional charges for his or her services. Neither *Primus* nor *Button* suggest that a pro bono attorney's advice to clients on the conduct of their litigation would be subject to anything other than the ordinary rules regulating the profession. And exempting medical professionals from ordinary regulations in their advice to non-paying patients would create a vast population vulnerable to abuse and neglect.[13]

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[12] For nonprofit litigating organizations, the client is not only a recipient of legal services but also a necessary participant in the lawsuit that propounds the organization's advocacy message to the public and to courts. A medical clinic's patient, in contrast, receives confidential medical services. California does not restrict petitioners' efforts to recruit staff or volunteers—the activity most analogous to the practices at issue in *Button* and *Primus*.

[13] *See* Centers for Disease Control, NCHS Data Brief No. 38 (May 2010) (roughly 20% of emergency room patients under age 65 are uninsured), available at http://www.cdc.gov/nchs/data/databriefs/db38.pdf.

NIFLA claims (Pet. 22-23) that the Ninth Circuit's rejection of its argument conflicts with *Moore-King v. County of Chesterfield*, 708 F.3d 560 (4th Cir. 2013). But *Moore-King* addressed the regulation of "'fortune-teller[s], palmist[s], astrologist[s],'" "'clairvoyant[s],'" "'prophet[s]'" and other practitioners of the "'occult sciences.'" *Id.* at 563. Its recognition that States have greater latitude to regulate such a person's advice to "'a paying client'" (NIFLA Pet. 23) does not imply converse restrictions on the States' ability to regulate the pro bono services of professionals such as doctors and lawyers. *Cf. Polk County v. Dodson*, 454 U.S. 312, 323 (1981) (legal ethics rules constrain public defenders' advocacy); *Barker v. Capotosto*, 875 N.W. 2d 157, 167 (Iowa 2016) (attorneys who serve indigent clients are subject to ordinary malpractice law).

c. Livingwell (Pet. 35) and NIFLA (Pet. 18) argue that, regardless of any professional context, compelled speech should receive strict scrutiny as content-based regulation under *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015). But *Reed* did not extinguish the categorically lower levels of scrutiny that apply to certain kinds of speech, such as commercial speech and speech in the context of a professional relationship. The Ninth Circuit's recognition of this point is consistent with other lower courts' post-*Reed* decisions. *E.g., Kiser v. Kamdar*, 831 F.3d 784, 788 (6th Cir. 2016) (applying intermediate scrutiny test of *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980), to content-based restriction on dentist's advertising). It is also consistent with recent actions by this Court. *See Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144, 1151 (2017) (remanding for consideration of whether a statute governing price-disclosures should

be reviewed as a commercial speech regulation under *Central Hudson*, or whether it should be "upheld as a valid disclosure requirement" under *Zauderer v. Office of Disciplinary Counsel of Supreme Ct. of Ohio*, 471 U.S. 626 (1985) (allowing disclosure requirements that are "reasonably related" to the State's interest in preventing deception of consumers)).

AWF contends (Pet. 18-20) that certain lower court decisions interpret *Reed* as mandating strict scrutiny for *all* speech regulations that are content-based. But AWF's cases say nothing about *Reed*'s effect on speech in categories for which this Court had previously established a lesser standard of review. *Free Speech Coalition, Inc. v. Attorney General*, 825 F.3d 149, 176 n.7 (3d Cir. 2016), cited without criticism several post-*Reed* decisions continuing to apply intermediate scrutiny to content-based commercial-speech laws. Two of AWF's strict-scrutiny cases concerned core political speech. *See Pursuing America's Greatness v. FEC*, 831 F.3d 500, 508 (D.C. Cir. 2016); *Wagner v. Garfield Heights*, 2017 WL 129034, at *1 (6th Cir. 2017) (per curiam). Another posed the same question as *Reed* itself. *See Central Radio Co. v. City of Norfolk*, 811 F.3d 625 (4th Cir. 2016) (sign ordinance with exemptions for particular content was not a time-place-manner restriction). And *Norton v. City of Springfield*, 806 F.3d 411 (7th Cir. 2015), applied strict scrutiny to an ordinance that barred oral requests for money. Nothing in those decisions demonstrates any need for further review in this case.

d. Petitioners contend that the Ninth Circuit's decision conflicts with lower court decisions regarding abortion-related disclosures in particular. That is not correct.

NIFLA argues (Pet. 24) that the Ninth Circuit's decision conflicts with the portion of *Evergreen Ass'n, Inc. v. City of New York*, 740 F.3d 233 (2d Cir. 2014), that considered a New York City ordinance which required pregnancy centers to make several disclosures, including one about whether or not each center would provide, or provide referrals for, abortion, emergency contraception, or prenatal care. *Id.* at 238. The Second Circuit affirmed the district court's preliminary injunction against that particular mandated disclosure, holding that the requirement could not survive strict or intermediate scrutiny because it "overly burden[ed]" the centers' speech. *Id.* at 249. But the ordinance in *Evergreen* applied only to centers that were *not* "'licensed ... to provide medical or pharmaceutical services'" and that did *not* "have a licensed medical provider on staff." *Id.* at 239. *Evergreen* thus did not consider or decide the questions concerning professional speech regulation that the Ninth Circuit addressed here.

Petitioners contend that the Ninth Circuit's decision conflicts with *Stuart v. Camnitz*, 774 F.3d 238 (4th Cir. 2014). *See* Livingwell Pet. 20-24; NIFLA Pet. 29; AWF Pet. 25. *Stuart* concerned a North Carolina law that required a doctor or technician to perform a sonogram on any woman seeking an abortion, to display the sonogram so that the woman would see it unless she "avert[ed] her eyes," to offer the woman the ability to hear the fetal heartbeat, and to give a detailed description of the fetus's "'presence, location, and dimensions'" and "'the presence of external members and internal organs.'" *Stuart*, 774 F.3d at 243. The Fourth Circuit in *Stuart*, like the Ninth Circuit here, rejected rational basis review and in-

stead applied a "heightened intermediate scrutiny standard." *Id.* at 248.[14] The statute in *Stuart* did not survive that scrutiny because "the context surrounding the delivery of [the state-mandated message] promote[d] the viewpoint the state wishe[d] to encourage." *Id.* at 253. "[U]nusual" features of the North Carolina disclosure requirement reinforced that its purpose was not to provide neutral information, but to make the discussion of abortion distasteful. *Id.* at 254-255. Moreover, unlike the law in *Casey* and California's law here, the North Carolina statute required the physician herself to speak the message, rather than simply "[i]nforming a patient that there are state-issued materials available." *Id.* at 253. Nothing in *Stuart* implies that the Fourth Circuit would have come to a different conclusion than the Ninth Circuit on the quite different facts of this case.

e. Finally, the State argued below that at least some of the activities of the licensed facilities were commercial speech and could be regulated as such. *See, e.g.*, Livingwell Pet. App. 31-32 (district court decision noting the commercial speech question). Although the court of appeals rejected the argument, NIFLA Pet. App. 18a n.5, it would provide an independent basis for sustaining the judgment below if the Court were to grant review in this case.

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[14] Because the decision below upheld California's notice requirement for licensed facilities under intermediate scrutiny, this case does not implicate AWF's view that a standard of review that is even lower should apply to other kinds of abortion-disclosure regulations. AWF Pet. 25-26 (citing *Texas Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570 (5th Cir. 2012), and *Planned Parenthood Minn. v. Rounds*, 530 F.3d 724 (8th Cir. 2008)).

2. The court of appeal also correctly affirmed the denial of a preliminary injunction with respect to NIFLA's Free Speech challenges to the notice that unlicensed facilities are required to give. NIFLA Pet. App. 36a-39a.

The notice requirement for unlicensed facilities applies only to facilities whose characteristics—such as the provision of ultrasound examinations and pregnancy tests, *see* p. 5, *supra*—could mislead visitors into believing that they are receiving care under the supervision of licensed medical professionals. The Act requires disclosure only of the fact that the facility "is not licensed as a medical facility by the State of California and has no licensed provider who provides or directly supervises the provision of services." *See* p. 6, *supra*. The court of appeals concluded that the disclosure was likely to survive strict scrutiny, because it is narrowly tailored to achieve the State's compelling interest in ensuring "that women, who may be particularly vulnerable when they are searching for and using family-planning clinical services, are fully informed that the clinic they are trusting with their well-being is not subject to the traditional regulations that oversee those professionals who are licensed by the state." NIFLA Pet. App. 37a-38a.

As NIFLA concedes (Pet. 25 n.4), the Second Circuit in *Evergreen* also upheld, under strict scrutiny, a requirement for unlicensed centers to "disclose whether or not they 'have a licensed medical provider on staff who provides or directly supervises the provision of all of the services at such pregnancy services center.'" 740 F.3d at 246.[15] *Evergreen* reasoned that

[15] This Court denied the *Evergreen* plaintiffs' petitions (continued...)

such a disclosure "is the least restrictive means to ensure that a woman is aware of whether or not a *particular* pregnancy services center has a licensed medical provider at the time that she first interacts with it." *Id.* at 247. *Evergreen* rejected an argument that New York should instead have barred only purposeful deception. A woman is harmed if a center's attributes lead her to believe erroneously that she is receiving care from licensed professionals, even in the absence of any active deception. *Id.*

NIFLA contends (Pet. 31-36) that the decision below is inconsistent with *Riley v. National Federation of the Blind of North Carolina*, 487 U.S. 781 (1988). *Riley* invalidated a North Carolina requirement that a nonprofit's paid fundraisers disclose to potential donors "the average percentage of gross receipts actually turned over to charities by the fundraiser for all charitable solicitations conducted in North Carolina within the previous 12 months." *Id.* at 786. The Court rejected North Carolina's attempt to defend the law as necessary to prevent donors from giving money under a mistaken assumption about how much would go to the soliciting charity. *Id.* at 798. But part of *Riley*'s reasoning for why that disclosure was unnecessary was that a separate provision of North Carolina law, which the plaintiffs had not challenged, *id.* at 786, "require[d] professional fundraisers to disclose their professional status to potential donors," *id.* at 799. *Riley* thus "suggest[s] that a requirement that solicitors disclose their professional status is 'a narrowly tailored requirement [that]

(...continued)
for certiorari on that issue. *See* 135 S. Ct. 435 (2014) (denying certiorari in Case Nos. 13-1462 and 13-1504).

would withstand First Amendment scrutiny.'" *Evergreen*, 740 F.3d at 248.[16]

In its question presented and elsewhere (Pet. i, 1, 10, 16, 32-33), NIFLA now focuses on the Act's requirement that notices be provided in Medi-Cal threshold languages, which NIFLA says would require it to use 13 languages in Los Angeles County and six languages in San Diego County. Neither that argument nor any supporting evidence was presented to the district court. Indeed, NIFLA's district court pleadings regarding its motion for a preliminary injunction did not raise the multiple-language issue at all. *See* NIFLA D. Ct. Doc. 3 (Motion); NIFLA D. Ct. Doc. 17 (Reply); NIFLA Pet. App. 85-122a (Com-

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[16] NIFLA contends (Pet. 32 n.5) that the Ninth Circuit's ruling as to notices by unlicensed providers conflicts with *Centro Tepeyac v. Montgomery County*, 5 F. Supp. 3d 745 (D. Md. 2014). But the *Centro Tepeyac* ordinance required that a disclosure about lack of medical personnel be made by *every* "'organization, center or individual'" that "'has a primary purpose to provide pregnancy-related services'" and "'provides information about pregnancy-related services'" without a licensed professional on staff. *Id.* at 748. California's requirement applies only to facilities with certain characteristics that could create a misimpression about whether they are in fact medical clinics. And the *Centro Tepeyac* ordinance required a covered facility to disclose not only that it "'does not have a licensed medical professional on staff,'" but also that "'the Montgomery County Health Officer encourages women who are or may be pregnant to consult with a licensed health care provider.'" *Id.* The district court decision cited by NIFLA did not decide whether it would have violated the First Amendment to require only the first disclosure. *Id.* at 754. When the Fourth Circuit considered the two provisions separately at an earlier stage of that case, it upheld the denial of a preliminary injunction as to the first disclosure. *Centro Tepeyac v. Montgomery County*, 722 F.3d 184, 189-190, 192 (4th Cir. 2013) (en banc).

plaint). NIFLA belatedly raised a form of the argument at the court of appeals, based on more limited (and inconsistent) assertions. *See* NIFLA C.A. Opening Br. 17 (arguing that law would require notice to be provided "in up to four languages"); *id.* at 54 (five languages). NIFLA's accusation (Pet. 15) that the lower courts failed to address the Act's multiple language requirement simply underscores NIFLA's failure to properly present or preserve the issue. There is no reason for this Court to address the language requirement in the first instance, in a preliminary injunction posture, on a nonexistent record.

The same is true of NIFLA's claims about how the Act's language and type-size requirements would interact with newspaper rates to make advertising "cost prohibitive" (Pet. 1, 16, 25, 32-33)—assertions that likewise were not presented to the courts below. And although NIFLA alleged generally at the district court that web advertisements on services such as Google "have limits on their size, such as in the number of characters that can be used," NIFLA Pet. App. 100a, NIFLA's submissions to the lower courts did not provide specific allegations about what those limits are or about how members' advertisements would be affected.[17] Even if NIFLA intends to provide further information to support its claims at a later stage, the district court did not abuse its discretion in withholding a preliminary injunction given the record before it. And the absence of proper argument

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[17] *See* NIFLA D. Ct. Doc. 51, at 20 (Jan. 28, 2016, Tr.) (court's observation about the absence of information in the record regarding "what [the plaintiffs'] advertisements say and how they might be impacted by the disclosure required by the statute").

and evidence in the courts below makes this case ill-suited for review of any related issue, at least in its current posture.[18]

3. AWF (Pet. 31-35) and NIFLA (Pet. 36-38) also challenge the lower courts' rejection of their requests for preliminary relief based on the Free Exercise Clause. NIFLA Pet. App. 39a-42a.

The Free Exercise Clause provides that "Congress shall make no law . . . prohibiting the free exercise" of religion. U.S. Const., amend I. It prevents "governmental regulation of religious beliefs as such." *Employment Div., Dep't of Human Res. of Ore. v. Smith*, 494 U.S. 872, 877 (1990) (emphasis omitted). But the Free Exercise Clause "does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" *Id.* at 879. Thus, a neutral law of general application need not be justified by a compelling interest, even if it has the incidental effect of burdening a particular religious practice. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993).

A law is neutral for these purposes if its object, as determined by its text and operational effect, is something other than the infringement or restriction of religious practice. *Lukumi*, 508 U.S. at 532-533, 535. A law is generally applicable if it does not "im-

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[18] That is particularly so because the Act's severability clause, *see* NIFLA Pet. App. 82a-83a, would require the Court to assess not only the combined effect of the Act's language, advertising, and other requirements, but also the separate effect of each individual provision.

pose special disabilities on the basis of religious views or religious status." *Smith*, 494 U.S. at 877. The FACT Act, which makes no distinction based on a particular licensed or unlicensed facility's religious affiliation, beliefs, or position on abortion, meets these tests.

Relying on *Lukumi*, NIFLA claims (Pet. 37-38) that the Act was designed to target antiabortion facilities, and that most such facilities are religiously motivated. The argument fails. *Lukumi* considered the constitutionality of ordinances that interfered with the Santeria religion's practice of ritual sacrifice. 508 U.S. at 526. The ordinances outlawed "'sacrific[ing]'" or killing animals "'for any type of ritual.'" *Id.* at 527. Most other kinds of animal killings were permitted, including hunting, fishing, meat production, pest extermination, and euthanasia. *Id.* at 536-537. In effect, the ordinances applied only to the Santeria Church. *Id.* at 537-538. The Court held that these "gerrymandered" ordinances were not neutral or generally applicable. *Id.* at 542.

Nothing similar can be said here. The unlicensed notice requirement applies to *all* unlicensed facilities that primarily provide pregnancy-related services and that meet two or more of the criteria in section 123471(b). Thus, a commercial facility that is neutral toward or supportive of abortion could be subject to the notice requirement as a consequence of advertising and offering ultrasounds. § 123471(b)(1), (3).[19]

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[19] *See* Cari Romm, FDA Warning: Stay Away From "Keepsake" Ultrasounds, *The Atlantic*, Dec. 16, 2014 (discussing businesses that offer "medically unnecessary scans ... administered by people with no healthcare training"), available at https://www.theatlantic.com/health/archive/2014/12/fdawarning

(continued...)

Licensed facilities, too, are subject to the Act's requirements based on criteria that are neutral as to religious motivation or stance on abortion. *See* § 123471(a).

Nor do the Act's exemptions amount to evidence of a "gerrymander" in the *Lukumi* sense. The exemption for clinics "conducted, maintained, or operated by the United States or any of its departments, officers, or agencies," § 123471(c)(1), simply recognizes that the State may lack power to regulate such entities. And the exemption for licensed clinics that are already "enrolled as a Medi-Cal provider and a provider in the Family [PACT] Program," § 123471(c)(2), recognizes that there is no reason to mandate notice of a phone number for accessing free or low-cost public services at facilities that are able to (and have the incentive to) enroll eligible patients in those very programs themselves. See NIFLA Pet. App. 77a.[20] It

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(...continued)
-stay-away-from-keepsake-ultrasounds/383816/.

[20] NIFLA now claims that the exemption for Family PACT participants "is the method by which the State excludes all others but the pro-life centers" and thus "forces only those centers that oppose abortion to speak the State's message." NIFLA Pet. 8-9; *see also id.* at 18, 20-21. At the court of appeals, however, NIFLA pointed to this exemption not as evidence of an anti-religious or viewpoint-discriminatory gerrymander, but only as something that "undermines the alleged importance of [the State] interest" in informing women. NIFLA C.A. Br. 47. Livingwell claims (Pet. 23) that the exemption for Medi-Cal Family PACT providers results in viewpoint discrimination because Family PACT providers are not required to inform women of alternatives to abortion. But Medi-Cal providers commonly cover the alternatives to abortion: prenatal care and live birth. *See* pp. 1-2, *supra*.

does not function to exempt abortion providers.[21] Indeed, offering abortion services is one of the factors that may make a licensed clinic subject to the notice requirement, § 123471(a)(5), and notice by such a provider would alert women to the availability of an alternative: prenatal care. *See* pp. 3-4, *supra*. NIFLA argues (Pet. 38) that groups opposed to abortion generally cannot participate in the Family PACT program because participants must "supply contraceptives [that such groups] believe work as abortifacients." But at least at this stage of the litigation, NIFLA has not introduced evidence of how broadly that belief is held among such entities, or that the exemption, in intent or operation, effectively singles out religious groups opposed to abortion.

4. Finally, these petitions concern only denials of motions for preliminary injunctive relief, which were litigated (by petitioners' choice) before discovery. Discovery in *Livingwell* has been completed in the interim, and it could be completed quickly in the other cases as well. Nothing bars petitioners from renewing their arguments in the lower courts on a full record. At this stage of the proceedings, however, review by this Court would be at best premature.[22]

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[21] Abortion is not a covered service under the Family PACT program, though it is covered under other Medi-Cal programs. *See* p. 2, *supra*.

[22] Moreover, NIFLA's complaint asserts that the notice requirement governing licensed clinics violates a federal statute and that the requirements imposed on both licensed and unlicensed facilities violate the California Constitution's Liberty of Speech Clause. NIFLA Pet. App. 116a-117a (asserting claims based on 42 U.S.C. § 238n and Cal. Const., art. I, § 2(A)). A pending state-court lawsuit, in which discovery has been com-

(continued...)

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted,

XAVIER BECERRA
Attorney General of California
EDWARD C. DUMONT
Solicitor General
JOSHUA A. KLEIN
Deputy Solicitor General
JONATHAN M. EISENBERG
ANTHONY R. HAKL
NOREEN P. SKELLY
Deputy Attorneys General

Counsel for Governor Edmund G. Brown, Jr. and Attorney General Xavier Becerra

May 24, 2017

(...continued)
pleted, challenges the Act based on three provisions of the California Constitution. *Scharpen Foundation, Inc. v. Becerra*, No. RIC1514022 (Riverside Cty. Super. Ct., filed Nov. 25, 2015). The State intends to defend against these challenges, but any plaintiff's success in enjoining the statute's enforcement on statutory or state constitutional grounds would make it unnecessary to consider the federal constitutional issues petitioners press here.

RECORD
NO.
BRIEFS

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No. 16-1140

IN THE
Supreme Court of the United States

NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES, D/B/A NIFLA, ET AL.,
Petitioners,

v.

XAVIER BECERRA, ATTORNEY GENERAL, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

JOHN C. EASTMAN
CENTER FOR CONSTITUTIONAL JURISPRUDENCE
Chapman University
Fowler School of Law
One University Drive
Orange, CA 92866
(877) 855-3330

ANNE O'CONNOR
NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES
5601 Southpoint Centre Blvd.
Fredericksburg, VA 22407
(540) 372-3930

DAVID A. CORTMAN
Counsel of Record
KRISTEN K. WAGGONER
KEVIN H. THERIOT
JORDAN W. LORENCE
ELISSA M. GRAVES
ALLIANCE DEFENDING FREEDOM
440 1st Street N.W.
Suite 600
Washington, D.C. 20001
(202) 393-8690
dcortman@ADFlegal.org

Counsel for Petitioners

DEAN R. BROYLES
THE NATIONAL CENTER FOR LAW AND POLICY
539 West Grand Avenue
Escondido, CA 92025
(760) 747-4529

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INTRODUCTION

This case presents an ideal opportunity for the Court to address a circuit conflict regarding the proper test for determining whether a compelled speech regulation on pro-life pregnancy centers survives First Amendment scrutiny.

The Ninth Circuit determined that the California Reproductive FACT Act (the "Act") is a neutral regulation of professional activity. However, in addition to it not being neutral, the Act impermissibly compels Petitioners to speak a government message and to promote government programs contrary to their pro-life beliefs. This conflicts with this Court's precedent, as well as rulings of other Circuits.

ARGUMENT

I. The Ninth Circuit decision upholding the compelled disclosures applicable to non-medical pregnancy centers conflicts with decisions of this Court.

The Ninth Circuit ruled that California may force non-medical facilities to recite extensive unwanted messages even under strict scrutiny, which Respondents concede applies to non-professionals. App. 36a–39a, Opp. 15. But this Court's decision in *Riley v. National Federation of the Blind*, 487 U.S. 781 (1988), struck down compelled disclosures by paid charitable solicitors under the First Amendment. The Act fails the strict scrutiny required by *Riley*.

Respondents have not explained how the Ninth Circuit decision regarding non-medical centers comports with *Riley*. The only argument Respondents have made is based on a mischaracterization of dicta in that case: they wrongly contend *Riley* noted that a requirement that paid solicitors disclose their professional affiliation might be narrowly tailored. Opp. 25 (citing *Riley*, 487 U.S. at 799; *Evergreen Ass'n, Inc. v. City of New York*, 740 F.3d 233, 248 (2d Cir. 2014)). This Court only mentioned that provision to show the state's interest in "full disclosure" is "not as weighty as the State asserts." 487 U.S. at 798. It was not included in the Court's list of potential regulations that are narrowly tailored. *Id.* at 799. *Riley*'s core holding is that the state could not require professional charitable solicitors to make unwanted disclosures prior to requesting donations because they would "almost certainly hamper the[ir] legitimate efforts" to advance a cause because an initial disclaimer might cause the listener to halt the conversation. 487 U.S. at 796–98, 800. Such is the case here.

Riley's mere dicta suggesting that a disclosure of professional status undermined the State's asserted interest does not mandate the conclusion that the Act's regulation of unlicensed centers is narrowly tailored. On the contrary, the burdensome nature of the Act effectively silences the unlicensed pregnancy centers' pro-life message. The Act requires a twenty-nine word disclosure to appear in myriad languages, and subject to strict font, size, and color

requirements. *See* Pet. for Cert. at 32–33. The Act imposes these burdensome requirements on all advertising, and renders it nearly impossible for unlicensed enters to engage in advocacy through advertisement. The Ninth Circuit ruled that California may force unlicensed facilities to recite extensive unwanted messages even under strict scrutiny, which Respondents concede applies to non-professionals' speech.[1] No limiting principle to this broad power to compel speech was provided by the Ninth Circuit. The Act cannot be narrowly tailored when its burdensome disclosures effectively silence the unlicensed centers' speech.

II. This Court and other Courts of Appeals apply strict scrutiny to professional advocacy speech.

Respondents argue that intermediate scrutiny is applicable to the licensed centers because the Act regulates professional speech or, alternatively, regulates commercial speech. Opp. 20–21. But this

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[1] Respondents allege that Petitioners have not preserved arguments concerning the Act's language, font, size, and color requirements. Petitioners' Complaint clearly cites the Act in its entirety as violative of the First Amendment, including the burdensome language, font, and size requirements. App. 81a–82a, 96a, 99a. Petitioners also made these arguments at the Ninth Circuit with no objection from Respondents. App. Br. 14, 54, 9th Cir. Case No. 16-55249, ECF No. 7. Petitioners' arguments are therefore preserved.

argument, and the Ninth Circuit's decision to apply intermediate scrutiny to the Act, directly conflicts with precedent of this Court and other Courts of Appeals regarding content and viewpoint based discrimination, as well as the regulation of pro bono professional speech.

a. The Act is content and viewpoint based, contrary to principles established in *Reed*.

Respondents effectively concede Petitioners' arguments that the Act is content and viewpoint discriminatory by not responding to them. The Act is unquestionably content discriminatory, as the Ninth Circuit itself recognized, *see* App. 22a, and Respondents admit, *see* Opp. 11, and therefore subject to strict scrutiny. Its requirements apply only to facilities that provide particular pregnancy information. Licensed pro-life pregnancy centers must post a disclaimer that states: "California has public programs that provide immediate free or low cost . . . contraception . . . and abortion," and to, "contact the county social services office at [insert telephone number]." App. 80a. *Reed v. Town of Gilbert*, which requires that content-based laws be "subject to strict scrutiny," 135 S. Ct. 2218, 2228 (2015), compelled the Ninth Circuit to apply strict scrutiny here. But the Ninth Circuit refused and applied intermediate scrutiny. App. 28a–36a.

The Act is also viewpoint based because it targets the pro-life viewpoint of pregnancy centers. Respondents have conceded that the "purpose and justification" of the Act is to target "crisis pregnancy

centers," that is, centers whose "principal aim is to discourage or prevent women from seeking abortions." App. 7a. Respondents further admit that the California legislature targeted "so-called 'crisis pregnancy centers'" because it believes "that they frequently provide women with medically inaccurate information, and that such clinics allegedly "present misleading information to women about reproductive medial services." Opp. 5, 13 (citing App. 37a). But no evidence that pregnancy centers had mislead anyone was presented to the legislature. The only evidence underlying the Act is biased, unscientific "reports" supplied by advocacy organizations that champion abortion, such as NARAL Pro-Choice California. *See* App. Br. 47, 9th Cir. Case No. 16-55249, ECF No. 7. The University of California, Hastings College of Law also issued a similar "report" that specifically explored strategies to restrict pro-life pregnancy centers. *Id.* It is little wonder then that the State imposed a broad prophylactic speech restriction only on licensed pro-life pregnancy centers. This Act was designed to target Petitioners' pro-life viewpoint. *See Sorrell v. IMS Health Inc.*, 564 U.S. 552, 566 (2011) (heightened scrutiny required when government regulates speech because it disagrees with the message).

Respondents allege that the purpose of the Act is to enroll citizens in Family PACT and Medi-Cal programs. *See* Opp. 2. But licensed medical pregnancy centers that participate in the Medi-Cal program may enroll participants in the Medi-Cal program and still be subject to the requirements of the Act. Petitioners object to participation in the Family PACT program because participating organizations must directly

provide abortifacient contraceptives. Again, the Act targets the Petitioners' pro-life viewpoint in conflict with *Reed*.

b. Strict scrutiny applies to the regulation of professionals' pro bono speech of licensed centers.

The Ninth Circuit's decision conflicts with this Court's decisions in *In re Primus*, 436 U.S. 412 (1978), and *NAACP v. Button*, 371 U.S. 415 (1963), which held that restrictions on pro bono speech in a regulated profession trigger strict scrutiny. The State claims that *In re Primus* and *Button* are inapplicable, Opp. 18–19, because the centers here deal with confidential medical services and not advocacy. Both of these points are incorrect. This Court applied strict scrutiny in both *In re Primus* and *Button*, even though both cases dealt with confidential legal services.

In re Primus held that regulations of attorney speech are subject to strict scrutiny where the attorney is offering services free of charge for public interest purposes. 436 U.S. at 437–38 & n. 2. This Court acknowledged that any regulation of pro bono advocacy speech must be done with "significantly greater precision" than regulations of the speech of licensed professionals for pecuniary gain. *Id.* at 438. Likewise, *Button*—which also dealt with the regulation of pro bono attorney speech—held that "only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms." 371 U.S. 415, 438 (1963). Here, licensed centers are engaging in speech for the advancement

of their pro-life viewpoint, offering their services for free. The central holding of both *In re Primus* and *Button* are therefore squarely on point.

Respondents attempt to distinguish this line of cases by alleging that the licensed centers provide confidential medical services, and therefore advocacy is not involved. Opp. 19 & n. 12. But the organizations in *In re Primus* and *Button* also provided confidential services, and the fundamental purpose of the pregnancy centers is to advocate a pro-life viewpoint by administering confidential services, just as in those precedents.

Respondents allege that *Moore-King v. County of Chesterfield*, 708 F.3d 560 (4th Cir. 2013), is inapplicable because the "recognition that States have greater latitude to regulate . . . a person's advice to a 'paying client' does not imply converse restrictions on the States' ability to regulate the pro bono services of professionals such as doctors and lawyers." Opp. 20. But *In re Primus* and *Button* state explicitly that there are more limitations on the state's ability to restrict the pro bono activities of licensed professionals when such activity is undertaken as a form of advocacy. *See In re Primus*, 436 U.S. at 432–33; *Button*, 371 U.S. at 429, 437–38. The Court in *Moore-King* held "the relevant inquiry to determine whether to apply the professional speech doctrine" is based on "whether the speaker is providing personalized advice in a private setting to a paying client." 708 F.3d at 569. The Ninth Circuit's refusal to apply this standard, and complete disregard for this Court's holding in *In re Primus* and

Button, conflicts with the precedent of this Court and the Fourth Circuit.

c. *Planned Parenthood v. Casey* does not compel a lower standard of review.

As Respondents agree, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), has been applied inconsistently by the Courts of Appeals. *See* Opp. 12. Resolving that conflict is an additional reason why the Court should grant this petition.

Casey allowed states to require physicians to disclose certain items to women before an abortion, but only as part of the process of obtaining their informed consent prior to conducting a medical procedure, and pursuant to the state's interest in protecting unborn life. 505 U.S. at 881–83. However, the Act compels speech long before any procedure is even contemplated by requiring a disclosure the moment a client walks in the door. This disclosure is not tied to any sort of procedure or treatment, and must be given even when no treatment or procedure is ever done. In these circumstances, *Casey*'s rule simply does not apply.

Moreover, Respondents concede that the Ninth Circuit admitted "some courts have applied [rational basis] review with respect to regulations of medical professionals' speech" pursuant to *Casey*. Opp. 18 & n. 11. But the Ninth Circuit "rejected the rational basis standard in favor of intermediate scrutiny." Opp. 15 & n. 11 (citing App. 25a–28a). This ruling

conflicts with the Eleventh Circuit's holding in *Wollschlaeger v. Governor of Florida*, which Respondents admit applied heightened scrutiny. *See* 848 F.3d 1293, 1301 (11th Cir. 2017). The court found that it "need not decide whether strict scrutiny applies" where the law failed even heightened scrutiny, though the court acknowledged that strict scrutiny would normally apply to such content-based regulations. *Id.* at 1308. Such an inconsistent application of *Casey* further warrants this Court's review.

d. The commercial speech doctrine is not applicable.

Respondents argue the commercial speech doctrine as an independent basis for declining review. However, the commercial speech doctrine is inapplicable to the speech of the licensed or unlicensed pregnancy centers, and the Ninth Circuit quickly—and correctly—dismissed Respondents' commercial speech argument. *See* App. 18a–19a & n. 11.

The District Court found, as a factual matter, that Petitioners "offer free information and services." App. 49a. But this court defines commercial speech as expression that "does no more than propose a commercial transaction." *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976)). No such speech is at issue here. Moreover, even commercial speech regulations were struck down under heightened scrutiny in *Sorrell v. IMS Health*, 564 U.S. 552, 557 (2011). *See also Riley*, 487 U.S. at 796 ("[W]e do not believe that the speech

retains its commercial character when it is inextricably intertwined with otherwise fully protected speech"). The viewpoint discriminatory measures at issue here demand an even higher level of scrutiny.

III. The Ninth Circuit's holding that the Act survives First Amendment scrutiny creates a circuit conflict.

The Act clearly targets pro-life pregnancy center's speech just as the regulations did in *Evergreen Association v. City of New York*, 740 F.3d 233 (2d Cir 2012). Yet Respondents claim that case is distinguishable because the regulations "went beyond merely supplying information in a neutral manner," Opp. 13, while the Act "does not use . . . language that suggests the California Legislature's preferences for prenatal care." *Id.* (citing App. 36a). But this is simply wrong.

In fact, the Second Circuit invalidated a requirement that pregnancy centers, like Petitioners, post a disclosure stating whether or not a facility provides referrals for abortion, emergency contraception or prenatal care (the "Services Disclosure"), *id.* at 238, because it implicated "a public debate over the morality and efficacy of contraception and abortion." *Id.* at 249. It held that the "Services Disclosure will change the way in which a pregnancy services center, if it so chooses, discusses the issues," contrary to the First Amendment. *Id.* at 249–50. The *Evergreen* Court noted that the Services Disclosure failed under either intermediate or strict scrutiny. *Id.* at 249. The Court further struck down a separate

mandatory notification that the City encourages women to consult with a licensed medical professional (the "Government Message"). *Id.* at 238.

The Act in this case lists the same items contained in *Evergreen's* Services Disclosure: abortion, contraception, and prenatal care. But it also states that California offers subsidies for those services, and tells women where to get them. App. 80a. The Act is therefore more constitutionally burdensome than the Services Disclosure struck down in *Evergreen* because it "requir[es] pregnancy services centers to advertise on behalf of" the government. 740 F.3d at 250. The circuit conflict is clear.

IV. The Ninth Circuit's decision holding that the Act does not violate the Free Exercise Clause conflicts with this Court's precedent.

Respondents allege that the Act does not violate the Free Exercise Clause because it is neutral and generally applicable pursuant to *Employment Division v. Smith*, 494 U.S. 872, 879 (1990). Opp. 28–31. But the Act is neither neutral nor generally applicable because it exempts broad segments of the medical community that engage in the same exact activities as Petitioners. Indeed, the Act is targeted only to entities, such as Petitioners, whose moral and religious beliefs compel them to oppose abortion.

Respondents contend that the Act does not violate the Free Exercise Clause because the Act applies to "all unlicensed facilities that primarily

provide pregnancy-related services," and to licensed facilities based on neutral criteria." *See* Opp. 29–30. However, the Act applies only to facilities which primarily provide pregnancy-related services, thus excluding myriad hospitals and clinics which provide the same or similar services, and further exempts providers who participate in both Medi-Cal and Family Planning, Access, Care, and Treatment Program ("Family PACT"). App. 78a–79a. Any center can avoid the Act's compelled speech requirements by joining both programs. But participation in the Family PACT program requires a center to provide "family planning services" that include "all FDA approved contraceptive methods and supplies." *See* http://www.familypact.org/Get%20Covered/what-does-family-pact-cover.

Licensed Petitioners cannot participate in the Family PACT program due to their religious beliefs, because doing so would require them to supply contraceptives that may cause abortions. Because the Act ties its exemption from the compelled speech to dispensing abortifacients, the Act's compelled speech requirements end up applying only to those centers that oppose abortion, many of which do so on religious grounds. The Act is therefore not neutral.

Moreover, the Act is not generally applicable as many medical facilities are exempted from its scope, including a variety of facilities that provide pregnancy-related services. App 80a. Respondents allege that the exemptions do not amount to a "gerrymander" under *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), because "the exemption for licensed clinics that are already

'enrolled as a Medi-Cal provider and a provider in the Family [PACT] Program,' § 123471(c)(2), recognizes that there is no reason to mandate notice of a phone number for accessing free or low-cost public services at facilities that are able to (and have the incentive to) enroll eligible patients in those very programs themselves." Opp. 30. By definition, the existence of an exemption means that the Act is not generally applicable.

Furthermore, the Act is gerrymandered under *Lukumi* because it applies exclusively to pro-life pregnancy centers, a majority of which are religious organizations that advocate against abortion in advance of their religious views. Strict scrutiny is required for this reason as well.

V. This Petition is an appropriate vehicle for this Court's review.

Respondents allege that review is inappropriate because discovery has not yet occurred. But, as the Ninth Circuit recognized, this case presents only issues of law, and there is no need for further fact finding. App. 16a ("This action turns on a question of law. Appellants seek to enjoin the enforcement of the Act on the grounds that it is unconstitutional. We require no further factual development to address Appellants' challenge."). Accordingly, no further factual development is required, particularly when the Act clearly compels speech in a content and viewpoint discriminatory fashion. All facts necessary to assess the legality of the statute are contained in the Complaint, and no further factual development is required.

CONCLUSION

For the foregoing reasons and those stated in the petition, this Court should grant review.

Respectfully submitted.

JOHN C. EASTMAN
CENTER FOR CONSTITUTIONAL JURISPRUDENCE
C/O Chapman University Fowler School of Law
One University Drive
Orange, CA 92866
(877) 855-3330

ANNE O'CONNOR
NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES
5601 Southpoint Centre Blvd.
Fredericksburg, VA 22407
(540) 372-3930

DEAN R. BROYLES
THE NATIONAL CENTER FOR LAW AND POLICY
539 West Grand Avenue
Escondido, CA 92025
(760) 747-4529

DAVID A. CORTMAN
Counsel of Record
KRISTEN K. WAGGONER
KEVIN H. THERIOT
JORDAN W. LORENCE
ELISSA M. GRAVES
ALLIANCE DEFENDING FREEDOM
440 1st Street N.W.
Suite 600
Washington, D.C. 20001
(202) 393-8690
dcortman@ADFlegal.org

Counsel for Petitioners

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RECORD AND BRIEFS

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No. 16-1140

In the Supreme Court of the United States

NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES, D/B/A NIFLA, ET AL., PETITIONERS,

v.

XAVIER BECERRA, ATTORNEY GENERAL OF CALIFORNIA, ET AL., RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* CARE NET IN SUPPORT OF PETITIONERS

John J. Bursch
BURSCH LAW PLLC
Counsel of Record
9339 Cherry Valley Ave SE, #78
Caledonia, MI 49316
(616) 450-4235
jbursch@burschlaw.com

Counsel for *Amicus Curiae*

QUESTION PRESENTED

Whether the Free Speech Clause or the Free Exercise Clause of the First Amendment prohibit California from compelling licensed pro-life centers to post information on how to obtain a state-funded abortion and from compelling unlicensed pro-life centers to disseminate a disclaimer to clients on site and in any print and digital advertising.

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INTEREST OF *AMICUS CURIAE*

Care Net is a national non-profit corporation and one of the largest affiliation organizations for pregnancy resource centers in North America. Care Net's mission is to promote a culture of life through the delivery of valuable, life-affirming, evangelistic ministry to people facing unplanned pregnancies and related issues. To accomplish this mission, Care Net provides education, support, and training for its more than 1,100 affiliates. Care Net also runs the nation's only real-time call center, providing pregnancy decision coaching.

Care Net is directly impacted by, and deeply concerned about, California's decision to force pregnancy resource centers in California to become spokespersons for the abortion industry. As detailed below, such compelled speech of a non-commercial, religiously-motivated entity violates the Free Speech and the Free Exercise Clauses of the First Amendment.[1]

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[1] Consistent with this Court's Rule 37.6, *amicus curiae* states that this brief was not authored in whole or in part by counsel for any party, and no person or entity other than Care Net and its counsel made a monetary contribution to the preparation or submission of this brief. In accordance with this Court's Rule 37.2, all parties were timely notified of Care Net's intent to file this brief, and correspondence consenting to the filing of this brief by all parties has been submitted to the Clerk.

INTRODUCTION

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein." *West Virginia Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 642 (1943). Yet such orthodoxy is precisely what the high and petty California politicians proscribe here. The Reproductive FACT Act was enacted with the admitted purpose of targeting pro-life pregnancy resource centers based on the centers' viewpoint that "discourage[s] abortion." Pet. App. 7a. The Act forces the centers to be spokespersons for the abortion industry via compelled speech—specifically, the posting of notices directing women how to obtain a state-funded abortion, and forcing utterance of the obvious fact that the centers do not provide medical treatment. The second requirement is an absurd command to dissuade clients; the first is anathema to organizations whose religiously-motivated speech and conduct is to save lives, not to take them.

In *Agency for International Development* v. *Alliance for Open Society International*, 133 S. Ct. 2321 (2013), this Court said the government could not condition funding on a recipient's promise to express a message; had such a policy been enacted as a direct speech regulation, it would "plainly violate the First Amendment," *id.* at 2327, because "freedom of speech prohibits the government from telling people what they must say," *id.* Yet telling pregnancy resource centers what *they* must say is the FACT Act's entire purpose. This Court should grant the petition and reverse.

STATEMENT

Care Net and its religiously-motivated speech

Care Net is a 501(c)(3) nonprofit that supports one of the largest networks of pregnancy centers in North America and runs the nation's only real-time call center providing pregnancy decision coaching. Care Net and its more than 1,100 affiliates acknowledge that every human life begins at conception and is worthy of protection. For anyone considering abortion, Care Net offers realistic alternatives and Christ-centered support. In 2015 alone, Care Net, its affiliated pregnancy resource centers, and its 30,000 volunteers helped bring more than 73,000 lives into the world.

Over the last seven years, eight of 10 women considering abortion when they entered a Care Net pregnancy center ultimately chose to foster their child's life. Those outcomes are a result of compassion and truthful communication from pregnancy center employees and volunteers. Specifically, Care Net training and best practices emphasize that:

- Everyone should be treated with compassion, unconditional love, and respect. It is important for pregnant mothers to know that someone is there for them, that they are not alone, and that the client advocate to whom they are speaking will walk through the situation with the pregnant mother. As the Bible instructs, "Carry each other's burdens, and in this way you will fulfill the law of Christ." Galatians 6:2 (NIV).

- Conversely, pregnant mothers should never be shamed or made to feel guilty for considering an abortion. An advocate's role is not to bring the conviction of sin—that comes only through the power of the Holy Spirit. Rather, an advocate must show compassion while speaking truth, reminding a pregnant mother that there is always help and hope for her situation.

- Pregnancy center client advocates use persuasion, not manipulation. Effective client advocates avoid potentially manipulative tactics like over-emphasizing abortion-procedure terms, exaggerating abortion risks, or using words like "kill," or "murder," no matter how passionate the client advocate feels about this issue. Client advocates are encouraged to pray before they speak, and to ask God what He wants to communicate to the pregnant mother. God empowers client advocates to present the truth in the most loving and compelling way possible, and it is through God's kindness that people are led to repentance. Romans 2:4b.

- Pregnancy center client advocates strive not to use confrontation negatively. While it is important for pregnant mothers to be fully informed about the impact abortion has on mothers, fathers, and babies, the goal is to speak the truth in love. Negative confrontation represents a failure to love. Client advocates trust that open and honest communication will bring others to the truth. Isaiah 55:11.

- Pregnancy center client advocates validate what pregnant mothers are thinking and feeling. Doing so opens the door to discuss those feelings. Invalidating a pregnant mother's emotions will make her feel isolated, unheard, or uncared for. Even when a client advocate does not agree with a pregnant mother's choice, the advocate can respond compassionately.

- Pregnancy center client advocates do not play the "blame game," and they do not compare pregnant mothers with others who did not get pregnant. Advocates remind mothers that they are fearfully and wonderfully made, Psalm 39:13; that God loves them unconditionally, John 3:16; and that God plans for them to prosper, with plans for a hope and a future, Jeremiah 29:11. Advocates explain that because Jesus felt that every one of us was worth dying for, the pregnant mother's life and that of her unborn child have immeasurable value and dignity.

- Pregnancy center client advocates do not tell pregnant mothers what they should and should not do. They listen well, encourage, give space, and try to present the bigger picture and the truth. True transformation can only come from the mother as God works on her heart. Cf. 2 Corinthians 3:18 ("And we all, who with unveiled faces contemplate the Lord's glory, are being transformed into his image with ever-increasing glory, which comes from the Lord, who is the Spirit.").

- Finally, pregnancy center client advocates offer non-judgmental post-abortion support. By speaking the truth in love, advocates show the love of God and respect pregnant mothers as an autonomous, capable individual. "[S]peaking the truth in love, we will grow to become in every respect the mature body of him who is the head, that is, Christ. From him the whole body, joined and held together by every supporting ligament, grows and builds itself up in love, as each part does its work." Ephesians 4:15–16.

In sum, Care Net's mission is one of love and life. But it can only pursue this mission through compassion and honest communication. When the government forces a pregnancy resource center to become a spokesperson for abortion, that compelled speech distorts the message and sows confusion.

California legislation targeting pro-life beliefs

The State of California has been a leader in pushing a pro-abortion agenda. California law gives teenagers the right to obtain contraception "without an adult's permission or knowledge."[2] In fact, clinics and healthcare providers are prohibited from giving "parents any information about their children's medical treatment, questions or prescriptions of contraception" unless the child consents.[3] California also provides funding for teenagers to obtain contraception without providing identification.[4]

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[2] NARAL California, Current Laws, https://goo.gl/Eo7PjA.

[3] *Id.*

[4] *Id.*

Unsurprisingly, minors also have the right to obtain an abortion "without notifying their parents or any other adult."[5] If a minor is unable to pay, California will provide the funding and the minor need not involve a parent or guardian.

California has enacted statutes that "protect" pregnant mothers from pro-life counselors who seek to communicate truthful information about the consequences of abortion.[6] Although there are no statewide buffer-zone laws, several major cities have enacted local laws that similarly "protect" pregnant mothers from frank and open speech.[7]

A California state law that went into effect in January 2014 dramatically expanded the supply of abortion providers in California by authorizing nurse practitioners, certified nurse midwives, and physician assistants to perform first-trimester abortions through "vacuum aspiration," [8] a procedure in which a suction catheter is inserted in utero to extract a preborn baby. In the words of the president of the National Abortion Federation, this law cements California's reputation as "the gold standard" for access to abortion.[9]

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[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *The Abortion Wars: New class of abortion providers helps expand access in California*, Los Angeles Times (Oct. 23, 2014), available at https://goo.gl/yD8dZH.

[9] *Id.*

Unlike most other states, "California does not have any of the major types of abortion restrictions—such as waiting periods, mandated parental involvement or limitations on publicly funded abortions."[10] Abortions in California represent 17.0% of all abortions conducted in the United States.[11]

In addition to the compelled-speech law at issue in this case, California's Legislature is considering legislation, AB-569, that would prohibit all employers—including religious employers—from taking an adverse employment action against employees who have an abortion.[12] And, like the compelled speech at issue here, the law requires employers to include a notice in their employee handbook notifying employees of their rights under AB-569.[13]

The subject of the present litigation is California's so-called Reproductive FACT Act. The Act requires non-medical, unlicensed pro-life organizations to provide extensive disclaimers that they are not a licensed medical organization, and it requires licensed medical centers that do not provide abortion to provide notice to all clients about how they can obtain a state-funded abortion. These obligations are not imposed on any other organizations, and are only targeted on those committed to foster life from conception to natural death.

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[10] Guttmacher Institute, *State Facts About Abortion: California*, https://goo.gl/cn3YHM.

[11] *Id.*

[12] AB-569, https://goo.gl/DNBH57.

[13] *Id.* § (b).

SUMMARY OF ARGUMENT

California's compelled-speech regulations violate the Free Speech Clause in two ways. First, the regulations force pregnancy resource centers to promote an idea—abortion—that they find morally repugnant. Second, the regulations force pregnancy resource centers to engage in unnecessary speech that dilutes the centers' own communications and message. These regulations are subject to strict scrutiny notwithstanding that California says it is only compelling "factual" speech; this Court has long held that compelled speech receives exacting scrutiny whether on matters of fact or opinion. And the level of scrutiny does not change based on the services that the centers provide, since those services do not require patient consent and are not commercial in nature. Moreover, California's regulations fail strict scrutiny because they compel communication of the State's orthodoxy on abortion, are underinclusive, and not narrowly tailored.

California's compelled-speech regulations also violate the Free Exercise Clause. That Clause protects religiously-motivated groups and individuals from being singled out and targeted by the government. And here, it is not difficult to conclude that California targeted religion and religious practices based on the political climate in which the regulations were enacted and the exemptions that the regulations contain.

The government has no power to interfere in a pregnancy resource center's mission by distorting its message. The petition should be granted, the Ninth Circuit reversed, and the Act held unconstitutional.

ARGUMENT

I. This Court should grant the petition and reverse the Ninth Circuit to protect the speech rights of pro-life, pregnancy resource centers.

The petition explains at length why this Court's review is necessary to resolve the conflict between the Ninth Circuit's decision below, this Court's free speech precedents, and the decisions of other circuits involving laws just like California's. Pet. 17–36. Care Net submits this *amicus* brief to highlight how California's compelled-speech regulation interferes with the speech of pregnancy resource centers.

Perhaps the most famous of this Court's decisions involving government-compelled speech is *Wooley* v. *Maynard*, 430 U.S. 705 (1977), the citizen challenge to New Hampshire's statute making it a crime to obscure the words "Live Free or Die" on the State's license plates. As it struck down the New Hampshire statute, this Court recognized that a "system which secures the right to proselytize religious, political and ideological causes must also guarantee the concomitant right to decline to foster such concepts." *Id.* at 714 (citing *W. Va. Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 633–34, 645 (1943) (Murphy, J., concurring)). In other words, the "right to speak *and the right to refrain from speaking* are complementary components of the broader concept of 'individual freedom of mind.'" *Ibid.* (emphasis added). That is because "[g]overnment-enforced [speech] inescapably 'dampens the vigor and limits the variety of public debate.'" *Id.* (quoting *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 279 (1964)).

Describing New Hampshire's requirement, this Court noted that it had the effect of "requir[ing] [state citizens to] use their private property as a 'mobile billboard' for the State's ideological message or suffer a penalty." *Wooley*, 430 U.S. at 715. Such coercive conduct is unconstitutional: "*The First Amendment protects the right of individuals* to hold a point of view different from the majority and *to refuse to foster*, in the way New Hampshire commands, *an idea they find morally objectionable*." *Id.* (emphasis added).

The *Wooley* Court acknowledged New Hampshire's self-professed interest in requiring the license-plate speech—promoting appreciation of history, individualism, and state pride—but did not find the interest sufficiently compelling to justify the regulation. "[W]here the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message." *Id.* at 717.

Thus, since at least the decision in *Woolev*, this Court has consistently recognized that compelled-speech laws are "subject to exacting First Amendment scrutiny." *Riley* v. *Nat'l Fed'n of Blind, Inc.*, 487 U.S. 781, 798 (1988) (government cannot "dictate the content of speech absent compelling necessity, and then, only by means precisely tailored"); *Turner Broad. Sys.* v. *FCC*, 512 U.S. 622, 642 (1994) ("laws that compel speakers to utter or distribute speech bearing a particular message are subject to the same rigorous scrutiny" as laws regulating speech based on content) (citing *Riley*, 487 U.S. at 798). Accordingly, California's forced-speech regulations are subject to strict scrutiny.

Importantly, the First Amendment does not provide any less protection simply because California's law compels purportedly factual speech. In *Riley*, this Court considered North Carolina regulations that required a professional fundraiser to disclose to a potential donor, before appealing for funds, the percentage of charitable contributions collected over the past year that were given to the charity. North Carolina argued that previous forced-speech precedents were inapplicable because the government was only requiring fundraisers to make true statements of fact. This Court rejected that distinction:

> These cases cannot be distinguished simply because they involved compelled statements of opinion while here we deal with compelled statements of "fact": *either form of compulsion burdens protected speech*. Thus, we would not immunize a law requiring a speaker favoring a particular government project to state at the outset of every address the average cost overruns in similar projects, or a law requiring a speaker favoring an incumbent candidate to state during every solicitation that candidate's recent travel budget. Although the foregoing factual information might be relevant to the listener, and, in the latter case, could encourage or discourage the listener from making a political donation, a law compelling its disclosure would clearly and substantially burden the protected speech. [*Riley*, 487 U.S. at 797–98 (emphasis added).]

There also can be no watering down of First Amendment requirements here based on decisions like *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, 505 U.S. 833, 884 (1992), or *Planned Parenthood of Minnesota, North Dakota, South Dakota* v. *Rounds*, 530 F.3d 724, 733–34 (8th Cir. 2008), cases that involved state regulation of medical professionals and patient informed consent. California's regulations do not target medical procedures that require informed consent of the patient. And this Court's precedents do not support government-required disclaimers or notices before one citizen may speak to another about healthcare issues. Pet. 27–29.

Finally, this case is not about the lesser scrutiny that applies to government regulation of commercial speech. Pregnancy resource centers are not in the business of making money; they are non-profits who do not charge for their services at all. As this Court explained in *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557 (1980), the government's power to regulate commercial speech extends only to "expression solely related to the economic interests of the speaker and its audience." *Id.* at 561. The primary message of pregnancy resource centers is not economic, it is political, social, and religious—to encourage pregnant mothers to preserve the lives of their unborn children. And under this Court's precedent, it is legally irrelevant that a pregnancy resource center is ultimately successful in depriving an abortion clinic of an economic transaction. See *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 761–62 (1976) ("[T]he speech whose content deprives it of protection cannot simply be speech *on* a commercial subject. No

one would contend that our pharmacist may be prevented from being heard on the subject of whether, in general, pharmaceutical process should be regulated or their advertisement forbidden.") (emphasis added). That is why a cigarette sale is a commercial transaction but an anti-smoking ad is not. *Id.*

On the merits, the Reproductive FACT Act fails strict scrutiny. Co-sponsored by the abortion advocacy group NARAL, the Act requires pregnancy resource centers to become couriers of California's pro-abortion ideology. Absent the Act, pregnancy resource centers would be free not to direct pregnant mothers to resources for State-funded abortions. Requiring them to do so violates the moral and religious convictions of the centers, their employees, and their volunteers. And it also dilutes the centers' message. When a center lovingly and truthfully speaks to pregnant mothers about God's will to honor the mother's life and dignity as well as that of her unborn child, the government compels the center to post signs providing advice about how to end the unborn child's life. The messages could not be more dissonant and contradictory. When a center's client advocate offers to help carry the burden of a pregnant mother as Christ commands, California requires the center to post a sign that essentially says the mother does not need to continue carrying any burden; the State will pay for an abortion. When a client advocate says that Jesus's death for us shows the immense worth and dignity of the mother and her unborn child, California requires the center to post a sign that communicates the message that there is no value or dignity in a developing fetus.

The legal result would be no different if California was instead trying to influence the other side of this emotional and highly-charged political issue. California could compel an abortion clinic to provide certain medical information so that a pregnant mother can make an informed choice before taking the life of her child. See, *e.g.*, *Casey*, *supra*. But it would violate the First Amendment for California to compel an abortion clinic to post signs informing pregnant mothers that the clinic does not provide live-birth deliveries or support for mothers choosing to continue their pregnancies, directing these women to information that could help them locate a nearby pregnancy resource center where they could reconsider their decision.

California's compelled-speech requirement is also underinclusive and not narrowly tailored to any interest California can articulate. The legislation is underinclusive because it does not regulate discussions of crucial healthcare issues when non-medical speakers discuss non-pregnancy topics, does not regulate pregnancy discussions by non-medical counselors at abortion clinics, and does not regulate pregnancy discussions by many other individuals who may be asked for advice concerning an unexpected pregnancy, such as counselors, teachers, priests, and parents.

Further, California's compelled-speech requirement is not narrowly tailored, because if California is concerned that pregnant mothers are unable to find abortion services, it can engage in public advocacy campaigns, advertise in newspapers and on the Internet, and enlist organizations that support abortion to carry that message to the public. Tellingly, California mandates licensed pregnancy resource

centers to make the abortion-services disclosure to all patients *regardless of the service they receive*, such as the provision of diapers or baby clothes, or even if there are no services being provided at all. Small wonder the Ninth Circuit's decision creates "a circuit split regarding the appropriate level of scrutiny to apply" in "abortion-related disclosure cases." App. 25a.

The Reproductive FACT Act also violates the First Amendment with respect to the extensive disclosure requirements it imposes on non-medical pregnancy resource centers, requiring such centers to include disclaimers in all advertising, in large font and in multiple languages, explaining that the centers do not offer medical services. Again, this is consequently akin to requiring an abortion clinic to include in all *its* advertising that the clinic does not perform live-birth deliveries or provide support for women who choose to bear their children. Though not as explicit as the obligation imposed on pregnancy resource centers that provide medical services, the pro-abortion message is just as ideological and offensive to pregnancy resource centers, their employees, and their volunteers.

These compelled disclaimers make advertising cost prohibitive. Pet. 32–33. Worse yet, they drown out the centers' life-affirming message. Pet. 33. And like the Act's requirement that medical centers direct clients to abortion services, the Act's compelled-disclaimer requirement supports no legitimate state interest. Neither the Ninth Circuit nor California identified any studies showing how women are harmed by unlicensed pregnancy centers, nor how the disclaimer would alleviate those harms. Pet. 34.

In sum, First Amendment supporters, whether pro-life or pro-abortion, should be able to agree that the government can never be in the business of promoting one side of an ideological battle by compelling the speech of those on the other side. In California, the target is pregnancy resource centers. In a different state, the target could be an abortion clinic. Elsewhere, it could be another controversial service entirely. Under the First Amendment, government-compelled speech is unconstitutional in all these circumstances.

California's regulation here is no different than if it forced Alcoholics Anonymous groups to post a sign at their meetings (1) informing participants that alcoholic drinks are not served, and (2) providing a listing of nearby bars and liquor stores. Buying and consuming alcohol is legal; AA encourages individuals not to engage in that legal activity. The government has no power to interfere in AA's mission by distorting its message. The same is true of California and pregnancy resource centers.

Accordingly, this Court should grant the petition, reverse the Ninth Circuit, and invalidate California's compelled-speech regulations because they "fail[ ] to respect [a pregnancy resource center]'s right not to utter a state-sponsored message that offends its core moral and religious principles." *Greater Baltimore Center for Pregnancy Concerns, Inc.* v. *Mayor & City Council of Baltimore*, 721 F.3d 264, 292 (4th Cir. 2013) (Wilkinson, J., dissenting). Even "[t]hose who support most firmly a woman's right to reproductive choice should find it the most disheartening [when a] court's First Amendment jurisprudence is trampling expressive privacy." *Id.* at 294 (Wilkinson, J. dissenting).

II. This Court should also grant the petition and reverse the Ninth Circuit to protect the religious rights of pro-life, pregnancy resource centers.

The First Amendment prohibits Congress from passing laws that interfere with the "free exercise" of religion, a prohibition that applies to the states via the incorporation doctrine. U.S. Const. amend. I; *Employment Division* v. *Smith*, 494 U.S. 872, 893 (1990). The Free Exercise Clause thus " 'protect[s] religious observers against unequal treatment,' and inequality results when a [decision-making body] decides that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation." *Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 542–43 (1993) (quotation omitted).

A law's facial neutrality is insufficient to take it outside the scope of the Free Exercise Clause. In *Lukumi*, for example, this Court "reject[ed] the contention . . . that [its free-exercise] inquiry must end with the text of the laws at issue." 508 U.S. at 534 (§ II.A.1, opinion of the Court). "Facial neutrality," said the Court, "is *not* determinative." *Id.* at 534 (emphasis added). Because the record in *Lukumi* "compel[led] the conclusion that suppression" of a religiously-motivated practice "was the object of the" otherwise facially neutral ordinances at issue, this Court held that the ordinances were "designed to persecute or oppress a religion or its practices," *id.* at 547 (§ IV, opinion of the Court); see also *id.* at 559 (Souter, J., concurring in part and in judgment) (joining § IV), were non-neutral, and violated the Free Exercise Clause.

Here, it is not difficult to conclude that California targeted religion and religious practices. The Act's scope is defined to apply only to facilities "whose primary purpose is providing pregnancy-related services." App. 78a. A hospital or clinic that covers non-pregnancy-related services is exempt, for example, even if the hospital or clinic offers the exact same services as the pregnancy resource center.

The Act also exempts from its compelled-speech requirements clinics that are both Medi-Cal providers and Family Planning, Access, Care, and Treatment Program enrollees. App. 79a. That exemption excludes pregnancy resource centers; to participate in the Family Planning, Access, Care, and Treatment Program, a clinic must provide "family planning services," including "all FDA approved contraceptive methods and supplies." Pet. 37. The result is that the Act's compelled-speech burdens fall exclusively on pregnancy resource centers whose religious beliefs preclude them from supplying all FDA approved contraceptive methods and supplies.

The Act represents the precise kind of religious targeting that *Lukumi* prohibits. It requires pregnancy resource centers to advertise a service to which they are religiously opposed and therefore do not offer, just in case someone who comes into the center might want to obtain that service elsewhere. That requirement constitutes religious discrimination and provides a separate and distinct reason for granting the petition, reversing the Ninth Circuit, and invalidating the Act.

CONCLUSION

This Court should grant the petition for certiorari.

Respectfully submitted,

John J. Bursch
Counsel of Record
Bursch Law PLLC
9339 Cherry Valley
Ave SE, #78
Caledonia, Michigan 49316
jbursch@burschlaw.com
(616) 450-4235

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Attorney for *Amicus Curiae*

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Supreme Court of the United States

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Petitioners,

v.

XAVIER BECERRA, ATTORNEY GENERAL, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

ILYA SHAPIRO
Counsel of Record
THOMAS A. BERRY
Cato Institute
1000 Mass. Ave. N.W.
Washington, D.C. 20001
(202) 842-0200
ishapiro@cato.org
tberry@cato.org

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QUESTION PRESENTED

Does the forced recitation of a government-mandated advertisement to every client of a pregnancy center, regardless of the client's individual circumstance, qualify as a regulation of "professional speech" subject to only intermediate First Amendment scrutiny?

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INTEREST OF THE *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan policy research foundation established in 1977 and dedicated to the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and produces the annual *Cato Supreme Court Review*. This case concerns Cato because it threatens the basic First Amendment right to be free from compulsory speech.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case asks whether licensed professionals can have their speech commandeered to advertise services that the government wishes to promote. California requires licensed clinics "whose primary purpose is providing family planning or pregnancy-related services" to deliver to each client the following message: "California has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women." Slip op. 7–8. There is an exception for clinics that actually enroll clients in these programs—so, in effect, the law applies only to clinics that oppose the very program they must advertise.

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[1] Rule 37 statement: All parties received timely notice of *amicus*'s intent to file this brief; their consent letters have been lodged with the Clerk. Further, no counsel for any party authored this brief in whole or in part and no person or entity other than *amicus* funded its preparation or submission.

Holding that the requirement regulates only "professional speech," the Ninth Circuit applied intermediate First Amendment scrutiny and upheld the law.[2] The definition of "professional speech" that the lower court applied is dangerously overbroad and requires this Court's correction. No one disputes that the speech of licensed professionals can be legitimately regulated in some circumstances. Medical doctors can be liable for malpractice if they fail to convey a diagnosis to a patient, for example, or if they fail to obtain informed consent before performing surgery. Some courts and scholars have argued that speech regulations of this type deserve their own doctrinal category—"professional speech"—and that a lower, "intermediate" level of scrutiny should be applied to such regulations. Others have argued that no new doctrinal tier is necessary, because the compelling need for malpractice enforcement and informed consent laws means that they would pass strict scrutiny. *See, e.g.*, Rodney A. Smolla, *Professional Speech and the First Amendment*, 119 W. Va. L. Rev. 67, 101 (2016) (arguing that "properly applied First Amendment principles would sustain the power of regulators to regulate professional speech in these instances. These are the very regulations that would typically be upheld even under application of the 'strict scrutiny' test.").

Amicus needs not take a side in this debate over doctrinal categories—and neither does the Court. That

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[2] The use of intermediate scrutiny may well have been outcome-determinative. The Ninth Circuit did not reach the factual question of whether California could have distributed this message itself, but admitted that "even if it were true that the state could disseminate this information through other means, it need not prove that the Act is the least restrictive means possible" in order to satisfy intermediate scrutiny. Slip op. 34.

is because the quality of true "professional speech" that justifies these limited regulations—namely an asymmetry of expert knowledge—is entirely absent here. For that reason, the compulsory speech that California has mandated neither warrants intermediate scrutiny nor overcomes strict scrutiny.

Moreover, review is warranted because the Ninth Circuit's test ignores the threat posed by compulsory recitation of government-selected facts. Under the court's test, a state can compel unwilling physicians to recite any fact that may be relevant to "the health of [the state's] citizens," a definition broad enough to encompass essentially any statement the government chooses. If left to stand, the decision below would allow states to force professionals of all kinds to promote products and services they morally oppose.

Finally, the Court should grant certiorari because lower courts have struggled for guidance in formulating the boundaries and definitions of true professional speech. As this case shows, the Court should weigh in before the definition of "professional speech" is dangerously expanded to the point where doctors effectively lose their First Amendment rights the moment they walk into their clinics.

ARGUMENT

I. THE NINTH CIRCUIT'S DEFINITION OF "PROFESSIONAL SPEECH" IS DANGEROUSLY OVERBROAD

A. "Professional Speech" Must be Limited to a Profession's Specialized Knowledge

Regulation of patient-physician speech is justified by the notion that when doctors speak to their patients, they "assume a fiduciary obligation faithfully

and expertly to communicate the considered knowledge of the 'medical community.'" Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 U. Ill. L. Rev. 939, 977 (2007). A doctor might, for example, be liable for malpractice if he fails to inform his client of relevant medical knowledge that only the doctor could be expected to know. At the crux of this duty is an asymmetry of specialized knowledge. As one legal scholar has described, "[t]he professional-client relationship is typically characterized by an asymmetry of knowledge. The client seeks the professional's advice precisely because of this asymmetry." Claudia E. Haupt, *Professional Speech*, 125 Yale L. J. 1238, 1243 (2016). *See also* Daniel Halberstam, *Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions*, 147 U. Pa. L. Rev. 771, 845 (1999). ("[T]he physician-patient relationship is marked by an imbalance of authority. Patients seeking the help of a physician tend to lack the knowledge to evaluate their own medical condition or to understand fully the various treatment options apart from their careful presentation by the physician.").

This asymmetry defines both the justification for, *and the limits of*, professional speech regulations. In the medical context specifically, "the scope of permissible regulation of the physician-patient dialogue must be determined with a view to the nature of the underlying relationship." *Id.* at 844–45.

With this standard in mind, it is clear that the compelled speech at issue here, a rote advertisement for a government program, does not have any of the qualities that uniquely characterize professional speech. The state's message requires no expert knowledge to

deliver. Nor is it in any way tailored to a client's unique circumstances as diagnosed by a doctor's professional judgment. When information does not require specialized medical knowledge to explain, a doctor holds no unique power over her patients. In other words, if a message can be understood fully by reading a website or brochure (as this advertisement can be), it is not one unique to the doctor-patient relationship.

Nonetheless, the Ninth Circuit held that the notice requirement "regulates professional speech." Slip op. 27. It reached this conclusion because "professional speech is speech that occurs between professionals and their clients in the context of their professional relationship. In other words, speech can be appropriately characterized as professional when it occurs within the confines of a professional's practice." Slip op. 27–28. The court thus applied only intermediate scrutiny, upholding the requirement on the theory that "California has a substantial interest in the health of its citizens, including ensuring that its citizens have access to and adequate information about constitutionally-protected medical services like abortion." Slip op. 32.

The Ninth Circuit's definition of "professional speech" is vastly overbroad. A *professional* may be speaking, but that, by itself, does not make it "professional speech." As this case shows, not all speech "that occurs between professionals and their clients in the context of their professional relationship" is speech grounded in unique expertise. Tellingly, the message that California mandates could be delivered just as competently by anyone who is *not* a licensed physician and for whom the "professional speech" doctrine would obviously *not* apply. The lower court focused exclusively on the *identity* of those compelled to speak and

the *setting* of the speech, in the process ignoring the core justification for the regulation of professionals.

Absent a limiting principle centered on expert knowledge, there is little a state could not force its licensed physicians to say under the auspices of "professional speech" regulation. The universe of "information" relevant to "the health of [a state's] citizens" is, after all, practically limitless. If the Ninth Circuit's reasoning is allowed to stand, California might constitutionally mandate that all doctors inform their patients where they can buy the cheapest nearby broccoli on the grounds that "California has a substantial interest in the health of its citizens, including ensuring that its citizens have adequate information about obtaining healthy foods like broccoli."

If this Court does not intervene, lower courts will continue to dangerously expand the ambit of so-called professional speech. One district court, for example, has suggested that any mandatory notice which "provides information relevant to patients' medical decisions" can be regulated as professional speech, because it "relates to the medical profession." *A Woman's Friend Pregnancy Resource Clinic v. Harris*, 153 F. Supp. 3d 1168, 1202 (E.D. Cal. 2015). The Court should reverse this trend and clarify the limits of professional speech before doctors are forced to be mouthpieces for promoting any product the state favors.

B. "Professional Speech" Must Be Tailored to a Particular Client's Circumstances

The fiduciary relationship between physician and patient involves not just the trust that a physician will relay expert knowledge. It also includes a trust that the physician will determine what advice is relevant *to*

a particular circumstance. "Under the knowledge community-focused theory of professional speech, the professional is to decide what is relevant professional information. The [professional] knowledge community's insights not only determine what accurate information is, but also what is relevant in any given situation according to the specific circumstances of the client." Haupt, *supra*, at 1300.

California's mandated one-size-fits-all recitation cannot be justified by the asymmetry of expertise that distinguishes professional-client relationships, because a patient's "interests are only served if the professional communicates information that is accurate (under the knowledge community's current assessment), reliable, and *personally tailored to the specific situation of the listener*." *Id.* at 1271 (emphasis added).

As Justice White accurately explained, speech cannot legitimately be regulated as professional speech when "a speaker does not purport to be exercising judgment on behalf of any particular individual with whose circumstances he is directly acquainted." *Lowe v. SEC*, 472 U.S. 181, 232 (1985) (White, J., concurring in the judgment). The rote recitation of a pre-written message delivered to *every* client clearly lacks this characteristic. California's regulation therefore does nothing to further the specific goals of professional speech regulations and must not be analyzed as one.

Nor can the mandatory message be justified as an informed-consent law. In *Planned Parenthood v. Casey*, this Court upheld a state informed-consent provision because it provided "truthful, nonmisleading information *about the nature of the procedure*" to women who planned to obtain an abortion. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 882

(1992) (plurality op.) (emphasis added). It is telling that the Court added the caveat "about the nature of the procedure." It is the fact that patients indicated an intent to undergo a specific procedure that triggered the required message. As Mark Rienzi explains:

> Doctors performing medical procedures need to obtain informed consent because, absent such consent, the procedure would constitute a battery and would expose them to liability. Thus, while it is entirely consistent with historical practice for state courts and legislatures to dictate the terms on which informed consent must be obtained by a doctor, these courts and legislatures have no similar role in requiring informed consent before merely talking about medical issues, much less as a required step before merely offering support and assistance to help someone through a pregnancy.

Mark L. Rienzi, *The History and Constitutionality of Maryland's Pregnancy Speech Regulations*, 26 J. Contemp. Health L. & Pol'y 223, 241 (2010).

California's message, by contrast, is not linked to any course of treatment recommended by a physician. Indeed, for the plaintiffs here and many other licensed pregnancy centers, it is not linked to any course of treatment such clinics will *ever* recommend.

In sum, the Ninth Circuit should have applied strict scrutiny here, because the rationales that may justify lower scrutiny for core professional speech simply are not present. The compulsory message is neither triggered by a physician's becoming aware of

any particular circumstance regarding his patient, nor does it relate any expert knowledge of which only licensed members of the profession can be expected to know. For these reasons, the speech it mandates is not professional speech at all. Instead, the law is a commandeering of certain persons to recite a government advertisement, and it must be analyzed as such.

II. COMPELLED SPEECH IN A DOCTOR'S OFFICE IS JUST AS DANGEROUS AS COMPELLED SPEECH IN ANY OTHER CONTEXT

A. Compelled Recitation of Selective Facts Allows the Government to Impermissibly Promote Its Agenda

This Court has previously warned that the mandated recitation of selective facts burdens First Amendment rights just as much as the mandated recitation of opinions. As the Court explained,

> either form of compulsion burdens protected speech. Thus, we would not immunize a law requiring a speaker favoring a particular government project to state at the outset of every address the average cost overruns in similar projects, or a law requiring a speaker favoring an incumbent candidate to state during every solicitation that candidate's recent travel budget.

Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 797–798 (1988).

This potential to put a thumb on the scale for the state's favored viewpoint is equally present in the context of medical advice. As one scholar explains, "[o]ne indicia of improper partisanship is underinclusiveness—that is, the imposition on doctors of unbalanced disclosure requirements that create the impression that government prefers one treatment to another." Paula Berg, *Toward a First Amendment Theory of Doctor-Patient Discourse and the Right to Receive Unbiased Medical Advice*, 74 B.U. L. Rev. 201, 262 (1994).

Precisely such indicia are present here. California mandates that clinics that do not provide abortions must tell clients where they can get one, but does not mandate, for example, that clinics that do not refer to adoption agencies must tell clients how to contact one.

The Ninth Circuit admitted that "the Act '[m]andat[es] speech that a speaker would not otherwise make' which 'necessarily alters the content of the speech.'" Slip op. 19 (quoting *Riley*, 487 U.S. at 795). But the test it applied—that a statute is permissible if it mandates recitation of "information about . . . medical services"—is wholly unresponsive to that concern. Indeed, it is so permissive that it would allow the state to engage in selective speech mandates even more blatant than the one here. To give just one example,

> Could a state have required physicians to tell any pregnant patient without health insurance who was contemplating an abortion that she should vote for Barack Obama in the 2012 presidential race if she was concerned about getting access to low-cost health insurance for herself and her unborn child through a state health-insurance exchange? This statement is

> truthful, non-misleading, and relevant to the patient's medical decision.

Jennifer M. Keighley, *Physician Speech and Mandatory Ultrasound Laws: The First Amendment's Limit on Compelled Ideological Speech*, 34 Cardozo L. Rev. 2347, 2350–51 (2013).

Whether a regulation this blatant is attempted or not, the power of the government to influence society by means of compelled physician speech should not be underestimated. "During certain historical periods . . . governments have overtly politicized the practice of medicine, restricting access to medical information and directly manipulating the content of doctor-patient discourse. For example, during the Cultural Revolution, Chinese physicians were dispatched to the countryside to convince peasants to use contraception." Berg, *supra*, at 201 (citations omitted).

The Ninth Circuit's permissive approach ignores this potential for abuse. The correct standard, once again, derives from the true definition of professional speech. A good-faith disclosure law does not mandate a recital of the state's preferred facts, but requires professionals to be candid in relaying what their own expertise tells them is relevant. "The State may ensure professionals' faithfulness to the public aspects of their calling, but it may not usurp their role or determine independently the bodies of knowledge that may be accessed or the individual judgments that may be rendered in a given case." Halberstam, *supra*, at 773.

B. Compelled Speech Violates Freedom of Conscience, Regardless Whether a Speaker Wishes to Enter a Public Debate

Compelled speech triggers First Amendment strict scrutiny not only because it impermissibly influences public debate but also because it "invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

This is no less true when the mandated speech consists of government-selected facts rather than opinions. For example, some investment funds invest only in stocks that those funds deem to be "ethical" by a particular moral or religious code. *See, e.g.*, Thomas M. Anderson, *The 7 Top Funds for Ethical Investing*, Kiplinger, July 2010, http://bit.ly/2oECcDZ. Suppose that a hypothetical financial services regulation requires that such funds inform their customers where and how they can buy stock in "non-ethical" companies that the funds themselves do not offer. Such a regulation, requiring funds to advertise precisely the companies to which they are morally opposed, would certainly burden their freedom of conscience just as much as many compelled recitations of opinions.

The regulation here "invades the sphere of intellect and spirit" of crisis pregnancy centers for precisely the same reason. It forces them to promote services to which they are morally opposed. Yet the lower court downgraded the right of professionals to be free from such compelled speech, because "'[w]hen professionals, by means of their state-issued licenses, form relationships with clients, the purpose of those relationships is to advance the welfare of the clients, rather than to

contribute to public debate.'" Slip op. 27 (quoting *Pickup v. Brown*, 740 F.3d 1208, 1228 (9th Cir. 2014)).

The Ninth Circuit, in both *Pickup* and the decision below, has created a false dichotomy. A speaker does not have to intend to "contribute to a public debate" to be free from a *compulsion* to support one side in that debate. Neither the schoolchildren in *Barnette* nor the private family in *Wooley v. Maynard* evinced any desire to enter into a public debate or broadcast their own message. There is no reason to hold physicians or other professionals to any higher standard.

III. THIS CASE PRESENTS AN EXCELLENT VEHICLE TO LEND CLARITY TO THE "PROFESSIONAL SPEECH" DOCTRINE

This Court should grant certiorari because the First Amendment rights of professionals have never been explicitly clarified. "Despite the century-old recognition of the regulation of professions, we still have, for example, no paradigm for the First Amendment rights of attorneys, physicians, or financial advisers when they communicate with their clients." Halberstam, *supra*, at 772. *See also* Haupt, *supra*, at 1241 ("The Supreme Court has never identified, with any clear boundaries, the category of professional speech."); Keighley, *supra*, at 2367 ("[W]hile the term 'professional speech' has entered into the doctrine and academic commentary, the degree of protection such speech should receive is unclear—'the phrase has been used by Supreme Court Justices only in passing.'") (quoting *Stuart v. Huff*, 834 F. Supp. 2d 424, 431 (M.D.N.C. 2011)).

As scholars have noted, "[t]here is now marked and explicit disagreement among the circuits regarding

[the] proper interpretation" of this Court's three-sentence treatment of professionals' First Amendment rights in *Casey*'s plurality opinion. Haupt, *supra*, at 1259 (citing *Stuart v. Camnitz*, 774 F.3d 238, 248–49 (4th Cir. 2014) (rejecting the Fifth and Eighth Circuits' interpretation), cert. denied sub nom. *Walker-McGill v. Stuart*, 135 S. Ct. 2838 (2015)). *Casey* thus "left the development of a coherent framework for the analysis of professional speech for another day." Halberstam, *supra*, at 837. This case presents an excellent opportunity to clarify the doctrine, so that doctors and other professionals are no longer at risk of having their speech unjustifiably commandeered.

CONCLUSION

For the foregoing reasons, and those stated by petitioners, the petition should be granted and the decision of the Ninth Circuit ultimately reversed.

Respectfully submitted,

ILYA SHAPIRO
Counsel of Record
THOMAS A. BERRY
Cato Institute
1000 Mass. Ave. N.W.
Washington, D.C. 20001
(202) 842-0200
ishapiro@cato.org
tberry@cato.org

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No. 16-1140

IN THE

Supreme Court of the United States

NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES, D/B/A NIFLA, ET AL.,

Petitioners,

v.

XAVIER BECERRA, ATTORNEY GENERAL, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

ILYA SHAPIRO
Counsel of Record
TREVOR BURRUS
MEGGAN DEWITT
Cato Institute
1000 Mass. Ave. N.W.
Washington, D.C. 20001
(202) 842-0200
ishapiro@cato.org

December 26, 2017

QUESTION PRESENTED

Does the forced recitation of a government-mandated advertisement to every client of a pregnancy center, regardless of the client's individual circumstance and not requiring any specialized knowledge to convey, qualify as a regulation of "professional speech" subject to less-than-strict First Amendment scrutiny?

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That's because the aspect of true "professional speech" that might justify these limited regulations—an asymmetry of expert knowledge—is entirely absent here.

For that reason, the compulsory speech that California has mandated neither warrants intermediate scrutiny nor overcomes strict scrutiny. The Act's requirements are both facially content-based—because they compel speech—and discriminate based on viewpoint. Both aspects require strict scrutiny, which the disclosure requirements cannot survive because (1) exemptions to the disclosure requirements illustrate that they are underinclusive, and (2) any number of other methods for distributing the same information would not impose significant burdens on speech.

The Ninth Circuit's test ignores the threat posed by compulsory recitation of government-selected facts. Under the court's test, a state can compel unwilling physicians to recite any fact that may be relevant to "the health of [the state's] citizens," a definition broad enough to encompass essentially any statement the government chooses. If left to stand, the decision below would allow states to force professionals of all kinds to promote products and services they morally oppose.

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With this standard in mind, it is clear that the compelled speech at issue here, a rote advertisement for a government program, does not have any of the qualities that uniquely characterize professional speech. The state's message requires no expert knowledge to deliver. Nor is it in any way tailored to a client's

unique circumstances as diagnosed by a doctor's professional judgment. When information does not require specialized medical knowledge to explain, a doctor holds no unique power over her patients. In other words, if a message can be understood fully by reading a website or brochure (as this advertisement can be), it is not one unique to the doctor-patient relationship.

Nonetheless, the lower court held that the notice requirement "regulates professional speech." *NIFLA*, 839 F.3d at 834. It reached this conclusion because "professional speech is speech that occurs between professionals and their clients in the context of their professional relationship. In other words, speech can be appropriately characterized as professional when it occurs within the confines of a professional's practice." *Id.* at 839. The court thus applied only intermediate scrutiny, upholding the requirement because "California has a substantial interest in the health of its citizens, including ensuring that its citizens have access to and adequate information about constitutionally-protected medical services like abortion." *Id.* at 841.

The Ninth Circuit's definition of "professional speech" is vastly overbroad: that a "professional" is speaking shouldn't be enough. Indeed, as this case shows, not even all speech "that occurs between professionals and their clients in the context of their professional relationship" is speech grounded in unique expertise. California's message could be delivered just as competently by anyone who is *not* a licensed physician and for whom the "professional speech" doctrine would obviously *not* apply. The lower court focused exclusively on the *identity* of those compelled to speak and the *setting* of the speech, ignoring the core justification for the regulation of professionals.

Absent a limiting principle centered on expert knowledge, there is little a state could not force its licensed physicians to say under the auspices of "professional speech" regulation. The universe of "information" relevant to "the health of [a state's] citizens" is, after all, practically limitless. If the Ninth Circuit's reasoning is allowed to stand, California might constitutionally mandate that all doctors inform their patients where they can buy the cheapest nearby broccoli on the grounds that "California has a substantial interest in the health of its citizens, including ensuring that its citizens have adequate information about obtaining healthy foods like broccoli."

Moreover, lower courts are free to dangerously expand the ambit of so-called professional speech. One district court, for example, has suggested that any mandatory notice which "provides information relevant to patients' medical decisions" can be regulated as professional speech, because it "relates to the medical profession." *A Woman's Friend Pregnancy Resource Clinic v. Harris*, 153 F. Supp. 3d 1168, 1202 (E.D. Cal. 2015). The Court should reverse this trend and clarify the limits of professional speech before doctors are forced to be mouthpieces for promoting any product or position the state favors.

B. "Professional Speech" Must Be Tailored to a Particular Client's Circumstances

The fiduciary relationship between physician and patient involves not just the trust that a physician will relay expert knowledge but also includes a trust that the physician will determine what advice is relevant *to a particular circumstance*. As Justice White accurately explained, speech cannot legitimately be regulated as

professional speech when "a speaker does not purport to be exercising judgment on behalf of any particular individual with whose circumstances he is directly acquainted." *Lowe v. SEC*, 472 U.S. 181, 232 (1985) (White, J., concurring in the judgment). The rote recitation of a pre-written message delivered to *every* client clearly lacks this characteristic.

"Under the knowledge community-focused theory of professional speech, the professional is to decide what is relevant professional information. The [professional] knowledge community's insights not only determine what accurate information is, but also what is relevant in any given situation according to the specific circumstances of the client." Haupt, *supra*, at 1300. California's mandated one-size-fits-all recitation cannot be justified by the asymmetry of expertise that distinguishes professional-client relationships because a patient's "interests are only served if the professional communicates information that is accurate (under the knowledge community's current assessment), reliable, and *personally tailored to the specific situation of the listener*." *Id.* at 1271 (emphasis added). California's regulation therefore does nothing to further the specific goals of professional speech regulations and must not be analyzed as one.

Nor can the mandatory message be justified as an informed-consent law. In *Planned Parenthood v. Casey*, this Court upheld a state informed-consent provision because it provided "truthful, nonmisleading information *about the nature of the procedure*" to women who planned to obtain an abortion. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 882 (1992) (plurality op.) (emphasis added). It is telling that the Court added the caveat "about the nature of

the procedure." It is the fact that patients indicated an intent to undergo a specific procedure that triggered the required message. As one observer explains:

> Doctors performing medical procedures need to obtain informed consent because, absent such consent, the procedure would constitute a battery and would expose them to liability. Thus, while it is entirely consistent with historical practice for state courts and legislatures to dictate the terms on which informed consent must be obtained by a doctor, these courts and legislatures have no similar role in requiring informed consent before merely talking about medical issues, much less as a required step before merely offering support and assistance to help someone through a pregnancy.

Mark L. Rienzi, *The History and Constitutionality of Maryland's Pregnancy Speech Regulations*, 26 J. Contemp. Health L. & Pol'y 223, 241 (2010).

California's message, by contrast, is not linked to any course of treatment recommended by a physician. Indeed, for the plaintiffs here and many other licensed pregnancy centers, it is not linked to any course of treatment such clinics will *ever* recommend.

In sum, the Ninth Circuit should have applied strict scrutiny because the rationales that may justify lower scrutiny for core professional speech are absent here. The compulsory message is neither triggered by a physician's becoming aware of a patient's particular circumstance, nor does it relate any expert knowledge of which only licensed members of the profession can

be expected to know. For these reasons, the speech it mandates is not professional speech at all. Instead, the law commandeers certain persons to recite a government advertisement, and it must be analyzed as such.

II. COMPELLED SPEECH IN A DOCTOR'S OFFICE IS JUST AS DANGEROUS AS COMPELLED SPEECH IN ANY OTHER CONTEXT

A. Compelled Recitation of Selective Facts Allows the Government to Impermissibly Promote Its Agenda

This Court has previously warned that the mandated recitation of selective facts burdens First Amendment rights just as much as the mandated recitation of opinions. As the Court explained,

> either form of compulsion burdens protected speech. Thus, we would not immunize a law requiring a speaker favoring a particular government project to state at the outset of every address the average cost overruns in similar projects, or a law requiring a speaker favoring an incumbent candidate to state during every solicitation that candidate's recent travel budget.

Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 797–98 (1988).

This potential to put a thumb on the scale for the state's favored viewpoint is equally present in the context of medical advice. As one scholar explains, "[o]ne indicia of improper partisanship is underinclusiveness—that is, the imposition on doctors of unbalanced

disclosure requirements that create the impression that government prefers one treatment to another." Paula Berg, *Toward a First Amendment Theory of Doctor-Patient Discourse and the Right to Receive Unbiased Medical Advice*, 74 B.U. L. Rev. 201, 262 (1994).

Such indicia are present here. California mandates that clinics that do not provide abortions must tell clients where they can get one, but does not mandate, for example, that clinics that do not refer to adoption agencies must tell clients how to contact one.

The Ninth Circuit admitted that "the Act '[m]andat[es] speech that a speaker would not otherwise make' which 'necessarily alters the content of the speech.'" *NIFLA*, 839 F.3d at 835 (quoting *Riley*, 487 U.S. at 795). But the test it applied—that a law passes muster if it mandates recitation of "information about . . . medical services"—is wholly unresponsive to that concern. Indeed, it is so permissive that it would allow the state to engage in selective speech mandates even more blatant than the one here. To give one example,

> Could a state have required physicians to tell any pregnant patient without health insurance who was contemplating an abortion that she should vote for Barack Obama in the 2012 presidential race if she was concerned about getting access to low-cost health insurance for herself and her unborn child through a state health-insurance exchange? This statement is truthful, non-misleading, and relevant to the patient's medical decision.

Jennifer M. Keighley, *Physician Speech and Mandatory Ultrasound Laws: The First Amendment's Limit*

on Compelled Ideological Speech, 34 Cardozo L. Rev. 2347, 2350–51 (2013).

Whether a regulation this blatant is attempted or not, the power of the government to influence society by means of compelled physician speech should not be underestimated. "During certain historical periods. . . governments have overtly politicized the practice of medicine, restricting access to medical information and directly manipulating the content of doctor-patient discourse. For example, during the Cultural Revolution, Chinese physicians were dispatched to the countryside to convince peasants to use contraception." Berg, *supra*, at 201 (citations omitted).

The Ninth Circuit's permissive approach ignores this potential for abuse. The correct standard, once again, derives from the true definition of professional speech. A good-faith disclosure law does not mandate a recital of the state's preferred facts but requires professionals to be candid in relaying what their own expertise tells them is relevant. "The State may ensure professionals' faithfulness to the public aspects of their calling, but it may not usurp their role or determine independently the bodies of knowledge that may be accessed or the individual judgments that may be rendered in a given case." Halberstam, *supra*, at 773.

B. Compelled Speech Violates Freedom of Conscience, Regardless Whether a Speaker Wishes to Enter a Public Debate

Compelled speech triggers First Amendment strict scrutiny not only because it impermissibly influences public debate but also because it "invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from

all official control." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

This is no less true when the mandated speech consists of government-selected facts rather than opinions. For example, some investment funds invest only in stocks that those funds deem to be "ethical" by a particular moral or religious code. *See, e.g.*, Thomas M. Anderson, *The 7 Top Funds for Ethical Investing*, Kiplinger, July 2010, http://bit.ly/2oECcDZ. Suppose that a hypothetical financial-services regulation requires that such funds inform their customers where and how they can buy stock in "non-ethical" companies that the funds themselves do not offer. Such a regulation, requiring funds to advertise precisely the companies to which they are morally opposed, would burden their freedom of conscience just as much as many compelled recitations of opinions.

The regulation here "invades the sphere of intellect and spirit," *Barnette*, 319 U.S. at 642, of crisis pregnancy centers for precisely the same reason. It forces them to promote services they morally oppose. Yet the lower court downgraded the right of professionals to be free from such compelled speech because "'[w]hen professionals, by means of their state-issued licenses, form relationships with clients, the purpose of those relationships is to advance the welfare of the clients, rather than to contribute to public debate.'" *NIFLA*, 839 F.3d at 839 (quoting *Pickup v. Brown*, 740 F.3d 1208, 1228 (9th Cir. 2014)).

The Ninth Circuit, in both *Pickup* and the decision below, has created a false dichotomy. A speaker does not have to intend to "contribute to a public debate" to be free from a *compulsion* to support one side in that debate. Neither the schoolchildren in *Barnette* nor, for

that matter, the private family in *Wooley v. Maynard*, 430 U.S. 705 (1977) ("Live Free or Die" license-plate case), evinced any desire to enter into a public debate or broadcast their own message—and this Court declined to force them to do so. There's no reason to hold doctors or other professionals to any higher standard.

III. THE FACT ACT, WHICH COMPELS SPEECH AND DISCRIMINATES BASED ON CONTENT AND VIEWPOINT, MUST BE ANALYZED UNDER STRICT SCRUTINY, WHICH IT CANNOT SURVIVE

The First Amendment protects against both speech prohibitions and compulsions. "Since all speech inherently involves choices of what to say and what to leave unsaid, one important manifestation of the principle of free speech is that one who chooses to speak may also decide what not to say." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Bos.*, 515 U.S. 557, 573 (1995). It was wrong for the Ninth Circuit to apply intermediate scrutiny when assessing the constitutionality of the compulsory disclosures.

Regulations that compel speech, such as the California FACT Act, are per se content-based because they require the speaker to alter the content of their message or to speak where they would otherwise remain silent. *Riley*, 487 U.S. at 795 ("Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech.") Content-based regulations of speech "are presumptively invalid," *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382 (1992), and courts "apply the most exacting scrutiny" to determine

whether regulations that discriminate based on content are constitutional. *Turner Broad. Sys. Inc. v. FCC*, 512 U.S. 622, 642 (1994).

Contrary to the Ninth Circuit's analysis, it is not necessary for a provision to discriminate based on viewpoint, *in addition to regulating speech based on content*, to warrant strict scrutiny. As the Court recently affirmed in *Reed v. Town of Gilbert*, "Government discrimination among viewpoints—or the regulation of speech based on 'the specific motivating ideology of the opinion or perspective of the speaker'—is a 'more blatant' and 'egregious form of content discrimination.'" 135 S. Ct. 2218, 2230 (2015) (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995)). Likewise, the laudable purpose of protecting public health cannot save the disclosure provisions from the most intense levels of inquiry. "A law that is content-based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech." *Id.* at 2228 (quoting *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993)), and "an innocuous justification cannot transform a facially content-based law into one that is content neutral." *Id.* at 2228. It is not necessary for determining the correct level of scrutiny to determine whether the FACT Act also discriminates on viewpoint, or whether the government can offer a seemingly reasonable justification for the disclosures.

Although, as the lower court suggested, viewpoint discrimination is a subset of content discrimination, and it is possible for a provision that discriminates based on content to be viewpoint neutral, that is not the case with the disclosures required by the FACT

Act. The Act blatantly favors a particular viewpoint by requiring crisis-pregnancy centers who wish to promote a pro-life message to be the state's mouthpiece and disclose information about the ready availability of abortion services. Unlike other centers not subject to the disclosure requirement, those objecting to delivering the state's favored message are being used to convey that preferred message precisely because of their views on abortion.

To remain consistent with this Court's precedent, the FACT Act's disclosure requirement must be examined under strict scrutiny as a provision that compels content-based and viewpoint-discriminatory speech. The Act fails that inquiry because it is underinclusive and there are less restrictive means available for achieving the same purpose.

The Act is underinclusive because it exempts all centers who enroll patients in the programs the state wishes to advertise. If the exact information, disclosed as required by the Act, was all-important, then it should also be required at *any* location providing services to pregnant women. That it is not a universal requirement indicates that the state's purpose may not be all that compelling—while a willingness to enroll women in the advertised programs *might* help each patient learn the necessary information, it in no way guarantees delivery of the same knowledge. Lack of universality in the disclosure requirement also demonstrates that less-restrictive ways of conveying the state's message are available, methods that do not excessively burden speech.

In fact, the state has an almost unimaginable number of ways to convey the same information it currently compels pregnancy centers to disclose in opposition to

their deeply held beliefs. The information could be emblazoned across billboards or leafletted at public and publicly accessible venues. It could be delivered by mail to every household in the state, or be made available on the Internet at a site that is cross-linked and posted across California's online presence. Or it could be distributed through all of the above suggested methods. None of these options burden speech as the current disclosures do; that these alternatives exist illustrates why the Act must fail strict scrutiny.

This Court should continue to faithfully abide by "the First Amendment's command that government regulation of speech must be measured in minimums, not maximums," *Riley*, at 790 (1988), and strike down the FACT Act's disclosure requirements as unconstitutional regulations of speech.

CONCLUSION

For the foregoing reasons, and those stated by petitioners, the Court should reverse the decision below.

Respectfully submitted,

ILYA SHAPIRO
Counsel of Record
TREVOR BURRUS
MEGGAN DEWITT
Cato Institute
1000 Mass. Ave. N.W.
Washington, D.C. 20001
(202) 842-0200
ishapiro@cato.org

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NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES, dba NIFLA, *et al.*,
Petitioners,

v.

XAVIER BECERRA,
Attorney General of California, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR *AMICUS CURIAE* CHARLOTTE LOZIER INSTITUTE IN SUPPORT OF PETITIONERS

CATHERINE GLENN FOSTER
Counsel of Record
THOMAS M. MESSNER
1200 New Hampshire Ave., N.W.
Suite 750
Washington, DC 20036
(202) 223-8073
cfoster@lozierinstitute.org

Counsel for Amicus Curiae

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae Charlotte Lozier Institute ("CLI" or "Lozier Institute") is the education and research arm of the Susan B. Anthony List. Named after a 19th century feminist physician who, like Susan B. Anthony, championed women's rights without sacrificing either equal opportunity or the lives of the unborn, the Lozier Institute studies federal and state policies and their impact on women's health and on child and family well-being.

In pursuit of its mission, Lozier Institute has undertaken a variety of initiatives focused on Pregnancy Help Centers ("PHCs"). For example, Lozier Institute has conducted a variety of survey research and evaluations designed to support PHC effectiveness and best practices. This research involves online survey instruments, market research, public opinion polling, message testing, and brand enhancement. Lozier Institute shares the results of this research with individual centers and center networks, combining quantitative measurements with advice on questions from presentation of services to nomenclature and avenues of advertising. Lozier Institute has also documented the popularity and reach of PHCs, supporting their efforts to communicate the value they offer to the public through low- and no-cost services to

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[1] No counsel for a party authored this brief in whole or part. No one other than *Amicus Curiae* Charlotte Lozier Institute or its counsel made a monetary contribution to the preparation or submission of this brief. On or before April 11, 2017, counsel of record for all parties received notice that *Amicus Curiae* Charlotte Lozier Institute intended to file this brief and all parties have consented to the filing of this brief.

some of the nation's most disadvantaged populations and communities.

The success of these vital nonprofits is a core part of Lozier Institute's vision for a better America. Lozier Institute has a strong interest in working to ensure that PHCs remain free to pursue their mission and live out the principles that inspire them to serve both mothers and their children.

SUMMARY OF THE ARGUMENT

Amicus Lozier Institute makes two arguments in support of the writ for a petition of certiorari.

First, more than 2,300 Pregnancy Help Centers ("PHCs") nationwide provide vital, highly valued services to vulnerable mothers and children on a free or low-cost basis. Amicus reviews and sets forth the findings of a major report on PHC work that demonstrates the enormous social value contributed by PHCs. For example, "In 2010, [PHCs] served over 2.3 million people with pregnancy assistance, abstinence counseling and education, community outreach programs and referrals, and public health linkages."[2] "A conservative estimate of community cost savings for these services during 2010 is over $100 million."[3] "In addition to specific cost savings, pregnancy centers drew on the help of 71,000 volunteers who performed

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[2] Family Research Council, *A Passion to Serve: How Pregnancy Resource Centers Empower Women, Help Families, and Strengthen Communities* iv (2d ed. 2010) [hereinafter PHC Report 2d Edition], http://downloads.frc.org/EF/EF12A47.pdf.

[3] *Id.*

an estimated 5,705,000 uncompensated hours of work in 2010."[4]

Direct services provided by PHCs, including medical PHCs, include ultrasound and other medical services, prenatal care, education on prenatal development, parenting education classes, and material assistance to mothers and children. PHCs also "play a critical role in referring women for necessary health care and support services across the country."[5] PHCs "are embedded within almost every type of community across the country,"[6] and PHC services "are generally provided at little or no cost to clients."[7]

The public value placed on PHC work manifests in various government actions. PHCs receive referrals from state health departments. Further, although primarily supported by private funding, PHCs have received financial support from both the federal and state governments. In addition, PHCs have been publicly commended or otherwise recognized by government at both the state and federal levels as well as by many individual public officials and community leaders.

Finally, *Amicus* explains that "[PHCs] receive an extraordinarily high approval rating from the clients

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[4] *Id.* at 1.

[5] *Id.* at 11.

[6] *Id.*

[7] *Id.* at 7.

they serve."[8] One national PHC affiliation organization claims that PHC satisfaction ratings it measured were higher than those of Netflix, Chipotle, and the iPhone. These findings correspond closely with the findings of a 2015 report that found very high ratings on experience with PHCs and the desirability of having organizations like PHCs in local communities.

Second, Amicus *argues that forcing PHCs to refer for abortion undermines their mission and the principles that inspire them to serve vulnerable mothers and children.* For the people who are employed by, donate to, or volunteer with local PHCs, the work is truly a labor of love. PHCs are devoted to loving both mothers and children through practical action. In many if not most cases this devotion springs from deeply held religious or moral commitments about the value of all human life and the obligation to serve those in society who are suffering, in crisis, or at disadvantage. Forcing PHCs to refer for abortion undermines their mission and burdens the principles that inspire them to serve mothers and children.

Whatever interest California might assert in providing information about the availability of abortion services, it cannot be denied that, as this Court has

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[8] Brief for Pregnancy Care Organizations Care Net, Heartbeat Int'l, Inc., Nat'l Inst. of Family and Life Advocates *et al.* as *Amici Curiae* Supporting Plaintiffs-Appellees at 2, *Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor and City Council of Balt.*, 683 F.3d 539 (4th Cir. 2012) (No. 11-1111) [hereinafter Brief for Pregnancy Care Organizations and Centers], http://www.aul.org/wp-content/uploads/2011/06/11-1111-Greater-Baltimore-Center-v-Mayor-and-City-Council-of-Baltimore-PCC-amicus-brief.pdf.

stated, abortion is a "unique act," *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 852 (1992), and is "inherently different from other medical procedures, because no other procedure involves the purposeful termination of a potential life," *Harris v. McRae*, 448 U.S. 297, 325 (1980). In the words of one federal court, "[t]he rationality of distinguishing between abortion services and other medical services when regulating physicians or women's healthcare has long been acknowledged by Supreme Court precedent." *Greenville Women's Clinic v. Bryant*, 222 F.3d 157, 173 (4th Cir. 2000). Nowhere is the "unique" and "inherently different" nature of abortion more deeply felt than in forcing pro-life individuals and institutions to promote or participate in it.

ARGUMENT

More than 2,300 Pregnancy Help Centers ("PHCs") nationwide provide vital, highly valued services to vulnerable mothers and children on a free or low-cost basis. Forcing PHCs to refer for abortion undermines their mission and the principles that inspire them to serve vulnerable mothers and children.

I. More than 2,300 Pregnancy Help Centers Nationwide Provide Vital, Highly Valued Services to Vulnerable Mothers and Children on a Free or Low-Cost Basis.

More than 2,300 Pregnancy Help Centers ("PHCs") nationwide provide vital social and, in some cases, medical services to vulnerable mothers and children.[9]

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[9] This brief uses the term "Pregnancy Help Centers" (PHCs). Other terms that have been used include the now generally disfavored

PHCs function as important links in community public health networks. The public value placed on PHC work manifests in various government actions including referrals, funding, and recognitions. Individual consumers also strongly value the contributions of PHCs in their local communities.

A. Data from 2010 Shows that Pregnancy Help Centers Served More than 2 Million People, with Estimated Community Cost Savings of More than $100 Million.

Pregnancy Help Centers (PHCs) provide a variety of free and low-cost services to pregnant women and other consumers. PHCs number "more than 2,300" nationwide.[10] Major national affiliation organizations for PHCs include Petitioner National Institute of Family and Life Advocates (NIFLA), Heartbeat International, and Care Net.

"Recording the scope of pregnancy center work in the United States poses challenges due to the differences in reporting among the many agencies involved, which are collaborating with increasing frequency."[11] However, the Family Research Council ("FRC"), a Washington, D.C., think tank, published a

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"Crisis Pregnancy Center" (CPC) designation, as well as "Pregnancy Resource Centers" (PRCs), "Pregnancy Care Centers" (PCCs), and "Pregnancy Medical Centers" (PMCs).

[10] Family Research Council, *A Passion to Serve, A Vision for Life* 14 (2009) [hereinafter PHC Report 1st Edition], http://downloads.frc.org/EF/EF09I51.pdf.

[11] *Id.* at 21.

report ("PHC Report") in 2009 on pregnancy center work that uses information including "published data from the major national affiliation groups."[12] A subsequent report ("PHC Report 2d Edition") published by FRC includes updated data from 2010 "to quantify the positive impact" made by PHCs.[13]

The PHC Report 2d Edition estimated the accomplishments of nearly 2,000 PHCs "using two online surveys completed by pregnancy centers affiliated with Care Net, Heartbeat International, and NIFLA."[14] Of note, "[t]he data represent only pregnancy centers in the U.S. affiliated with one or more of these organizations."[15]

The PHC Report 2d Edition includes the following findings.

- "In 2010, [PHCs] served over 2.3 million people with pregnancy assistance, abstinence counseling and education, community outreach programs and referrals, and public health linkages."[16]

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[12] *Id.*

[13] PHC Report 2d Edition, *supra* note 2, at iv.

[14] *Id.* at 2–3.

[15] *Id.* at 3.

[16] *Id.* at iv.

- "A conservative estimate of community cost savings for these services during 2010 is over $100 million."[17]

- "In addition to specific cost savings, pregnancy centers drew on the help of 71,000 volunteers who performed an estimated 5,705,000 uncompensated hours of work in 2010."[18]

Findings for specific services provided and estimated cost savings for those services include the following.

- "Consulting with New Clients" – Total Number 963,000 – Estimated Cost Saving of $24,076,000.[19]

- "Ultrasounds Performed" – Total Number 230,000 – Estimated Cost Saving of $57,485,000.[20]

- "Pregnancy Tests" – Total Number 720,000 – Estimated Cost Saving of $4,323,000.[21]

According to the PHC Report 2d Edition, "[PHC] services are generally provided at little or no cost to

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[17] *Id.*

[18] *Id.* at 1.

[19] *Id.*

[20] *Id.*

[21] *Id.*

clients."[22] This is due "in large part . . . to individual charitable donations and the high proportion of volunteers who work at the centers."[23]

B. Local Pregnancy Help Centers Provide a Wide Range of Social Services.

PHCs fall into two main categories based on whether they offer direct medical services. "The growth in the number of medically oriented pregnancy centers has been impressive."[24] According to the PHC Report 2d Edition, "[i]n 2008 there were approximately 700 medical [PHCs], but by 2010 the number had grown to over 1,000."[25]

As the PHC Report 2d Edition explains, and as set forth below, direct services provided by PHCs, including medical PHCs, include ultrasound and other medical services, prenatal care, education on prenatal development, parenting education classes, and material assistance to mothers and children.[26]

i. Ultrasound and other medical services

"Medical pregnancy clinics operate today under the license of a physician-medical director and, where

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[22] *Id.* at 7.

[23] *Id.*

[24] *Id.* at 8.

[25] *Id.*

[26] *See id.* at 7–10, 16–18, 20–21, 24.

required, under state licensure as well."[27] According to the PHC Report 2d Edition, "[m]edical services are provided by numerous certified and licensed professionals as well as trained specialists proficient in a wide range of maternal and child health areas."[28]

Ultrasound services compose one area of medical care provided by many PHCs. "These services provide confirmation of pregnancy, determine if the pregnancy is viable (through fetal cardiac activity), establish if it is a uterine or ectopic pregnancy (which can be life-threatening), and measure how far along the pregnancy is by verifying the developing baby's gestational age."[29]

Following the provision of ultrasound services, PHCs "refer the new mom for follow-up obstetrical care to ensure entrance into prenatal care."[30] Furthermore, "[w]hen adverse medical conditions are suspected, women are referred into specialized medical care."[31]

The PHC Report 2d Edition also reports the following.

- "In 2010, close to 230,000 ultrasounds were performed at pregnancy medical centers."[32]

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[27] *Id.* at 7.

[28] *Id.* at 7–8.

[29] *Id.* at 9.

[30] *Id.*

[31] *Id.*

[32] *Id.*

- "[A]pproximately 54 percent of [PHCs] offer ultrasound services."[33]
- "The approximately 1,000 medical [PHCs] that provide limited ultrasound deliver this service at little or no cost to women."[34]

In addition to ultrasound services, other specialty areas of medical care provided by PHCs include

- "obstetrical medical care and nursing,"
- "childbirth classes,"
- "labor coaching," and
- "midwife services."[35]

In addition, after birth, "some [PHCs] are able to offer"

- "lactation consultation,"
- "nutrition consulting," and
- "social work."[36]

Furthermore, some PHCs also offer testing for sexually transmitted diseases ("STDs"). According to the Centers for Disease Control and Prevention, some

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[33] *Id.* at 8.

[34] *Id.* at 9.

[35] *Id.* at 8.

[36] *Id.*

STDs can cause infertility.[37] The PHC Report 2d Edition reports that in 2010 as many as 260 medical PHCs offered STD testing and treatment.[38] That number likely has grown since then.[39]

ii. Prenatal care

According to the *Eunice Kennedy Shriver* National Institute of Child Health and Human Development, "[h]aving a healthy pregnancy is one of the best ways to promote a healthy birth."[40] "[P]renatal care can help prevent complications and inform women about important steps they can take to protect their infant and ensure a healthy pregnancy."[41] "Getting early and regular prenatal care improves the chances of a healthy pregnancy."[42]

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[37] *Sexually Transmitted Diseases (STDs) – STDs & Infertility*, Ctrs. for Disease Control & Prevention, https://www.cdc.gov/std/infertility/ (last updated October 18, 2016).

[38] PHC Report 2d Edition, *supra* note 2, at 10.

[39] *Cf. id.* (stating that centers began to "test and refer" for STDs "[a]bout ten years ago" and the number of medical PHCs offering STD testing grew from "over 200" in 2008 to "as many as 260" in 2010).

[40] *What Is Prenatal Care and Why Is It Important?*, Nat'l Inst. Child Health & Hum. Dev., https://www.nichd.nih.gov/health/topics/pregnancy/conditioninfo/Pages/prenatal-care.aspx (last visited Apr. 11, 2017).

[41] *Id.*

[42] *Id.*

"Pregnancy medical clinics often make direct referrals to prenatal care for their patients who are pregnant. However," according to the PHC Report 2d Edition, "a growing number [of PHCs] are also providing prenatal care on-site."[43]

iii. Education on prenatal development

"Prenatal development education has been a primary method for [PHCs] to inform women about the changes taking place in early pregnancy and the dramatic development of human life inside of them."[44]

The vital importance of proper prenatal care to both maternal and fetal health is well established. Regular prenatal care can "[r]educe the risk of pregnancy complications" as well as "[r]educe the infant's risk for complications."[45] "[PHC] staff/volunteers inform their clients about the importance of eating well, getting exercise, avoiding smoking and alcohol, and coping with morning sickness or discomfort during pregnancy."[46]

iv. Parenting education classes

"Parenting education has become a core service provided [by PHCs] to equip new mothers and fathers

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[43] PHC Report 2d Edition, *supra* note 2, at 9.

[44] *Id.* at 17.

[45] *What Is Prenatal Care and Why Is It Important?*, Nat'l Inst. Child Health & Hum. Dev., *supra* note 40.

[46] PHC Report 2d Edition, *supra* note 2, at 17.

to be stronger and more nurturing parents."[47] According to the PHC Report 2d Edition, "Nationally, over 78 percent of centers offer this specialized education either through direct services on premises or in nearby churches, schools, and other locations."[48] Further, "more than 292,000 clients attended [PHC] parenting programs" in 2010.[49]

Topics covered in parenting education include

- "child development,"
- "bonding,"
- "nutritional counseling,"
- "communication skills,"
- "finance management,"
- "safety and injury prevention,"
- "family rules," and
- "positive discipline strategies."[50]

In addition, parenting education classes "also typically cover"

- "life skills topics to strengthen the development and resilience of mothers-to-be,"

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[47] *Id.* at 21.

[48] *Id.*

[49] *Id.*

[50] *Id.*

- "strategies for stress management," and
- "job skills training."[51]

v. Material assistance to mothers and children

According to the PHC Report 2d Edition, "[n]early every [PHC] provides clients with material support for pregnancy and infant care."[52] This support "may include"

- "maternity clothing,"
- "baby clothes and furniture,"
- "housing assistance," and
- "nutritional counseling and resources."[53]

Just as important as these goods themselves, PHCs provide this assistance in a warm and supporting environment.

C. Pregnancy Help Centers Function as Important Links in Broader Community Public Health Networks.

In addition to the goods and services PHCs provide directly, PHCs also "play a critical role in referring women for necessary health care and support services

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[51] *Id.*

[52] *Id.*

[53] *Id.*

across the country."[54] According to the PHC Report 2d Edition, "[r]eferrals to community agencies expose women to key education interventions spanning childbirth, breast-feeding, nutrition, sudden infant death syndrome (SIDS), unintentional and intentional injury prevention, and child safety seat instruction."[55] Examples of community referrals include:

- "Breastfeeding Classes,"
- "Social Services,"
- "State Children's Health Insurance Program (S-CHIP),"
- "Women Infants & Children (WIC),"
- "Housing Support,"
- "Maternity Homes,"
- "Childcare Programs,"
- "Prenatal Care,"
- "Nutrition Classes,"
- "Parenting Classes,"
- "Community Health Centers,"
- "Financial Assistance,"
- "Food Banks and Pantries,"
- "Legal Aid/Assistance,"

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[54] *Id.* at 11.

[55] *Id.*

- "Medicaid,"
- "Medical Services,"
- "Postpartum Depression Care," and
- "Transportation Help"[56]

PHCs "are embedded within almost every type of community across the country."[57] This reality underlies and magnifies the importance of the PHC referring role.

D. The Federal and State Governments Recognize and Value Pregnancy Help Center Contributions.

The public value placed on PHC work manifests in various government actions.

i. State health agencies refer pregnant women to Pregnancy Help Centers.

"In 2009, 92 percent of Care Net [PHCs] reported having clients referred to them from state health departments."[58] "These referrals demonstrate widespread support and trust in [PHCs]."[59] Indeed, many state health departments provide PHC contact or

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[56] *Id.* at 12–13.

[57] *Id.* at 11.

[58] Brief for Pregnancy Care Organizations and Centers, *supra* note 8, at 4 (citing Care Net, *2009 Care Net National Pregnancy Center Statistics* (2009)).

[59] *Id.*

other information in materials published on publicly accessible websites. *See Woman's Right to Know – Find a Service by County*, Ariz. Dep't of Health Servs. (listing resources, including PHCs, by county for women considering abortion);[60] Ark. Dep't of Health, *Directory of Helpful Services in Arkansas* (2015) (listing locations where pregnant women can receive support during pregnancy);[61] Del. Health and Social Servs., *Directory of Human Services for Delaware 2015* (2015) (including information for at least one PHC);[62] *Pregnancy*, Fla. Dep't of Health (including link to a statewide network of PHCs);[63] Ga. Dep't of Public Health, *Abortion: A Woman's Right to Know* (2016), (noting availability of private organizations that "offer a variety of services to meet the needs of pregnant women" but do not offer abortions or abortion referrals);[64] *Pregnancy Resources*, Idaho Dep't of Health

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[60] *Available at* http://azdhs.gov/prevention/womens-childrens-health/informed-consent/index.php#find-a-service (last visited Apr. 18, 2017).

[61] *Available at* http://www.healthy.arkansas.gov/programsServices/familyHealth/Documents/AbortionAlternatives.pdf.

[62] *Available at* http://dhss.delaware.gov/dhss/dssc/files/2015_hsdirectory.pdf.

[63] *Available at* http://www.floridahealth.gov/programs-and-services/womens-health/pregnancy/index.html#heading_1 (last visited Apr. 18, 2017).

[64] *Available at* https://dph.georgia.gov/sites/dph.georgia.gov/files/related_files/site_page/Abortion-A%20Womens%20Right%20to%20Know_2016_Eng.pdf (last visited Apr. 18, 2017).

& Welfare (including a directory of services that includes information about PHCs);[65] *If You are Pregnant: Directory of Available Services*, Kan. Dep't of Health & Env't Bureau of Family Health (2016) (providing a directory of available services for pregnant women, including PHCs);[66] *Women's Right to Know*, La. Dep't of Health (providing a link to information for PHCs);[67] *Locations Offering Free Ultrasounds, Organized by Geographic Region*, Mich. Dep't of Community Health (providing a list of locations where women can procure free ultrasounds, including many PHCs);[68] *If You Are Pregnant: A Directory of Services Available in Minnesota*, Minn. Dep't of Health (including a directory of services available to pregnant women, including PHCs);[69] *Alternatives to Abortion Program*, Mo. Dep't of Health & Senior Servs. (providing a searchable map of counties in Missouri and listing information on abortion alternatives,

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[65] *Available at* http://healthandwelfare.idaho.gov/Families/Pregnancy, AbortionParentingAdoptionResources/tabid/395/Default.aspx (last visited Apr. 19, 2017).

[66] *Available at* http://www.womansrighttoknow.org/download/Directory_of_Services_English.pdf.

[67] *Available at* http://www.dhh.louisiana.gov/index.cfm/subhome/29 (last visited Apr. 19, 2017).

[68] *Available at* http://www.michigan.gov/documents/mdch/ultrasound_196523_7.pdf (last updated Mar. 18, 2015).

[69] *Available at* http://www.health.state.mn.us/wrtk/directoryenglish2017.pdf (last updated Jan. 2017).

including PHCs);[70] *Pregnant? It's Your Decision. We're Here to Help.*, N.D. Dep't of Human Servs. (including contact information for pregnant women, including information about PHCs, as part of the state's abortion alternatives program);[71] Ohio Dep't of Health, *Where to Get Help With Your Pregnancy: 2011 Resource Directory* (2011) (listing service options for pregnant women, including many PHCs);[72] *A Woman's Right to Know Resource Directory*, Okla. Board of Med. Licensure & Supervision (providing a directory of resources including information about PHCs);[73] *Alternatives to Abortion Services Program*, Pa. Dep't of Human Servs. (providing link to Real Alternatives, a network of PHCs operating in Pennsylvania);[74] *Pregnancy Help Centers*, S.D. Dep't of Health (providing contact information for PHCs);[75] *Woman's Right to Know*, Tex. Dep't of State Health Servs.

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[70] *Available at* http://a2a.mo.gov/ (last visited Apr. 11, 2017).

[71] *Available at* https://www.nd.gov/dhs/info/pubs/docs/dn-88-alternatives-to-abortion.pdf (last visited Apr. 19, 2017).

[72] *Available at* https://www.odh.ohio.gov/-/media/ODH/ASSETS/Files/dspc/complaints---nursing-homes/PregnacyResDirectory2011_updated.pdf?la=en.

[73] *Available at* http://www.awomansright.org/pdf/ResourceDirectory.pdf (last visited Apr. 19, 2017).

[74] *Available at* http://www.dhs.pa.gov/citizens/reproductivehealth/alternativestoabortionservicesprogram/ (last visited Apr. 19, 2017).

[75] *Available at* https://doh.sd.gov/family/pregnancy/helpcenters.aspx (last visited Apr. 19, 2017).

(including a downloadable resource directory that provides a list of PHCs);[76] *Free Ultrasound Providers*, Va. Dep't of Health (listing providers of free ultrasounds for pregnant women in Virginia, including PHCs);[77] W. Va. Dep't of Health & Human Resources, *Women's Right to Know Resource Directory* (Nov. 13, 2015) (listing PHCs in the state);[78] Wis. Dep't of Health Servs., *Directory of Services for Women, Children and Families* (2015–2016) (providing resources for pregnant women, including contact information for PHCs).[79]

ii. Local Pregnancy Help Centers have received public funds.

One of the "hallmarks" of PHC operations is that "funds are raised locally and spent locally."[80] More than 80 percent of the PHCs covered by the PHC Report 2d Edition "receive[d] no public funding at all."[81]

However, PHCs have received financial support from both the federal and state governments. At the

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[76] *Available at* http://www.dshs.texas.gov/wrtk/ (last visited Apr. 19, 2017).

[77] *Available at* http://www.vdh.virginia.gov/pregnancy/free-ultrasound-providers/ (last visited Apr. 19, 2017).

[78] *Available at* http://www.wvdhhr.org/wrtk/wrtk_resource_directory_december_2015.pdf.

[79] *Available at* https://www.dhs.wisconsin.gov/publications/p4/p40073.pdf.

[80] PHC Report 2d Edition, *supra* note 2, at 31.

[81] *Id.*

federal level, "[p]ublic . . . funding of [PHCs] began in 1996 when the federal welfare reform law allocated $50 million to Title V abstinence-only education programs, which some states made available to [PHCs]."[82] "The first direct allocation of federal grants to [PHCs] began in 2000 under the maternal and child health block grant's Special Projects of Regional Significance Program."[83] Under this program, "[c]lose to $3 million . . . was directed that year to groups that identify as [PHCs], and that amount doubled to $6 million in 2002."[84]

At the state level, "Legislators frequently attempt to fund [PHCs] . . . through state-sponsored programs, specific grants, or tax credits."[85] According to another source, "in 2009, at least eleven states provided direct taxpayer funding to [PHCs], or approved such funding."[86] More, "At least twenty-six states . . . have approved 'Choose Life' specialty license plate programs where the proceeds benefit [PHCs] and other

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[82] Nat'l Abortion Fed'n, *Crisis Pregnancy Centers: An Affront to Choice* 11 (2006), https://www.prochoice.org/pubs_research/publications/downloads/public_policy/cpc_report.pdf [hereinafter NAF Report].

[83] *Id.* at 11–12.

[84] *Id.* at 12 (citing Vitoria Lin & Cynthia Dailard, *Crisis Pregnancy Centers Seek to Increase Political Clout, Secure Government Subsidy*, The Guttmacher Report on Public Policy, Feb. 2002, Vol. 5, No. 1.).

[85] *Id.* at 12.

[86] Brief for Pregnancy Care Organizations and Centers, *supra* note 8, at 25.

organizations providing abortion alternatives. These plates have raised nearly $14,000,000 for [PHCs] and abortion alternatives."[87]

iii. Pregnancy Help Centers have been recognized by government at both the federal and state levels.

PHC contributions have been recognized by government at both the state and federal levels. At the federal level, 56 PHCs "were honored at a [2008] White House event" where "[t]hen-Assistant Secretary of Health Dr. Joxel Garcia conducted the ceremony commending outstanding centers . . . . The awards were bestowed in the name of the President as part of the recognition program of USA Freedom Corps."[88] Through legislative resolutions PHCs have also been recognized in many states.[89]

Individual public officials have also recognized PHCs. This recognition is bipartisan, as evidenced by the following representative examples.

- "I strongly commend the life-affirming work of pregnancy care centers. The success rates and national expansion of these pregnancy care centers are a testament to their invaluable work

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[87] *Id.*

[88] PHC Report 1st Edition, *supra* note 10, at 64.

[89] *See* Brief of Pregnancy Care Organizations and Centers, *supra* note 8, at 25–28; Jeanneane Maxon, *Positive Pregnancy Center Resolutions Sweep the Country*, Heartbeat International (last visited Apr. 18, 2017), https://www.heartbeatinternational.org/positive-pregnancy-center-resolutions-sweep-the-country.

in the lives of communities and individuals over the years. *These networks provide services that are often unavailable elsewhere to expectant mothers.*" – Rep. Daniel Lipinski (D-Ill.)[90]

- "Pregnancy Resource Centers give women a safe and supportive environment to ask questions and receive the medical care and information needed to ensure healthy pregnancies and births." – Rep. Heath Shuler (D-N.C.)[91]

- "The more than 2,000 pregnancy care centers across the country are an expression of charity and genuine love for people dealing with life-changing situations. The outpouring of local support over the years shown by supporters, organizers, and staff embody the spirit of volunteerism and *truly make pregnancy care centers one of the most important grassroots movements in American history.*" – Rep. John Boehner (R-Ohio)[92]

E. Individual Consumers Strongly Value the Contributions Provided by Pregnancy Help Centers.

"[PHCs] receive an extraordinarily high approval rating from the clients they serve. In a 2009 survey by

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[90] PHC Report 1st Edition, *supra* note 10, at 22 (formatting altered, emphasis added, and internal quotations omitted).

[91] *Id.* at 68 (formatting altered and internal quotations omitted).

[92] *Id.* at 68 (formatting altered, emphasis added, and internal quotations omitted).

Care Net, 97 percent of client exit surveys were positive about the client's experience at the center."[93] Similarly, "98.7 percent of Care Net-affiliated center clients who completed a written exit survey in 2013 indicated that their overall experience at the center was positive. This number was 97% in 2014."[94]

Putting these 2013 and 2014 results in context, Care Net claimed in 2016 that "[t]his satisfaction rating is higher than that of Netflix, Chipotle, and the iPhone."[95]

The Care Net statistics correspond very well with *Amicus* Lozier Institute's own findings. In a 2015 report called Turning Hearts Toward Life II, the Lozier Institute conducted research "via a national survey of 1,300 respondents" and found that the "reactions to the centers and their work were overwhelmingly positive."[96] At one point this research "[d]rill[ed] down with those respondents who had either been to a PHC or knew someone who had sought its services" and found that "nearly nine in 10 females and eight in 10

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[93] Brief for Pregnancy Care Organizations and Centers, *supra* note 8, at 2.

[94] Ardee Coolidge, *Care Net Pregnancy Centers Saved 70,000 Lives in 2015*, Care Net (Sept. 1, 2016), https://www.care-net.org/abundant-life-blog/care-net-pregnancy-centers-saved-70000-lives-in-2015.

[95] *Id.* (linking to sources).

[96] Chuck Donovan, *Pregnancy Centers: A Consensus Service to Women and Children*, Charlotte Lozier Inst. (Apr. 13, 2017), https://lozierinstitute.org/pregnancy-help-centers-a-consensus-service-to-women-and-children/.

males described their experience as 'very positive' or 'somewhat positive.'"[97] *Remarkably, "these percentages were almost the same whether the person responding self-described as pro-life or pro-choice."*[98]

Given the extremely high favorability ratings PHCs enjoy, it is no surprise that people want them in their communities. The survey referenced above "went on to ask whether the respondents would desire for a PHC to be in their community and if the respondent regarded a PHC as a necessary community resource for 'free services to women with an unexpected pregnancy.'"[99] "Regarding the desirability of having a PHC in the community" and "asking only those respondents who were not sure whether there was a PHC in their community," 73 percent of women reportedly "replied that a PHC was desirable."[100] "Moreover, fully 92 percent of females participating in the poll answered that they regarded such centers as 'very necessary[']or 'fairly necessary.'"[101] Of note, "The poll question made it very plain that these pro-life centers neither offer nor even refer for abortions."[102]

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[97] *Id.*

[98] *Id.* (emphasis added).

[99] *Id.*

[100] *Id.*

[101] *Id.*

[102] *Id.*

II. Forcing Pregnancy Help Centers to Refer for Abortion Undermines Their Mission and the Principles that Inspire Them to Serve Vulnerable Mothers and Children.

Petitioners ably argue that the California law in question here violates their First Amendment freedoms. In writing separately, and mindful of the Court's guidelines for *amicus* contributions, *Amicus* Lozier Institute seeks here only to emphasize how significantly this First Amendment violation burdens PHCs.

For the people who are employed by, donate to, or volunteer with local PHCs, the work is truly a labor of love. PHCs are devoted to loving both mothers and children through practical action. In many if not most cases, this devotion springs from deeply held religious or moral commitments about the value of all human life and the obligation to serve those in society who are suffering, in crisis, or at disadvantage. Forcing PHCs to refer for abortion undermines their mission and burdens the principles that inspire them to serve vulnerable mothers and children.

Whatever interest California might assert in providing information about the availability of abortion services, it cannot be denied that, as this Court has stated, abortion is a "unique act," *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 852 (1992), and is "inherently different from other medical procedures, because no other procedure involves the purposeful termination of a potential life," *Harris v. McRae*, 448 U.S. 297, 325 (1980). In the words of one federal court, "[t]he rationality of distinguishing between abortion services and other medical services

when regulating physicians or women's healthcare has long been acknowledged by Supreme Court precedent." *Greenville Women's Clinic v. Bryant*, 222 F.3d 157, 173 (4th Cir. 2000). Nowhere is the "unique" and "inherently different" nature of abortion more deeply felt than in forcing pro-life individuals and institutions to promote or participate in it.

CONCLUSION

Pregnancy Help Centers make up "one of the most important grassroots movements in American history."[103] The Court should grant the petition for a writ of certiorari and protect the freedom of Pregnancy Help Centers to serve mothers and children in a way that is consistent with their mission and values.

Respectfully submitted,

CATHERINE GLENN FOSTER
Counsel of Record
THOMAS M. MESSNER
1200 New Hampshire Ave., N.W.
Suite 750
Washington, DC 20036
(202) 223-8073
cfoster@lozierinstitute.org

Counsel for Amicus Curiae

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[103] PHC Report 1st Edition, *supra* note 10, at 68 (quoting Rep. John Bochner (R-Ohio)) (formatting altered and internal quotations omitted).

RECORD
AND
BRIEFS

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In the Supreme Court of the United States

NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES, DBA NIFLA, *et al.*,
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v.

XAVIER BECERRA, ATTORNEY GENERAL OF CALIFORNIA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF FREEDOM X AND CRISIS PREGNANCY CLINIC OF SOUTHERN CALIFORNIA AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

William J. Becker, Jr.
Counsel of Record
FREEDOM X
11500 Olympic Blvd.
Suite 400
Los Angeles, California 90064
(310) 636-1018
FreedomXLaw@gmail.com

Counsel for Amici Curiae

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

1. What is the proper level of scrutiny for reviewing a state law requiring pro bono pregnancy centers to disseminate information undermining their pro-life message?

2. Does the state unduly chill a center's First Amendment rights when its engaging in protected speech triggers an obligation to disseminate an unwanted message?

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INTEREST OF *AMICI CURIAE*[1]

Amicus Freedom X is a public interest law firm dedicated to protecting the freedom of religious, political and intellectual expression. Freedom X and its donors and supporters are vitally interested in the outcome of this case inasmuch as they believe that the California Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act (the FACT Act or the Act) requires pregnancy centers to promote a message that directly conflicts with their *raison d'etre* – protecting the lives of the unborn, discouraging abortion and fostering a respect for the right to life enshrined in America's founding principles.

The FACT Act burdens the expressive rights of pregnancy centers over one of America's most contentious political and religious policy issues by compelling them to promote by words and action the very evil they are established to counter. This is precisely the type of attack on political and religious expression Freedom X works to resist.

Amicus Crisis Pregnancy Clinic of Southern California (CPCSC), the first established clinic of its kind in the state, is registered with the IRS as a 501(c)(3) charitable non-profit operating facilities in Hollywood and Glendale, California. CPCSC exists to provide alternatives to women with unplanned

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[1] Counsel for all parties received at least 10 days notice of the intent to file this brief. Counsel for all parties have consented to the filing of this *amici* brief. No counsel for a party authored this brief in whole or in part. No person, other than *amici curiae*, their members, or their counsel, made a monetary contribution that was intended to fund preparing or submitting this brief.

pregnancies free of charge. CPCSC provides women with tens of thousands of dollars annually in maternity and healthcare financial assistance. The outcome of this case will have a direct impact on CPCSC's ability to help women successfully carry their pregnancies to term. The FACT Act prevents CPCSC from demonstrating results necessary to raise donations to finance its operations and conflicts with its mission statement and deeply held religious and philosophical beliefs.

SUMMARY OF THE ARGUMENT

"The First Amendment protects the right of individuals to refuse to foster . . . an idea they find morally objectionable." *Wooley v. Maynard*, 430 U.S. 705, 715 (1977). The Ninth Circuit's decision in *NIFLA v. Harris*, 839 F.3d 823 (9th Cir. 2016), upholds a regulation compelling pregnancy centers to promote a message entirely inconsistent and incompatible with their reason for existing – to discourage women from taking the life of their unborn children. Two hundred centers operate in California alone, and similar facilities operate in other states, as do laws regulating their speech. *Id.* at 829. The frequency with which this case's constitutional issues will recur warrants review.

Lower courts need guidance in determining which standard of review to apply to these regulations. The Ninth Circuit's rejection of strict scrutiny conflicts most directly with decisions from the Second and Fourth Circuits authorizing such rigorous review. *Evergreen Ass'n, Inc. v. City of New York*, 740 F.3d 233 (2d. Cir. 2014); *Centro Tepeyac v. Montgomery County*, 722 F.3d 184 (4th Cir. 2013) (en banc). This conflict alone supports review. Argument IA, post.

The decision applying lesser scrutiny additionally deviates from this Court's precedents. This Court has distinguished between (1) professionals acting pro bono to "advance 'beliefs and ideas'" (warranting strict scrutiny) and (2) commercial speech designed to advance the professional's commercial interests (where intermediate scrutiny is adequate). *In re Primus*, 436 U.S. 412 (1978). Argument IB, post.

This Court has also distinguished between (1) professional conduct involving "personalized advice attuned to a client's concerns," (warranting intermediate scrutiny) and (2) advice that is not "individualized" or addressed to a "client's particular needs" (warranting strict scrutiny). *Lowe v. SEC*, 472 U.S. 181, 208 (1985). Argument IC, post. Strict scrutiny applies to the "three P's": personalized advice in a private setting to a paying client. (*Moore-King v. Cnty. of Chesterfield, VA*, 708 F.3d 560, 569 (4th Cir. 2013). None applied here.

As this case involves a free clinic seeking to advance the pro-life idea, not commercial interests, and the compelled speech is a standardized legal notice (which may be posted by someone other than a medical professional) about the availability of state-subsidized abortion, rather than personalized advice addressing the client's particular medical circumstances, the Ninth Circuit's decision appears to have misapplied both *Primus*, 436 U.S. 412, and *Lowe*, 472 U.S. 181.

Furthermore, the "FACT Act" unconstitutionally compels pregnancy centers to use their own property to disseminate an unwanted message. *Wooley v. Maynard*, 430 U.S. 705, 713 (1977). Compelling the disclosures as a consequence for the centers' pro-life speech

imposes an unconstitutional penalty on their free expression. *See Arizona Free Enterprise Club's Freedom PAC v. Bennett*, 564 U.S. 721, 742 (2011); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256-57 (1974). Argument II, post.

ARGUMENT

I. THIS COURT SHOULD GRANT REVIEW TO DETERMINE THE PROPER LEVEL OF SCRUTINY FOR PREGNANCY CENTERS' COMPELLED DISCLOSURES.

A. The Ninth Circuit's Decision Conflicts With Second Circuit And Fourth Circuit Decisions In Determining The Proper Level Of Scrutiny For Pregnancy Centers' Compelled Disclosures.

In upholding the disclosures compelled by the FACT Act, the Ninth Circuit in *NIFLA v. Harris*, 839 F.3d 823 (9th Cir. 2016), produced a conflict with decisions from other circuits invalidating such compulsion. *Evergreen Ass'n, Inc. v. City of New York*, 740 F.3d 233 (2d. Cir. 2014); *Centro Tepeyac v. Montgomery County*, 722 F.3d 184 (4th Cir. 2013) (en banc). *NIFLA* found those cases distinguishable, as they applied strict scrutiny rather than the intermediate scrutiny governing review of the FACT Act. *NIFLA*, 839 F.3d at 842. (The Second Circuit actually rejected the compelled message under both strict and intermediate scrutiny. *Evergreen*, 740 F.3d at 249-50.) But even insofar as these cases applied strict scrutiny, the circuits remain in conflict, if not over how to apply a standard of review than over how to select it.

The compelled speech rejected in *Evergreen* and *Centro Tepeyac* for unconstitutionally infringing free speech rights was substantially less intrusive than the FACT Act. The New York law reviewed in Evergreen forced clinics to disclose "whether or not they 'provide or provide referrals for abortion,' 'emergency contraception,' or 'prenatal care.'" *Evergreen*, 740 F.3d at 238. A statement denying their provision of abortion did not actively facilitate the patient's undergoing one as the FACT Act does. The rejected disclosure in *Centro Tepeyac* was even less intrusive, informing clients "the Montgomery County Health Officer encourages women who are or may be pregnant to consult with a licensed health care provider." 722 F.3d at 186. This generic "pro-doctor" advice also did not facilitate abortion; it advised clients to consult licensed professionals but did not provide them with the precise means of contacting a government agent who could advise them on how to obtain a free or subsidized abortion.

The Second and Fourth Circuits found these compelled statements could justify strict scrutiny. *Evergreen*, 740 F.3d 233, 244-45; *Centro Tepeyac*, 722 F.2d 184, 189. The Ninth Circuit's rejection of strict scrutiny for the FACT Act's more intrusive direction creates a conflict requiring this Court's resolution.

B. The Compelled Disclosures Warrant Strict Scrutiny Under *In re Primus* Because They Affect Pro Bono Work To Advance "Beliefs and Ideas" Rather Than Commercial Interests.

The selection of the proper standard of review has posed challenges in many contexts. This Court's recent decision in *Expressions Hair Design v. Schneiderman*, --- S.Ct --- (2017 WL 1155913), observed the legally significant but factually murky distinction between conduct and speech. Justice Breyer's concurring opinion offered a functional test for selecting the proper standard of review, which would turn not so much on the conduct/speech distinction but on whether, or how, the challenged statute, rule, or regulation affects a First Amendment interest. The lowest level of scrutiny would apply to the compelled disclosure of "purely factual and uncontroversial information," an intermediate level to a law that "restricts the 'informational function' provided by truthful commercial speech," and strict scrutiny should govern "government regulations [that] negatively affects the processes through which political discourse or public opinion is formed or expressed." The Second Circuit had no trouble concluding a pregnancy center's speech regarding abortion and its alternatives rested on the most protected of these First Amendment values. *Evergreen*, 740 F.3d 233, 249, citing *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982).

Expressions Hair Design observed that speech in some cases may be incidental to conduct, thus permitting compelled disclosure. It offered the example of a law prescribing restaurants charge ten dollars for

sandwiches, which would be a conduct regulation, even though it would likely produce the speech by which the restaurant would inform diners of that price. The FACT Act is very different. A closer analogy to it would involve a committed vegan who opened a restaurant to convince diners to consider adopting a plant-based diet for ethical and/or ecological reasons — but the state forced her to post on her door directions to the closest McDonald's and Burger King.

The analogy could apply to other recognized rights. A sporting goods store that preferred not to sell firearms could be forced to direct customers to the nearest gun store. Or a newsstand that opted not to sell pornographic publications could be forced to tell customers where they could buy them. All these examples would involve not the "'information function' provided by truthful commercial speech" but the "process[] through which . . . public opinion is formed or expressed."

This Court drew guidelines for evaluating the protection available to professional speech in *In re Primus*, 436 U.S. 412 (1978). The precedent is remarkably apposite, right down to the subject matter. A practicing professional (attorney) advised a woman she could contact the ACLU for free representation in possible legal action regarding her sterilization. *Id.* at 414-16. The state disciplined the attorney for the referral. *Id.* at 417-21.

Both *Primus* and *NIFLA* thus involved: 1) the speech of a practicing professional; 2) directing a potential client; 3) to receive free services elsewhere; 4) concerning the constitutionalized issue of procreation and its negation. Because the ACLU

engaged in litigation "to advance 'beliefs and ideas' and "as a vehicle for effective political expression and association," the Supreme Court applied strict scrutiny. *Id.* at 430-32, 438 n. 32. Lesser scrutiny would have been enough to protect speech intended to advance only the professional's own commercial interests. *Id.* at 438 n. 32.

The Ninth Circuit found *Primus* inapposite because pregnancy center staff "offer medical services in a professional context." *NIFLA*, 839 F.3d at 841. But both the referring attorney and the ACLU offered legal services in a professional context in *Primus*.

The Ninth Circuit's primary ground for distinguishing *Primus* was the centers' positioning themselves "in the marketplace as pregnancy clinics." *NIFLA*, 839 F.3d at 841. The centers do not position themselves in the "marketplace" at all as they do not charge for their services. The Ninth Circuit's objection instead appears to be that they describe themselves as "pregnancy clinics" but neither offer nor recommend abortion. But just as self-positioning as a "restaurant" does not represent one sells meat, and self-positioning as a "sporting goods store" does not represent one sells guns, nothing in the description "pregnancy center" involves an offer to terminate one. The decision not to — and to counsel against such termination — is the essence of "the processes through which political discourse or public opinion is formed or expressed." *Expressions Hair Design*; *see also Primus*, 436 U.S. at 431.

Pregnancy centers exist to advance beliefs and ideas about pregnancy, childbirth and abortion, not the staff's commercial interests. *Primus*, 436 U.S. 412, 438

n. 32. In rejecting strict scrutiny for the compelled speech below, the Ninth Circuit rejected the holding of *Primus*.

C. The Compelled Disclosures Warrant Strict Scrutiny Under *Lowe v. SEC* Because They Are Standardized Notices (Dictated By The State) Rather Than Doctors' "Individualized Advice Attuned . . . To Any Client's Particular Needs."

The *NIFLA* decision described the relevant professional practice subject to regulation far more broadly than did this Court in *Primus*, which deemed pro bono advice for the purpose of political expression subject to strict scrutiny. The Ninth Circuit characterized as "professional," and thus deserving of lesser scrutiny, any speech "within the confines of a professional's practice," or "within their walls related to their professional services." *NIFLA*, 839 F.3d at 840. This definition not only defies *Primus*, it does not apply to the FACT Act itself. The posted notice concerns access to abortion, but that is not among the center's "professional services."

The Ninth Circuit cited two authorities emphasizing the special nature of the doctor-patient relationship, both of which are inapposite on their face.

A Third Circuit case highlighted a doctor's "education and training," and "access to a corpus of specialized knowledge," but the required notice could be posted by a high school intern, requiring no more specialized knowledge than how to tape paper to a wall. *NIFLA*, 839 F.3d at 839, citing *King v. Governor of New Jersey*, 767 F.3d 216, 232 (3d Cir. 2014).

NIFLA also recalled *Lowe v. SEC*, 472 U.S. 181 (1985), though it profoundly misrepresented its teaching. The *Lowe* court addressed the distinction between the circumstances under which an investment adviser could publish freely and those subjecting him to professional regulation. Although regulation properly applied to advisers providing "personalized advice attuned to a client's concerns," such regulation was unconstitutional where the adviser did "not offer individualized advice attuned to any specific portfolio or to any client's particular needs." *Id.* at 208. Justice White's Lowe concurrence expounded upon the contrast:

> One who takes the affairs of a client personally in hand and purports to **exercise judgment** on behalf of the client in the light of the **client's individual needs and circumstances** is properly viewed as engaging in the practice of a profession. . . Where the personal nexus between professional and client does not exist, and a speaker does not purport to be exercising judgment on behalf of any **particular individual with whose circumstances he is directly acquainted**, government regulation ceases to function as legitimate regulation of professional practice with only incidental impact on speech; it becomes regulation of speaking or publishing as such, subject to the First Amendment's command that "Congress shall make no law ... abridging the freedom of speech, or of the press."

Lowe, 472 U.S. at 232 (White, J. concurring) (emphasis added).

The Ninth Circuit quoted the first sentence from the above quotation --- but not the second --- in finding the compelled disclosures concerned professional speech subject to intermediate scrutiny. *NIFLA*, 839 F.3d at 839. But it is the second sentence, not the first, that describes the instant regulation. The FACT Act prescribes a standardized notice, which displays the same message to all clients, regardless of their "individual needs and circumstances." The sign need not be posted by licensed medical professionals exercising professional judgment but may be posted by anyone, including staff who have no "direct acquaint[ance]" with the client's particular circumstances. And the disclosure appears to the client before any personalized examination occurs. Accordingly, the requirement to post the notices is not a legitimate regulation of professional practice but a direct regulation of speech. *Lowe*, 472 U.S. at 232, (White, J. concurring).

Other circuit decisions have since applied Justice White's analysis in the medical context, warranting strict scrutiny here. *See King*, 767 F.3d 216, 231-32. The Fourth Circuit held "the relevant inquiry to determine whether to apply the professional speech doctrine is whether the speaker is **providing personalized advice in a private setting to a paying client** or instead engages in public discussion and commentary." *Moore-King v. County of Chesterfield, Virginia*, 708 F.3d 560, 569 (4th Cir. 2013) (emphasis added). As the compelled notices are neither personalized, private, nor shown to paying clients, they unquestionably fall on the latter side of that test.

The Eleventh Circuit likewise concluded that speech to the public about public issues enjoyed the highest degree of First Amendment protection, and "the key to distinguishing between occupational regulation and abridgment of First Amendment liberties is in finding a personal nexus between professional and client." *Wollschlaeger v. Florida*, 760 F.3d 1195, 1218 (11th Cir. 2014).

The Ninth Circuit's holding that the notices deserve only intermediate scrutiny as regulations on medical practice thus conflicts with this Court's guidance in *Lowe v. SEC*, 472 U.S. 181, and its progeny in the circuits. *See e.g.*, *Moore-King*, 708 F.3d 560, 569. The decision also conflicts with this Court's applying strict scrutiny to pro bono speech advancing beliefs and ideas (*Primus*, 436 U.S. 412), and the Second and Fourth Circuits' finding strict scrutiny proper for reviewing pregnancy centers' compelled disclosures. *Evergreen*, 740 F.3d 233, 244-45; *Centro Tepeyac*, 722 F.2d 184, 189. Considering the many states regulating hundreds of such centers (*see NIFLA*, 839 F.3d at 831), this Court should clarify the proper standard of review.

II. THE FACT ACT BURDENS PREGNANCY CENTERS' PRO-LIFE SPEECH BY REQUIRING THEY PROMOTE A PRACTICE THEY FIND MORALLY OBJECTIONABLE.

Compelling speech violates the First Amendment as much as forbidding it, if not more. *See West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633 (1943): "It would seem that involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence." The State may not constitutionally require an individual to participate in

the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public. *Wooley v. Maynard*, *infra*, 430 U.S. at 713. Compelled disclosures require pregnancy centers to do just that. *Centro Tepeyac*, 722 F.3d 184, 194 (Wilkinson, J. concurring).

The Ninth Circuit justified the FACT Act because it does not suggest pregnant women *should* pursue a state-subsidized abortion; it informs them only of the *existence* of that option. *NIFLA*, 839 F.3d 823, 842. But regardless of whether compelled speech presents "opinion" or "fact," either form of compulsion unconstitutionally burdens speech. *Riley v. National Federation of the Blind of North Carolina*, 487 U.S. 781, 797-98 (1988). The right not to speak extends not only to matters of belief or opinion but equally "to statements of fact the speaker would rather avoid." *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 573 (1995).

A. The FACT Act Asymmetrically Burdens Pro-Life Medical Staff By Forcing Them To Express An Unwanted Message.

The Ninth Circuit also justified the FACT Act's compelled disclosure as neutrally applying to all clinics "regardless of their stance on abortion or contraception." *NIFLA*, 839 F.3d at 836. But that analysis conflicted with NIFLA's own description of viewpoint discrimination in *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002), and *Stuart v. Camnitz*, 774

F.3d 238 (4th Cir. 2014).[2] *NIFLA*, 839 F.3d at 836. *Conant*'s viewpoint discrimination involved a law prohibiting doctors from telling patients that marijuana could help them, even though the compelled silence applied to all doctors, regardless of their stance on marijuana. *NIFLA*, 839 F.3d at 836, citing *Conant*, 309 F.3d at 637. *Stuart*'s viewpoint discrimination similarly involved a law compelling doctors to show their pregnant patients a sonogram and otherwise describe the fetus, even though the obligation to speak applied to all doctors, regardless of their stance on abortion. *NIFLA*, 839 F.3d at 836, citing *Stuart*, 774 F.3d at 255-56.

As *Conant* and *Stuart* thus show, universal application of compelled speech or silence may still burden asymmetrically; the law struck down in *Wooley* required all drivers to display the message "Live Free or Die," regardless of their stance on the subject. The Ninth Circuit's reasoning would justify a law requiring all drivers to display a sticker with the message, "President Trump is Making America Great Again" --- so long as it applied to Republicans and Democrats alike.

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[2] In contrast to the Ninth Circuit's offering physician-patient advice a lower level of protection in *NIFLA* ("a licensed professional does not enjoy the full protection of the First Amendment when speaking as part of the practice of her profession," *NIFLA*, 839 F.3d at 839, quoting *King v. Gov. of New Jersey*, 767 F.3d 216, 232 (3d Cir. 2014) (emphasis added)), the Ninth Circuit in *Conant* deemed the specific "communication between a doctor and a patient" as involving "core First Amendment interests." *Conant*, 309 F.3d at 636.

Even if there are circumstances under which the state may compel speech, the special vice here is that the state imposed the obligation on the centers only as a consequence of (and effective penalty for) their engaging in protected speech. The FACT Act covers pregnancy centers promoting a message favoring childbirth, and compels them to provide information to pregnant women about how they may seek a state-funded abortion. The obligation to provide this information does not fall upon the taxpaying public generally or any private citizen specifically – only those who operate centers counseling pregnant women with a pro-life message. *See Pacific Gas & Elec. v. Public Utilities Comm'n. of California*, 475 U.S. 1, 15 (1986) (considering provision that "forces the speaker's opponent — not the taxpaying public — to assist in disseminating the speaker's message.") The obligation to post the disclosures (which counter the centers' pro-life message) is specifically triggered inter alia by a center's providing or advertising sonograms (*NIFLA*, 839 F.3d at 830), an expressive act enjoying First Amendment protection. *Stuart*, 774 F.3d 238, 245. This has the effect of unconstitutionally burdening protected speech.

B. The FACT Act Unconstitutionally Chills Speech By Penalizing Pregnancy Centers' Pro-Life Speech With An Obligation to Display a Contrary Message.

1. Print Cases: *Miami Herald* and *Pacific Gas*

The Supreme Court described this burden in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). The challenged law applied to newspaper publishers

who engaged in protected speech (criticizing political candidates), and required the publishers to provide the criticized candidate with an opportunity to reply in the newspaper's pages. *Id.* The law mandated the newspaper provide the reply free of charge "in as conspicuous a place and in the same kind of type" as the newspaper's initial criticism. *Id.* at 244.

The Florida law resembles the FACT Act in significant ways. The "same kind of type" requirement resembles the FACT Act's prescriptions regarding the size and placement of the notices directing women toward subsidized abortions. *NIFLA*, 839 F.3d at 830. The Florida mandate that the newspaper use its own pages to disseminate a contrary message resembles the FACT Act's requirement that pregnancy centers use their own walls to display the required notices. *Id.* And the offered justification for the Florida law, "an electorate informed about the issues," (*id.* at 260, (White, J. concurring)), resembles the offered justification below: "to ensure that women are able to receive . . . accurate information about [family planning] services." *NIFLA*, 839 F.3d at 830.

But however great the interest in an informed electorate, the State could not impose upon the newspaper the responsibility for providing such information in a manner contrary to its wishes. *Miami Herald*, 418 U.S. at 256. The twofold penalty on speech identified in *Miami Herald* applies here too. The tangible penalty concerned physical resources. The Florida law required newspapers to allocate space in the paper (and funds required for printing) to the unwanted message, which otherwise could have been devoted to "other material the newspaper may have

preferred to print." *Id.* Likewise, the FACT Act requires pregnancy centers to devote some of their wall space and printing budget to display the required notices, which otherwise could have promoted their preferred message.

Miami Herald also identified an intangible penalty: The right-of-reply rule could deter the newspaper from publishing the criticism in the first place. *Miami Herald*, 418 U.S. at 257. "Government-enforced right of access inescapably 'dampens the vigor and limits of the variety of public debate.'" *Id.*, quoting *New York Times v. Sullivan*, 376 U.S. 254, 279 (1964).

The FACT Act has a similar effect. The law imposes no obligations on the public, or on specific individuals. Individuals are thus free to express privately their pro-life position without government interference. But if they operate a pregnancy center to communicate their message more effectively (and display sonograms in so doing), the state compels them to express an unwanted message, and facilitate the very conduct they seek to discourage. The desire to avoid directly facilitating abortions could well deter pro-life individuals from speaking in their preferred manner to avoid triggering the FACT Act's notice requirements.

The newspaper that initially published the criticism of the candidate was undoubtedly the most effective medium for rebuttal, but this did not justify the First Amendment burden in *Miami Herald*. Accordingly, the California Legislature's finding "that the most effective way to ensure that women are able to receive access to family planning services, and accurate information about such services, was to require licensed pregnancy-related clinics . . . to state the existence of these

services" does not justify the First Amendment infringement below. *NIFLA*, 839 F.3d at 830.

Miami Herald's principles extend beyond the press. Although Justice White's *Miami Herald* concurrence distinguished newspapers from public utilities, the Supreme Court extended the *Miami Herald* rule to a public utility twelve years later. *Pacific Gas*, 475 U.S. 1; *Miami Herald*, 418 U.S. 241, 259 (White J., concurring). The application of *Miami Herald* to a public utility guarantees its application a fortiori to private individuals' pro bono speech about the morality of abortion, which rests on the highest rung of First Amendment values. *Primus*, 436 U.S. 412, 438 n. 32; *Evergreen Ass'n, Inc. v. City of New York*, 740 F.3d 233, 249, citing *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982); *Expressions Hair Designs*, Breyer J., concurring).

Pacific Gas concerned the utility's monthly billing envelope, which included a newsletter covering matters ranging from political editorials to energy conservation tips and "straightforward" billing information. *Pacific Gas*, 475 U.S. 1, 5, 8-9. California's Public Utilities Commission ordered the utility to present the speech of an organization with which the utility disagreed. *Id.* at 4. *Pacific Gas* found a First Amendment violation based on the same concerns present in *Miami Herald*, even though the Commission's order required the opponent's message to appear in the envelope rather than the newsletter itself. *Id.* at 11 and n. 7.

Pacific Gas' summary of the *Miami Herald* holding fully applies here. "The constitutional difficulty with the right-of-reply statute was that it required the newspaper to disseminate a message with which the

newspaper disagreed." *Pacific Gas*, 475 U.S. at 18. The state could not force citizens' private property to be a "'billboard' for the State's ideological message." *Id.* at 17, quoting *Wooley v. Maynard*, 430 U.S. 705, 715 (1977).[3] The Court further condemned the asymmetry whereby the utility had to help present the views of its opponents, who had no corresponding obligation to present the utility's position. *Pacific Gas*, 475 U.S. at 14.

The FACT Act involves the same vice; it requires a pregnancy center to "use *its* property as a vehicle for spreading a message with which it disagrees." *Pacific Gas*, 475 U.S. 1, 17. And by compelling the posting of only information inimical to the center's position, and not compelling any speech from those more favorably inclined toward abortion, the FACT Act "is not content neutral." *Id.* at 13-14.

2. Campaign Finance Cases: *Davis* and *Arizona Free Enterprise.*

The same principle has emerged more recently in campaign finance cases. The Court has invalidated regulations designed, like the one in *Pacific Gas*, to "abridge [a speaker's] rights to 'enhance the relative

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[3] The Court has distinguished *Miami Herald* and *Pacific Gas* and required a party to facilitate another's speech in contexts where presenting the other's speech would not interfere with its own message or be construed as reflecting its own views. *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 63-65 (2006); *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 88 (1980). But as the FACT Act requires pregnancy centers themselves to distribute the notices, which facilitate an activity the centers seek to discourage, this exception does not apply.

voice' of its opponents." *Pacific Gas*, 475 U.S. at 14, quoting *Buckley v. Valeo*, 424 U.S. 1, 49 and n. 55 (1976). The first case concerned a disincentive to candidate speech; the candidate's spending beyond a certain limit would asymmetrically exempt opponents from restrictions that would have operated had the candidate spoken less. *Davis v. Federal Election Comm'n.*, 554 U.S. 724, 729 (2008). The Court found the law's authorizing fundraising advantages for one's opponents acted as an "unprecedented penalty" on the robust exercise of First Amendment rights. *Id.* at 739. Candidates needed either to limit their speech or endure discriminatory legal treatment. *Id.* at 740. *Davis* thus recalled *Pacific Gas*, "finding infringement on speech rights where if the plaintiff spoke it could 'be forced . . . to help disseminate hostile views.'" *Davis*, 554 U.S. at 739, quoting *Pacific Gas*, 475 U.S. 1, 14.

The Court considered an even more direct infringement in *Arizona Free Enterprise Club's Freedom PAC v. Bennett*, 564 U.S. 721 (2011). The challenged law burdened a candidate's speech not by merely waiving law that would otherwise restrict his opponents; it *directly funded them*. For every 1000 dollars a privately-funded candidate spent, all opponents would receive 940 for their own use. *Id.* at 728-32. This rule by which "each personal dollar spent by the privately financed candidate results in an award of almost one additional dollar to his opponent" imposed an even more "constitutionally problematic" "penalty" on speech than in *Davis*, as candidate speech produced "a direct and automatic release" of funds to possibly several opponents. *Id.* at 737.

Arizona Free Enterprise cited *Miami Herald* and *Pacific Gas* in rejecting this speech deterrent. The Court recalled how the challenged law in *Miami Herald* "purported to advance free discussion" but actually "penalized the newspaper's own expression," and the argument that the Arizona law promoted free and robust discussion was "no more persuasive here than it was in [*Miami Herald v.*] *Tornillo*." *Arizona Free Enterprise*, 564 U.S. at 742, internal citations omitted. The Arizona law likewise resembled the *Pacific Gas* mandate that the utility "help disseminate hostile views." *Arizona Free Enterprise*, 564 U.S. 721, 742 n.8, quoting *Pacific Gas*, 475 U.S. 1, 14. After a candidate spoke beyond a limit, the law forced him to disseminate hostile views "in a most direct way — his own speech triggers the release of state money to his opponent." *Arizona Free Enterprise*, 564 U.S. at 742 n. 8.

The FACT Act forces the dissemination of hostile views in an even more direct way. It does not merely trigger funding for a contrary message; it *forces pregnancy centers to express it themselves*.

The FACT Act asymmetrically forces pro-life professionals to disseminate a hostile message, and does so as a "penalty" for exercising their own speech rights. *Davis*, 554 U.S. at 739. This compulsion unconstitutionally burdens speech. *Arizona Free Enterprise*, 564 U.S. at 742; *Miami Herald*, 418 U.S. at 256-57.

CONCLUSION

The Ninth Circuit's decision involves a frequently arising issue where states impose on pro-life professionals a legal obligation to undermine their own pro-life message. This unconstitutionally burdens their speech. This Court should grant review and clarify whether pro bono professional speech, offered to advance beliefs and ideas and not just commercial interests, deserves the highest degree of protection. *Primus*, 436 U.S. 412. This Court should also clarify whether the instant professional speech was so personalized and individualized as to forfeit strict scrutiny under *Lowe v. SEC*, 472 U.S. 181.

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Respectfully submitted,

William J. Becker, Jr.
Counsel of Record
FREEDOM X
11500 Olympic Blvd. Suite 400
Los Angeles, California 90064
(310) 636-1018
FreedomXLaw@gmail.com
Counsel for Amici Curiae

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In the Supreme Court of the United States

NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES, dba NIFLA, *et al.*,
Petitioners,

v.

XAVIER BECERRA,
Attorney General of California, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF LIBERTY, LIFE, AND LAW FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Deborah J. Dewart
Counsel of Record
620 E. Sabiston Drive
Swansboro, NC 28584-9674
(910) 326-4554
debcpalaw@earthlink.net

Counsel for Amicus Curiae

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

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INTEREST OF *AMICUS CURIAE*[1]

Liberty, Life, and Law Foundation ("LLLF"), as *amicus curiae*, respectfully urges this Court to grant the Petition for a Writ of Certiorari and reverse the decision of the Ninth Circuit.

LLLF is a North Carolina nonprofit corporation established to defend religious liberty, sanctity of human life, liberty of conscience, family values, and other moral principles. LLLF is gravely concerned about the growing hostility to religious expression in America and the related threats to life, liberty, and the rule of law. LLLF participated as *amicus curiae* in many of the cases challenging the HHS contraception mandate. LLLF's founder, Deborah J. Dewart, is the author of a book, *Death of a Christian Nation*, and many *amicus curiae* briefs in this Court and the federal circuits.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The mission of Petitioners is advocacy—not commerce or the practice of a profession. Their message is religious expression on a matter of intense public concern. Their method is to offer free information and other resources. The State's alleged mission is to

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[1] Counsel of record for all parties received notice at least 10 days prior to the due date of *amicus curiae*'s intention to file this brief. The parties have consented to the filing of this brief. *Amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to its preparation or submission.

prevent deception and ensure that women are informed about their full range of reproductive choices. But that mission is betrayed by its method. Rather than using its own voice to disseminate its own message—which advocates only *one* choice (abortion)—California hijacks the Centers as its couriers.

Compelled speech is anathema to the First Amendment. The Ninth Circuit parted company with this Court and other circuits when it upheld California's Reproductive FACT Act (Cal. Health & Safety Code §§ 123471, 123472, 123473) (the "Act"). Its ruling, if allowed to stand, empowers government to bludgeon free speech.

ARGUMENT

I. THE NINTH CIRCUIT OBSTRUCTS THE CENTERS' ABILITY TO CARRY OUT THEIR *MISSION*.

Petitioners are pregnancy resource centers (the "Centers") whose mission is to offer life-affirming alternatives to abortion. The State has a competing mission. Allegedly the State seeks to ensure that women are fully informed—but in reality it aggressively promotes abortion and suppresses information about alternatives. *The State treats the religious nonprofit Centers as commercial enterprises and ignores their mission*. The State's mission, if successful, would ensure that many Centers fail to accomplish their mission. Indeed, the State openly concedes its intent to target the Centers because of their pro-life viewpoint. Through a scheme of broad exemptions, the State cherry-picks pro-life centers and deliberately thwarts their mission. The end result is

that the only entities legally required to promote abortion are those who oppose it.

Incredibly, the Ninth Circuit insists the Act does not "encourage, suggest, or imply that women should use those state-funded services." *Nat'l Inst. of Family & Life Advocates v. Harris*, 2016 U.S. App. LEXIS 18515, *39 (9th Cir. 2016) ("*NIFLA v. Harris*"). This is an astounding denial of reality. If California does not intend to "encourage, suggest, or imply" that women should use state-subsidized abortion services, then it makes no sense to commandeer the Centers to advertise them. The Centers subsidize life-affirming alternatives to abortion. The State subsidizes abortion—then uses its superior resources and power to impede the Centers' mission.

The State essentially compels the Centers to abandon their mission. Either they must comply with the law and direct women to state-subsidized abortions, or they must enroll in a regime (the Family PACT program) that would mandate their participation in abortion-related drugs and services. Both options are constitutionally flawed.

II. THE NINTH CIRCUIT DECISION CHILLS THE CENTERS' ABILITY TO COMMUNICATE A MESSAGE CONTRARY TO PREVAILING STATE ORTHODOXY.

Abortion is not the only solution to an unplanned pregnancy. That is the Centers' distinctly *religious* message. This is speech at the heart of the First Amendment:

> Our precedent establishes that private religious speech, far from being a First Amendment

> orphan, is as fully protected under the Free Speech Clause as secular private expression. Indeed, in Anglo-American history, at least, government suppression of speech has so commonly been directed *precisely* at religious speech that a free-speech clause without religion would be Hamlet without the prince.

Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 760 (U.S. 1995) (internal citations omitted).

The State compels a distinctly pro-abortion message that fails to mention other choices.

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.

W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943). California not only "prescribes what shall be orthodox" on a morally hot-button issue, but demands that the Centers publicize this state orthodoxy. It is difficult enough for small religious nonprofits to accomplish their mission in reliance on voluntary contributions. The difficulties may be insurmountable if the Centers cannot communicate effectively with their intended audience.

A. The Centers Are Engaged In Expressive Advocacy On A Matter Of Public Concern.

The Centers promote an ideology on one of the most explosive public issues in America. "[S]peech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Snyder v. Phelps,* 131 S. Ct. 1207, 1215 (2011), quoting *Connick v. Myers,* 461 U.S. 138, 145 (1983). A matter of public concern is "a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public at the time of publication." *City of San Diego v. Roe*, 543 U.S. 77, 83-84 (2004); *see also Connick,* 461 U.S. at 146 ("any matter of political, social, or other concern to the community"). Abortion has been a quintessential "matter of public concern" for over four decades. "Adherents of particular faiths"—individuals and organizations such as the Centers—"frequently take strong positions on public issues." *Lemon v. Kurtzman*, 403 U.S. 602, 623 (1973), quoting *Walz v. Tax Com. of New York,* 397 U.S. 664, 670 (1970). The State's efforts to stifle the Centers' religious pro-life message, and compel "the utterance of a particular message favored by the Government, contravenes this principle." *Turner Broadcast Sys., Inc. v. FCC,* 512 U.S. 622, 641 (1994). California "may not burden the speech of [the Centers] in order to tilt public debate in a preferred direction." *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 578-579 (2011); *Wollschlaeger v. Governor*, 848 F.3d 1293, *38 (11th Cir. 2017).

B. The Disclosures Force The Centers To Become Couriers Of The State's Speech.

The State advances a message about government-subsidized abortions. But rather than use the massive resources at its disposal, California usurps the Centers' limited resources. The mandatory disclosures gobble up space and garble the Centers' message. Instead of hearing a clear pro-life message, the public is confronted with a hodgepodge of pro-abortion and pro-life statements.

The Act stifles the Centers' right to tailor, time, and edit their messages. Regardless of motives, the State "may not substitute its judgment as to how best to speak" for that of the Centers and the women they serve. *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 791 (1988). The Centers are entitled to exercise discretion about the "choice of material . . . the size and content . . . and treatment of public issues." *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 575 (1995). The State wrongfully intrudes on this "editorial control and judgment." *Id.* Moreover, editorial rights extend "not only to expressions of value, opinion, or endorsement, but *equally to statements of fact the speaker would rather avoid.*" *Id.* at 573 (emphasis added). Compelled statements of either opinion *or* fact burden protected speech. *Riley*, 487 U.S. at 797-798; *see also Milavetz, Gallop & Milavetz, P.A. v. United States*, 130 S. Ct. 1324, 1343 (2010) (Thomas, J., concurring). Even statutory disclosures that do pass constitutional muster should grant "flexibility to tailor the disclosures to . . . individual circumstances, as long as the resulting statements are substantially similar to the statutory

examples." *Id.* at 1341. The Act is *inflexible*, compelling the exact words and allowing no breathing space for the Centers to craft their presentation, even if the disclosures themselves were justified. The disclosures are so onerous that Centers cannot print advertisements without transgressing the Act.

C. The Licensed Centers Are Not Engaged In Professional Speech Or Conduct.

The Ninth Circuit opinion rests heavily on precedents governing professional speech, asserting that clients come to the Centers "precisely because of the professional services" and specialized knowledge they offer. *NIFLA v. Harris*, *32-33. Even so, this Court should consider "the nature of the speech taken as a whole and the effect of the compelled statement[s] thereon." *Riley*, 787 U.S. at 796. California may not, "under the guise of prohibiting professional misconduct, ignore constitutional rights." *NAACP v. Button*, 371 U.S. 415, 439 (1963). In *Button*, "the Court rightly rejected the State's claim that its interest in the 'regulation of professional conduct' rendered the statute consistent with the First Amendment." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2229 (2015), citing *Button*, 371 U.S. at 438-439.

The Ninth Circuit splits with the Fourth Circuit when it ignores a key element of professional speech:

> [T]he relevant inquiry to determine whether to apply the professional speech doctrine is whether the speaker is providing personalized advice in a private setting to a *paying client* or instead engages in public discussion and commentary.

Moore-King v. Cty. of Chesterfield, 708 F.3d 560, 569 (4th Cir. 2013) (emphasis added). The Centers are unquestionably engaged in "public discussion and commentary." The court ignores the obvious and briefly brushes over *Moore-King* in a footnote. *NIFLA v. Harris*, *36-37 n. 8.

Even when financial gain is involved, "a speaker's rights are not lost merely because compensation is received." *Riley*, 487 U.S. at 801. As in *Riley*, the mandatory disclosures are necessarily "intertwined with informative and perhaps persuasive speech" (*id.* at 796)—persuasion against abortion and information to facilitate alternatives. Under the Act, women who enter Licensed Centers are confronted with a state pro-abortion message that contradicts the Center's core beliefs and undermines its mission. A woman who enters an Unlicensed Center is greeted by the government's message about what the Center is *not*. The lengthy disclosures, which must appear in all printed and digital advertisements, obscure the Centers' message and mission. In both cases, the State compels conspicuous disclosures about what the Center does *not* do before the Center can explain what it *does* do. The State—not the Center—creates each woman's *first impression* of the Center.

The Ninth Circuit tramples the freedom of professionals and clients to discuss controversial topics like abortion, and it fails to distinguish such discussion from informed consent to a medical procedure. Even if the Licensed Centers were engaged in "professional" speech—a questionable premise at best—professional speech has many dimensions and is likely entitled to "the strongest protection our Constitution has to offer"

when the topic is a public issue like abortion. *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 634 (1995). Here the Ninth Circuit departs from recent Eleventh Circuit precedent *and even its own prior case law*:

> The Ninth Circuit recognized that doctor-patient speech (even if labeled professional speech) is entitled to First Amendment protection, and invalidated the policy because it was content- and viewpoint-based and did not have the requisite "narrow specificity." *See Conant v. Walters*, 309 F.3d 629, 637-639 (9th Cir. 2002).

Wollschlaeger, 848 F.3d at *29-30; *see also Pickup v. Brown*, 740 F.3d 1208, 1227 (9th Cir. 2013) ("doctor-patient communications *about* medical treatment receive substantial First Amendment protection"). Here, the disclosures are admittedly content-based, and California's gerrymandered targeting reveals its pro-abortion viewpoint.

Pro Bono Public Interest Advocacy. The Ninth Circuit ignores the distinction this Court carved out for pro bono public interest advocacy. The Centers' message and services are remarkably analogous to *In re Primus*, 436 U.S. 412 (1978), where an ACLU attorney offered free services "to express personal and political beliefs and to advance the civil-liberties objects of the ACLU, rather than to derive financial gain." *Id.* at 422. This Court relied on the speaker's motive to distinguish protected First Amendment expression from commercial or professional activities the government may regulate more freely. *Id.* at 437-438 n. 2. Even if the Centers were engaged in professional speech, their purpose is advocacy—as in *Primus*. The

free services and information they provide are integrally related to the expression of their core beliefs.

Professional Licensing. Courts uphold reasonable regulations on licensed professions that require speech—e.g., law, accounting, medicine.[2] Laws that regulate entry into a profession are constitutional if they "have a rational connection with the applicant's fitness or capacity to practice" the profession. *Lowe v. Sec. & Exch. Comm'n,* 472 U.S. 181, 228 (1985) (White, J., concurring), quoting *Schware v. Bd. of Bar Examiners,* 353 U.S. 232, 239 (1957).

Here, the **Licensed Centers** have already complied with the licensing requirements applicable to the limited services they provide—and unlike other licensing programs,[3] the Act does "dictate the content." This is classic compelled speech. The State

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[2] *Milavetz,* 130 S. Ct. 1324 (bankruptcy attorneys); *Fla. Bar v. Went For It, Inc.,* 515 U.S. at 625-26 (restriction on direct-mail solicitation of accident victims); *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio,* 471 U.S. 626 (1985) (upholding mandatory disclosure that client may be liable for litigation costs, in attorney ads for contingency fee cases); *Ohralik v. Ohio State Bar Ass'n,* 436 U.S. 447 (1978) (in-person attorney-client solicitation); *Lawline v. Am. Bar Ass'n,* 956 F.2d 1378 (7th Cir. 1992) (rejecting challenge to restrictions on the unauthorized practice of law); *Accountant's Soc'y of Va. v. Bowman,* 860 F.2d 602 (4th Cir. 1988) (accounting terms and standards for licensed CPA's).

[3] *See, e.g., Nat'l Ass'n for Advancement of Psychoanalysis v. Cal. Bd. of Psychology,* 228 F.3d 1043, 1056 (9th Cir. 2000) ("California does not dictate the content of what is said in therapy; the state merely determines who is qualified as a mental health professional.")

commandeers the Centers to disseminate a government message antithetical to their core mission. The **Unlicensed Centers** are not subject to any licensing requirement. None of the Centers "purport to exercise judgment on behalf of [a] client in the light of a client's individual needs and circumstances." *Lowe v. SEC,* 472 U.S. at 232 (White, J., concurring). All of them are engaged in expressive advocacy on a public issue with significant moral, religious, and political ramifications—not a profession that the State may regulate. They offer free information and services to empower *the women themselves* to make informed decisions about their pregnancies. "This mere provision of information would not seem to be enough to create the type of quasi-fiduciary relationship contemplated by the *Lowe* and *Thomas* concurrences." *Centro Tepeyac v. Montgomery Cnty.*, 779 F. Supp. 456, 467 (D. Md. 2012); *see Lowe v. SEC,* 472 U.S. at 232 (White, J., concurring) and *Thomas v. Collins,* 323 U.S. 516, 545 (1945) (Jackson, J., concurring) ("It cannot be the duty, because it is not the right, of the state to protect the public against false doctrine").

Even truly professional speech may trigger "a collision between the power of government to license and regulate . . . and the rights of freedom of speech." *Lowe v. SEC,* 472 U.S. at 232 n. 10 (White, J., concurring) (non-personalized newsletters with investment advice are not professional speech). Occupational regulations are valid only if "[a]ny abridgement of the right to free speech is merely the incidental effect of observing an otherwise legitimate regulation." *Ohralik v. Ohio State Bar Ass'n,* 436 U.S. at 467-468. The Act's constitutionally flawed burdens can hardly be deemed *incidental*.

D. The Centers Have No Economic Interests At Stake And Do Not Engage In Commercial Transactions With The Women They Serve.

The Ninth Circuit rejected the State's argument that the Centers are engaged in commercial speech. But even if it were:

> The commercial marketplace, like other spheres of our social and cultural life, provides a forum where ideas and information flourish. Some of the ideas and information are vital, some of slight worth. But the general rule is that the speaker and the audience, not the government, assess the value of the information presented.

Sorrell, 564 U.S. at 579, quoting *Edenfeld v. Fane*, 507 U.S. 761, 767 (1993). In the commercial setting, it may be possible to "compel disclosure without suppressing speech." *Conn. Bar Ass'n v. United States,* 620 F.3d 81, 93 (2d Cir. 2010). But even there, "unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech." *Zauderer,* 471 U.S. at 651.

The Centers exist to assist women facing unplanned pregnancies and inform them about *choices* other than abortion. At no time do they "propose a commercial transaction." *Bolger v. Youngs Drug Prods. Corp.,* 463 U.S. 60, 64-68 (1983); *Bd. of Trustees of State Univ. of N.Y. v. Fox,* 492 U.S. 469, 473 (1989); *Greater Baltimore Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Baltimore*, 721 F.3d 264, 284 (4th Cir. 2013). Their message is not "expression related solely to the economic interests of the speaker and its

audience." *Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 561 (1980). It is only through a warped redefinition—equating "the opportunity to advocate against abortion" with economic benefit—that the government could possibly manufacture a "commercial" transaction. *Evergreen Ass'n, Inc. v. City of New York*, 801 F. Supp. 2d 197, 204 (S.D.N.Y. 2011), *aff'd in part and rev'd in part*, 740 F.3d 233 (2014). That fanciful transformation is "particularly offensive to free speech principles." *Id.* at 206. It twists the free services of religious missions and upends the First Amendment:

> [A]ny house of worship offering their congregants sacramental wine, communion wafers, prayer beads, or other objects with commercial value, would find their accompanying speech subject to diminished constitutional protection.

O'Brien v. Mayor & City Council of Baltimore, 768 F. Supp. 2d 804, 813-814 (D. Md. 2011). Restaurants can be required to disclose caloric and nutritional information. *N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health*, 556 F.3d 114, 131-32 (2d Cir. 2009). But it would be flagrantly unconstitutional to impose comparable disclosures on a church operating a soup kitchen to feed the homeless. Restaurants and soup kitchens both provide food—but a church ministry to the poor is not a "commercial" venture subject to the same level of government regulation. To assume that position would "represent a breathtaking expansion of the commercial speech doctrine." *Evergreen*, 801 F. Supp. 2d at 205. Here, the Centers are motivated by

religious beliefs and social concerns, not economic interest.

For many years, "the Constitution impose[d] [no] restraint on government as respects purely commercial advertising." *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942). When this Court expanded protection for admittedly *commercial* speech, the context was abortion. Three decades after *Valentine*, "the notion of unprotected commercial speech all but passed from the scene." *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 759-760 (1976). One of the earliest commercial speech cases held that an out-of-state advertisement for abortion services "did more than simply propose a commercial transaction"—"it contained factual material of clear 'public interest.'" *Bigelow v. Virginia*, 421 U.S. 809, 822 (1975). "The fact that the particular advertisement in appellant's newspaper [for legal abortions in New York] had commercial aspects or reflected the advertiser's commercial interests did not negate all First Amendment guarantees." *Id.* at 818. This Court protected the rights of the New York advertiser and distinguished the facts from *Valentine*, where a "message of asserted public interest was appended solely for the purpose of evading the ordinance." *Id.* at 819. A few years later, this Court characterized unsolicited mailings about contraception as commercial speech, after a careful analysis of many factors—and not solely the economic motivation or the reference to a specific product. *Bolger*, 463 U.S. at 66. Even so, the commercial character of the speech did not remove it from the First Amendment:

> [W]here – as in this case – a speaker desires to convey truthful information relevant to important social issues such as family planning and the prevention of venereal disease, we have previously found the First Amendment interest served by such speech paramount.

Id. at 69, citing *Carey v. Population Services International*, 431 U.S. 678 (1977) and *Bigelow v. Virginia*, 421 U.S. 809. *In spite of classifying the speech as commercial*, this Court struck down the federal statute that prohibited mailing information about contraception because it unreasonably suppressed the flow of information. *Id.* at 72. Here, the Centers' pro-life message is at the heart of their existence, not an afterthought designed to sidestep government regulation. As in *Bolger*, the Centers "desire to convey truthful information relevant to [an] important social issue." The State cannot employ its regulatory authority to shut down speech on either side of the abortion debate. The most it can do is "assess liability for specific instances of deliberate deception"—not "impose a prophylactic rule requiring disclosure even where misleading statements are not made." *Riley*, 487 U.S. at 803 (Scalia, J., concurring).

Commercial speech may be "linked inextricably" with the underlying commercial transaction. The government's interest in regulating that transaction "may give it a concomitant interest in the expression itself." *Edenfeld*, 507 U.S. at 767 (CPA client solicitation). But commercial speech may also be "inextricably intertwined" with expressive speech. In that case, it does not retain its commercial character but instead must be treated as fully protected

expressive speech. This Court declines to "parcel out the speech, applying one test to one phrase and another test to another phrase." *Riley*, 487 U.S. at 796. That is particularly true when the expressive aspect is targeted for regulation. *Riley* built on a principle from an earlier case involving fundraising, where this Court recognized that "[s]olicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues." *Village of Schaumberg v. Citizens for a Better Environment*, 444 U.S. 620 (1980). Here, even if the Centers' speech could plausibly be considered either professional or commercial, it is "inextricably intertwined" with "persuasive speech" advocating a "particular view[]" on an important social issue.

Even where regulation of commercial speech is appropriate, the government has limited power to restrict communication that is "neither misleading nor related to unlawful activity." *Central Hudson*, 447 U.S. at 564. The regulation must directly advance a substantial state interest, and "if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive." *Id.* The framework developed by this Court is "substantially similar to the test for time, place, and manner restrictions." *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 554 (2001) (internal citations and quotation marks omitted). And "the abiding characteristic of valid time, place, and manner regulations is their content neutrality. See *Ward v. Rock Against Racism,* 491 U.S. 781, 791-796 (1989)." *Id.* at 573 (Thomas, J., concurring). As the Ninth

Circuit acknowledged, California's FACT Act is not content neutral.

E. The Disclosures Shut Off The Free Flow Of Information—The Very Purpose Of Disclosures In Commercial And Professional Contexts.

The First Amendment promotes the free flow of ideas and information. This helps ensure that even commercial decisions are well informed. "To this end, the free flow of commercial information is indispensable." *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976). *See also Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 113-114 (2d. Cir. 2001) ("Protection of the robust and free flow of accurate information is the principal First Amendment justification for protecting commercial speech, and requiring disclosure of truthful information promotes that goal.") Here, decisions about pregnancy are "protected from unwarranted state interference." *Bolger*, 463 U.S. at 69; *see also Carey*, 431 U.S. at 700-701, *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. at 766-767. This principle cuts both ways and protects a woman's choice to learn about alternatives to abortion. And unlike cases involving merely the sale or advertising of a product, the Centers *do* "wish to editorialize on [a] subject"—one that is a matter of grave public concern and heated political debate. *Id.* at 761.

Even if professional or commercial speech were involved, the State mandate thwarts the flow of information that disclosures ordinarily facilitate. The Act purports to ensure that women are fully informed of their reproductive options but in reality it stifles

access to their full range of choices. Its sole focus is the availability of abortion, emergency contraception, and birth control. The State is determined to promote abortion and crafts its message accordingly. *But that does not fully inform women.* The Centers fill the gap by providing "truthful information relevant to [an] important social issue[]." *Bolger,* 463 U.S. at 69. The Centers widen the range of options for women who might otherwise believe abortion is their *only* choice. Their services facilitate the free flow of information. The Act hinders that flow by interfering with the right to *receive* information. "Indeed, the right to hear and the right to speak are flip sides of the same coin." *Conant,* 309 F.3d at 643 (Kozinski, J., concurring) (medical marijuana); see also *Bd. of Educ. v. Pico*, 457 U.S. 853, 866-867 (1982), *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.,* 425 U.S. at 756-757. Contrary to the state's alleged interest in *fully* informing women, the Act imposes restrictions *only* on entities that oppose abortion and mandates *only* disclosures that promote abortion. The Act smothers expression and impedes access to information.

The State equates informed consent disclosures imposed on *physicians* with the mandates imposed on the Centers. The only similarity is that both schemes are related to abortion. The resemblance ends there. Like *any* other surgical procedure, abortion requires informed consent. Without it, the physician could be liable for malpractice. Doctors remain free to advocate abortion or discuss a host of other options with pregnant patients. Informed consent laws are viewpoint neutral and their impact on speech is incidental. California's inflexible mandates are beyond

incidental, drowning out the Centers' pro-life message and even jeopardizing their ability to remain open.

The Ninth Circuit continues the State's charade, citing this Court's decision in *Planned Parenthood of Southeastern Pa. v. Casey,* 505 U.S. 833 (1992). *NIFLA v. Harris*, *25 ("[T]he Supreme Court has recognized a state's right to regulate physicians' speech concerning abortion."). The circuit court also references Fourth, Fifth, and Eighth Circuit cases that are anything but analogous to the facts here. *NIFLA v. Harris*, *26 ("courts are in agreement that strict scrutiny is inappropriate in abortion-related disclosure cases"). The Fourth Circuit struck down an informed consent law under intermediate scrutiny. *Stuart v. Camnitz*, 774 F.3d 238, 248-249 (4th Cir. 2014). The Fifth Circuit applied a reasonableness standard to uphold a requirement that doctors show pregnant women sonograms and make audible the fetus's heartbeat. *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 575-576 (5th Cir. 2012). The Eighth Circuit, also using a reasonableness test, upheld the compelled disclosure of "truthful, non-misleading information relevant to a patient's decision to have an abortion." *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 734-735 (8th Cir. 2008).

The Ninth Circuit admits a "circuit split regarding the appropriate level of scrutiny" (*NIFLA v. Harris*, *26) but misses the elephant in the room: Unlike *Stuart*, *Lakey*, *Rounds*, or *Casey*, the Act contains no informed consent provision. The court masks the difference by using the broad term "abortion-related disclosures." Informed consent laws facilitate the free flow of information by equipping patients with critical

information they need in order to consent to a medical procedure. Here, the Act's disclosures are unrelated to any risk associated with services the Centers offer. If ultrasounds or pregnancy tests posed a health risk, the State could require disclosure of that risk. Instead, the State mandates dissemination of information about a procedure the Centers *oppose* and would never recommend or perform—abortion. That is just as illogical as it is unconstitutional.

Occasionally courts recognize expanded First Amendment protection for new categories of speech. This enhances the free flow of information. In fact, the protection currently enjoyed by commercial speech was forged in the context of disseminating information about abortion services (*Bigelow v. Virginia,* 421 U.S. 809) and contraception (*Bolger,* 463 U.S. 60). But courts cannot exercise "freewheeling authority to declare new categories of speech outside the scope of the First Amendment." *United States v. Stevens,* 130 S. Ct. 1577, 1586 (2010). That is exactly what the Ninth Circuit has done. The "new category" it expunges is pro-life speech offering free information about life-affirming alternatives to abortion.

The Ninth Circuit's departure from its own precedent is startling. In a case *not* related to abortion, the circuit court stated that: "An integral component of the practice of medicine is the communication between a doctor and a patient. Physicians must be able to speak frankly and openly to patients." *Conant*, 309 F.3d at 636. In *Conant*, the court enjoined a federal law that allowed revocation of a physician's license for recommending medical marijuana. The law impermissibly "condemn[ed] expression of a particular

viewpoint." *Id.* at 636. The decision acknowledged that the government must respect First Amendment rights even in the context of requiring informed consent. *Id.* at 637 ("Being a member of a regulated profession does not, as the government suggests, result in a surrender of First Amendment rights.") The State's authority to regulate commercial or professional speech does not, under any standard, grant the government carte blanche to skew disclosures in favor of one side of a heated public debate and destroy the mission of those who disagree with its viewpoint.

III. THE NINTH CIRCUIT CRIPPLES THE CENTERS' ABILITY TO CONTINUE THEIR *METHOD* OF OFFERING FREE RESOURCES.

The Centers and the State each have a method to accomplish their respective missions. The Centers' method is to offer free information and resources, including limited, non-surgical medical services such as pregnancy tests and ultrasounds. The State has a constitutionally flawed method—rather than using its own funds and voice, California confiscates the Centers' limited resources and compels them to spread a government message that conflicts with their mission. And while the State claims its purpose is to prevent deception and ensure that women are fully informed about their reproductive choices, its method betrays that claim. The State informs women about *only one* choice—abortion—and deceives women by using pro-life speakers as its mouthpiece. The State abuses its power by enacting laws that distort the Centers' message, crippling their ability to speak and otherwise carry out their mission.

The Act turns free speech jurisprudence on its head. Its burdensome disclosures are broadly tailored, using the most restrictive means to accomplish the State's viewpoint-based objective. The State defies this Court's precedent by imposing these disclosures as its *first* line of attack:

> If the First Amendment means anything, it means that regulating speech must be a *last—not first—resort. Yet here it seems to have been the first strategy the Government thought to try.*

Thompson v. Western States Medical Ctr., 535 U.S. 357, 373 (2002) (emphasis added); *see also Conant*, 309 F.3d at 637. Rather than use its own voice, the "first strategy the [State] thought to try" was requiring the Centers to become ventriloquists and bear the costs of transmitting its message. Even in the commercial context, "if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive." *Cent. Hudson,* 447 U.S. at 564. The State has a wealth of more narrowly tailored means available—starting with its own voice and resources. *See, e.g., Riley,* 487 U.S. at 800 ("the State may itself publish the detailed financial disclosure forms it requires professional fundraisers to file").

The State can adopt, promote, publicize and even fund a viewpoint. "The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way." *Rust v. Sullivan*, 500 U.S.

173, 193 (1991). In *Rust*, the government funded family-planning services but chose to exclude abortion. *Id.* at 178. The government may appropriate public funds for a program, and when it does, it may define the limits of the program. *Id.* at 194. But the Act unconstitutionally compels the Centers to expend their limited resources to be a conduit for the State's own message, compromising "the core principle of speaker's autonomy" (*Hurley*, 515 U.S. at 575) and "assum[ing] a guardianship of the public mind" (*Riley*, 487 U.S. at 791, quoting *Thomas v. Collins*, 323 U.S. at 545 (Jackson, J., concurring)).

The Constitution severely restricts the State's ability to compel speech. Under narrow circumstances, the government may protect the public by requiring disclosures. But even in a commercial context, "unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech." *Zauderer*, 471 U.S. at 651. That would be true here *even if* the Centers' speech were "commercial"—which the Ninth Circuit admits it is not. *NIFLA v. Harris*, *19 n. 5 ("We find unpersuasive Appellees' argument that the Act regulates commercial speech subject to rational basis review.").

In upholding California's flawed method of pursuing its mission, the Ninth Circuit generates a split with the Second Circuit. That circuit expressed concerns about laws "requir[ing] pregnancy services centers to advertise on behalf of the City." *Evergreen Ass'n*, 740 F.3d 233, 250 (2d Cir. 2014). This "offends the Constitution even if it is clear that the government is the speaker." *Id.*, citing *Wooley v. Maynard*, 430 U.S.

705, 715 (1977) (invalidating statute that turned "private property [into] a mobile billboard for the State's ideological message"). Even if a message appears benign or is acceptable to some, the State's interest does not "outweigh the [Centers'] First Amendment right to avoid becoming the courier for such message." *Id.* at 717. Even seemingly innocuous content-based laws can too easily cross the threshold into viewpoint discrimination. Such laws "pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion." *Turner*, 512 U.S. at 641. That is exactly what California does—in conflict with this Court:

> While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government.

Hurley, 515 U.S. at 579. The FACT Act contravenes the basic presumption "that speakers, not the government, know best both what they want to say and how to say it." *Riley*, 487 U.S. at 791. Moreover, the State fails to publicize its own message, instead *inflicting the entire burden on the Centers*.

CONCLUSION

This Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

Deborah J. Dewart
Counsel of Record
620 E. Sabiston Drive
Swansboro, NC 28584-9674
(910) 326-4554
debcpalaw@earthlink.net

Counsel for Amicus Curiae

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Nos. 16-1146, 16-1140, 16-1153

In the Supreme Court of the United States

A WOMAN'S FRIEND PREGNANCY RESOURCE CLINIC AND ALTERNATIVE WOMEN'S CENTER,
Petitioners,

v.

XAVIER BECERRA,
Attorney General of the State of California,
Respondent.

NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES, D/B/A NIFLA, *et al.*,
Petitioners,

v.

XAVIER BECERRA, ATTORNEY GENERAL, *et al.*,
Respondents.

LIVINGWELL MEDICAL CLINIC, INC., *et al.*,
Petitioners,

v.

XAVIER BECERRA, Attorney General of the State of California, in his official capacity, *et al.*,
Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICI CURIAE* OF NATIONAL ASSOCIATION OF EVANGELICALS, CHRISTIAN LEGAL SOCIETY, AND THE NATIONAL LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

Steven W. Fitschen
The National Legal Foundation
2224 Va. Beach Blvd., St. 204
Virginia Beach, VA 23454
(757) 463-6133; nlf@nlf.net

Frederick W. Claybrook, Jr.
Counsel of Record
Claybrook LLC
1001 Pa. Ave., N.W., 8th Fl.
Washington, DC 20004
(202) 250-3833;
rick@claybrooklaw.com

QUESTION PRESENTED

The Ninth Circuit *sustained* legislation compelling anti-abortion pregnancy centers to distribute pro-abortion messages because it allegedly dealt with "professional speech." Another circuit *enjoined* legislation compelling abortion providers to give information that tended to reduce abortions, but for the same reason. *See Stuart v. Camnitz*, 774 F.3d 238 (4th Cir. 2014). When dealing with abortion-related speech compelled by the government, some circuits apply strict scrutiny and some other standards of their definition.

The question this and its related petitions present is whether a uniform legal standard is to be applied when dealing with pro- and anti-abortion legislation, or whether pro-abortion legislation compelling speech by pro-life groups is to be given preferential treatment.

INTEREST OF *AMICI CURIAE*[1]

National Association of Evangelicals ("NAE") is the largest network of evangelical churches, denominations, colleges, and independent ministries in the United States. It serves 40 member denominations, as well as numerous evangelical associations, missions, nonprofits, colleges, seminaries, and independent churches. NAE serves as the collective voice of evangelical churches and other religious ministries. It believes that human life is sacred because made in the image of God, that civil government has no higher duty than to protect human life, and that duty is particularly applicable to the life of the unborn because they are helpless to protect themselves.

Christian Legal Society ("CLS") is a nonpartisan association of attorneys, law students, and law professors, founded in 1961, with attorney chapters nationwide and law student chapters at nearly 90 law schools. CLS's advocacy arm, the Center for Law and Religious Freedom, works to defend religious liberty and the sanctity of human life in the courts, the legislatures, and the public

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[1] Counsel of Record for the Parties received timely notice of the intent to file this Brief. Sup. Ct. R. 37.2(a). The Parties in these cases have consented to the filing of this Brief. Copies of the written consent are being filed with this Brief. No Counsel for any Party authored this Brief in whole or in part, and no Counsel or Party made a monetary contribution intended to fund the preparation or submission of this Brief. No person or entity other than *Amici*, their members, and their Counsel made a monetary contribution intended to fund the preparation or submission of this Brief.

square. CLS has long believed that pluralism, essential to a free society, prospers only when the First Amendment rights of all Americans are protected.

The **National Legal Foundation** ("NLF") is a public interest law firm dedicated to the defense of First Amendment liberties, including our First Freedoms of speech, assembly, and religion. The NLF and its donors and supporters, in particular those from California, are vitally concerned with the outcome of this case because of the impact a case such as this one will have on the interactions that religious institutions and other charitable organizations have with local governments when these institutions and organizations speak and assemble. The NLF and its donors also believe that these protections are especially it is important when it comes to a contentious issue such as abortion.

SUMMARY OF THE ARGUMENT

Because uniformity of the rules of decision making are critical, not only to the rule of law but also to the public perception of the evenhandedness of the judiciary in reviewing regulation concerning abortion, one of the most contentious issues of our time, this Court should take this opportunity to set out the applicable standards, consistent with its recent decision in *Reed v. Town of Gilbert*.

ARGUMENT

The petitions for certiorari filed in this case and in the related cases ask for review of the Ninth Circuit's upholding of California's law mandating pro-life pregnancy centers to advertise abortion

services by the state (among other things). Those petitions amply identify the conflicts among the circuits and will not be repeated. Instead, *Amici* briefly set out three additional points in support of the petitions.

1. Perhaps to belabor the obvious, abortion remains one of the most contentious issues of our public life, implicating not just religious and ethical issues, but scientific and political ones. When the judiciary appears to be taking sides, with some courts holding what can be perceived as anti-abortion legislation to a more exacting legal standard than other courts hold pro-abortion legislation, it necessarily reflects on the impartiality of our courts, a perception that is critical to be maintained for the Third Branch to be held in proper respect. The petitions should be granted to assure uniform standards are applied on both sides of this issue, preserving the perception of integrity and impartiality by the courts on this contentious topic.

2. Whether abortion should be encouraged or discouraged is not a "closed" issue such that the courts should themselves take sides. The desirability of abortion is still open for legitimate debate among people of intelligence and good faith on any number of levels, including social policy, economics, and biology. Indeed, this Court has repeatedly held that, although abortion may not be fully banned, governments do not have to fund the exercise of the abortion right. *See, e.g., Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989) (upholding state law prohibiting use of public facilities and personnel for abortions); *Williams v. Zbarez*, 448 U.S. 358 (1980) (upholding state law prohibiting use of public funds for abortion); *Poelker v. Doe*, 432 U.S. 519

(1977) (upholding city's refusal to pay for abortions at its hospital).

3. The Ninth Circuit applied its definition of an intermediate standard of review to the California statute by labeling the compelled advertisement by pro-life facilities of free or reduced-rate abortion services by the state as regulating "professional" speech. Assuming some content-based regulation is permissible for some types of speech of historical professions, this Court should clarify that admittedly viewpoint-discriminatory speech such as that here cannot be given a standard of review of less than strict scrutiny. As this Court recently observed in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), viewpoint regulation is a particularly "egregious form of content discrimination." *Id.* at 2230 (quoting *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995)). The *Reed* Court noted that, in *NAACP v. Button*, 371 U.S. 415 (1963), the Court "rightly rejected the State's claim that its interest in the 'regulation of professional conduct' rendered the statute consistent with the First Amendment, observing that 'it is no answer . . . to say . . . that the purpose of these regulations was merely to insure high professional standards and not to curtail free expression.'" *Id.* at 2229 (quoting *Button*, 371 U.S. at 438-39). Similarly here, the California legislature cannot immunize its viewpoint-discriminatory legislation on a matter of central political significance by calling those whose speech it seeks to curtail "professionals." Indeed, *Reed* applied strict scrutiny to the town's content-based regulation of notices about meeting times and places, information that is much less central to major public issues than is abortion.

CONCLUSION

Amici urge this Court to grant the petitions seeking review of the Ninth Circuit's decision that failed to apply strict scrutiny to California's pro-abortion law that compels anti-abortion facilities to advertise the availability of abortion services. The Ninth Circuit's approach is out of step with *Reed* and is in tension with that of other circuits. In this highly contentious area of our national discourse, it is essential that the public have the perception that our courts are giving evenhanded treatment to all participants. These petitions provide this Court with a prime opportunity to set a uniform standard.

Respectfully submitted,
this 20th day of April 2017

Frederick W. Claybrook, Jr.
Counsel of Record
Claybrook LLC
1001 Pa. Ave., NW, 8th Floor
Washington, D.C. 20004
(202) 250-3833
rick@claybrooklaw.com

Steven W. Fitschen
The National Legal Foundation
2224 Virginia Beach Blvd., Suite 204
Virginia Beach, VA 23454
(757) 463-6133
nlf@nlf.net

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NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES, D/B/A NIFLA, *ET AL.*, *Petitioners*,

v.

XAVIER BECERRA, ATTORNEY GENERAL, *ET AL.*, *Respondents*.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

Brief *Amicus Curiae* of United States Justice Foundation, Family PAC Federal, Eberle Associates, and Conservative Legal Defense and Education Fund in Support of Petitioners

JOSEPH W. MILLER
U.S. Justice Foundation
932 D Street, Ste. 2
Ramona, CA 92065
Attorney for Amicus Curiae
U.S. Justice Foundation

JEREMIAH L. MORGAN*
HERBERT W. TITUS
WILLIAM J. OLSON
ROBERT J. OLSON
WILLIAM J. OLSON, P.C.
370 Maple Ave. W., Ste. 4
Vienna, VA 22180
(703) 356-5070
wjo@mindspring.com
Attorneys for *Amici Curiae*

**Counsel of Record*

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INTEREST OF THE *AMICI CURIAE*[1]

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SUMMARY OF ARGUMENT

California's "Reproductive FACT Act" ("FACT Act") requires approximately 200 pro-life Crisis Pregnancy Centers ("CPCs) across the State of California to advise pregnant women about the availability of state-sponsored abortion-on-demand. As the Ninth Circuit describes it, the California Fact Act "requires [i] licensed pregnancy-related clinics [to] disseminate a notice stating the existence of publicly-funded family-

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[1] It is hereby certified that counsel for the parties have consented to the filing of this brief; that counsel of record for all parties received notice of the intention to file this brief at least 10 days prior to the filing of it; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

planning services, including contraception and abortion, [and ii] unlicensed clinics [to] disseminate a notice stating that they are not licensed by the State of California." Nat'l Inst. Of Family & Life Advocates v. Harris ("NIFLA"), 839 F.3d 823, 828-29 (9th Cir. 2016). Failure to speak the state's pro-abortion message subjects CPCs to significant fines. CPCs, created to protect human life, are being compelled to compromise their mission, and render their message incoherent, should they agree to direct pregnant woman to programs which facilitate the killing of their unborn children. The Ninth Circuit has determined that the California law is constitutional. This cannot stand.

This brief explains why any such compelled speech on a matter of public policy violates both Free Speech (section II, *infra*) and Free Exercise (section III, *infra*) principles. Moreover, the same rationale used to compel this pro-abortion speech has no natural limitation, and could be used to shut down all Crisis Pregnancy Centers entirely (section IV, *infra*). However, the issue of life is not analogous to a matter of debatable tax policy or environmental policy, but rather lies at the core of personal spiritual convictions. In truth, the enactment of the FACT Act was a grotesque exercise of raw political power by the pro-abortion forces in California who grant no quarter to those who reject their culture of death (section I, *infra*).

ARGUMENT

I. THE CALIFORNIA LEGISLATURE VIOLATES UNALIENABLE RIGHTS OF CALIFORNIANS.

The battle over abortion is generally considered a political one. It is not. As the Apostle Paul warned us, the battle for life itself is an invisible, spiritual one. *See* Ephesians 6:12. The California legislature may think it has the power to decide what is true and what is misleading in the battle over abortion. But the self-evident truth is that life is a gift from God, for each human being is "fearfully and wonderfully made." *See* Psalm 139:14; Psalm 22:9-10; Psalm 119:73. Under the pretext that the California legislature knows best, it enacted a law with a noble name: the "Reproductive FACT Act." But the law is neither factual nor legal. An unborn child is made in the image and likeness of God[2] — not just so much tissue to be disposed of as unwanted property, as the California legislature assumes.

With this law, the California legislature violates the nation's founding charter, the Declaration of Independence, which confirms our national view that we are created beings. It is truly "self-evident" that every man is endowed by our Creator with "unalienable Rights" which the California legislature

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[2] "And God said, Let us make man in our image, after our likeness:" Genesis 1:26.

may not impair.[3] "Governments are instituted among Men" to secure these rights, the first among which is the right to "Life" — not to take Life through abortion.

In rejecting these self-evident truths, the California legislature has elevated itself above God and those who embrace the law of our Creator, seeking to compel pro-life CPCs to violate their religious convictions, which they cannot do.[4] The Bible does not distinguish between a child in the womb and a child after birth.[5] And it is the arrogance of evil men and women to require pro-lifers to aid and abet their crimes against humanity by joining in the shedding of the blood of these innocents — a slaughter that has now risen to "perhaps 50 million"[6] babies nationwide since this Court struck down state laws criminalizing homicide by abortion 44 years ago this past January 22.

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[3] Indeed, if one searches for the true source of American exceptionalism, it is to be found in the Declaration's recognition of unalienable rights that may not be trampled on by government.

[4] "Then Peter and the other apostles answered and said, We ought to obey God rather than men." Acts 5:29.

[5] *See* M. Grisanti, "The Abortion Dilemma," The Master's Seminary Journal (Fall 2000) at 169-190, https://www.tms.edu/m/tmsj11i.pdf.

[6] *See* "Norma McCorvey, 'Roe' in Roe v. Wade, Is Dead at 69" *New York Times* (Feb 18, 2017). https://www.nytimes.com/2017/02/18/obituaries/norma-mccorvey-dead- roe-v-wade.html

It is a sign of the times that the FACT Act is described not as promotion of abortion, but as a "reproductive health" measure. However, as one Ohio-based pro-life ministry explains:

> Abortion is not healthcare. Planned Parenthood does not plan parenthood...it ends it. Every woman that visits one of those "clinics" enters as a mother and leaves as a mother. The sad truth is that she is the mother of a dead baby.[7]

The California legislature unrighteously assumes the opposite — the highest good is abortion, not birth. Thus, in their eyes, those who counsel mothers to keep their babies are on the wrong side of history, and, therefore, must be engaged in trickery and deceit, whereas, in reality, the CPCs are not a threat to the people of California, but a blessing. The state's legislature, however, prefers death to life, putting the nation in grave danger.[8]

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[7] *See* D. Daubenmire, "Fake Women's Healthcare," Pass the Salt Ministry (April 13, 2017), https://coachdavelive.com/news-with-views-column/fake-womens-healthcare.

[8] "Woe unto them that call evil good, and good evil; that put darkness for light, and light for darkness; that put bitter for sweet, and sweet for bitter!" Isaiah 5:20.

II. THE FACT ACT UNCONSTITUTIONALLY ESTABLISHES THE CALIFORNIA LEGISLATURE AS A "MINISTRY OF TRUTH."

This case involves abortion, an area of constitutional jurisprudence where the Supreme Court has demonstrated a willingness "to bend the rules when any effort to limit abortion, or even to speak in opposition to abortion, is at issue." Stenberg v. Carhart, 530 U.S. 914, 954 (2000) (Scalia, J., dissenting). Twenty-seven years ago, Justice Scalia explained how judges decide cases involving abortion:

> One will search in vain the document we are supposed to be construing for text that provides the basis for the argument over these distinctions [among abortion laws].... The **random** and **unpredictable** results of our consequently unchanneled individual views make it increasingly evident, Term after Term, that **the tools for this job** are not to be found in the lawyer's — and hence **not in the judge's — workbox**. I continue to dissent from this enterprise of devising **an Abortion Code**, and from the **illusion** that we have authority to do so. [Hodgson v. Minn., 497 U.S. 417, 480 (1990) (Scalia, J., concurring in part and dissenting in part) (emphasis added).]

Invoking the Abortion Code, the Ninth Circuit, searched for the least restrictive atextual, judge-empowering balancing test to apply. In doing so, the

Ninth Circuit candidly admitted that, "courts have routinely applied a lower level of scrutiny when states have compelled speech concerning abortion-related disclosures." NIFLA at 837. If the FACT Act involved any topic other than abortion, it likely already would have been found in violation of the First Amendment principles that the government may neither compel nor suppress speech that it believes is misleading.

A. The California FACT Act Violates the First Amendment Rule Against Compelled Speech.

For three quarters of a century, this Court has explained that the First Amendment protects against government compelled speech. Famously, Justice Jackson addressed a West Virginia requirement compelling all school students to salute the United States flag, and imposing expulsion as well as penalties on the parents of those who failed to comply. *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 626 (1943). After acknowledging that "**suppression** of expression of opinion is tolerated by our Constitution only when the expression presents a **clear and present danger** of action of a kind the State is empowered to prevent and punish," Justice Jackson stated, "[i]t would seem that **involuntary affirmation** [of a belief] could be commanded only on **even more** immediate and urgent grounds than silence." *Id.* at 633 (emphasis added). In striking down the statute, Justice Jackson warned that "[c]ompulsory unification of opinion achieves only the unanimity of the graveyard." *Id.* at 641. The principle

adopted in Barnette has since been applied often and has served this Court and the Country well.

In 1974, this court struck down a Florida requirement that newspapers provide a "right to reply" to a political candidate criticized by a newspaper. The Court held that "[t]he clear implication has been that any such a **compulsion to publish** that which "'reason" tells them should not be published' is unconstitutional." Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 256 (1974) (emphasis added).

In 1977, this Court affirmed an injunction against New Hampshire from prosecuting those who covered up the state motto, "Live Free or Die," on their state-issued automobile license plates. Chief Justice Burger's analysis began:

> with the proposition that the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the **right to refrain from speaking at all**. A system which secures the **right to proselytize** religious, political, and ideological causes must also guarantee the **concomitant right to decline** to foster such concepts. [Wooley v. Maynard, 430 U.S. 705, 714 (1977) (internal citation omitted) (emphasis added).]

In 1986, this Court was faced with the question of "whether the California Public Utilities Commission may require a privately owned utility company to include in its billing envelopes **speech of a third**

party with which the utility disagrees." Pacific Gas & Electric Co. v. Public Utilities Com., 475 U.S. 1, 4 (1986) (emphasis added). The Court concluded that "[t]hat kind of forced response is antithetical to the free discussion that the First Amendment seeks to foster. For corporations as for individuals, the choice to speak includes within it the **choice of what not to say**." *Id.* at 16 (internal citation omitted) (emphasis added).

More recently, a unanimous Court held that a private parade sponsor could not be forced under state law to accommodate a group whose message the sponsor rejected. *See* Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston, 515 U.S. 557 (1995). Some members of this Court set aside their viewpoints on the message of respondents in that case to agree that:

> "[s]ince *all* speech inherently involves choices of what to say and **what to leave unsaid**," one important manifestation of the principle of free speech is that one who chooses to speak may also decide "what not to say...." Indeed this general rule, that the speaker has the right to tailor the speech, applies not only to expressions of value, **opinion**, or endorsement, but equally to **statements of fact** the speaker would rather avoid.... [*Id.* at 573 (emphasis added).]

In this case, the Ninth Circuit ignored these venerable precedents, disregarding the rule of Hurley stating that the compelled speech doctrine applies to

matters of opinion and "equally to statements of fact." Contrary to this Hurley principle, the Ninth Circuit ruled that "the Act does not convey any **opinion** [but] merely states the [fact of the] existence of publicly-funded family-planning services...." NIFLA at 836 (emphasis added). Moreover, this claim does not constitute a clear and present danger that can overcome the basic constitutional presumption that a person cannot be compelled to say what he or she does not want to say.

B. First Amendment Protection Extends to Matters of Opinion.

The California legislature claimed that:

> the purpose of the Act's disclosure requirement is to ensure pregnant women receive **non-misleading information** so they are fully-informed when making decisions regarding critical health care. [Nat'l Inst. of Family & Life Advocates v. Harris, 2016 U.S. Dist. LEXIS 92612, *24 (emphasis added).]

The Ninth Circuit relied on:

> the Legislature's findings regarding the existence of CPCs, which often present **misleading information** to women about reproductive medical services.... [NIFLA at 843 (emphasis added).]

As the petitioners have clearly revealed, these findings are a particularly shaky foundation upon which to rest

the FACT Act: "Targeting 'misleading information' is even more dangerous than targeting 'false' speech, because misleading is a term used when statements are not serious enough to be deemed false." Pet. Cert. at 34.

Neither the California legislature nor the Ninth Circuit understand that the sovereignty in this country is vested in the People, not the State. The framers never intended the government to have a department of truth: "Our constitutional tradition stands against the idea that we need Oceania's Ministry of Truth." United States v. Alvarez, 132 S.Ct. 2537, 2547 (2012) (citing G. Orwell, Nineteen Eighty-Four (1949) (Centennial ed. 2003)). Rather, the nation is committed to a free marketplace of ideas. As Thomas Jefferson proclaimed:

> the **opinions** of men are **not the object of civil government**, nor under its jurisdiction: That **to suffer the civil Magistrate to intrude his powers** into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a **dangerous fallacy**, which at once destroys all religious liberty; because he being of course Judge of that tendency will make his own **opinions** the rule of judgment, and approve or condemn the sentiments of others only as they shall square with, or differ from his own. [Thomas Jefferson, "A Bill for Establishing Religious Freedom," (June 12, 1779) reprinted in 5 The Founders Constitution, 77 (item # 37) (Kurland, P. &

Lerner, R., eds., Univ. Chi. Press: 1987) (emphasis added).]

Although Jefferson penned these words to guard against the imposition of a religious orthodoxy upon the people, he stated a rule applicable to all "opinions," asserting "[t]hat it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order." *Id.* Thus, Jefferson declared:

> that truth is great and will prevail if left to herself; that she is the proper and sufficient antagonist to errour, and has nothing to fear from the conflict, **unless by human interposition,** disarmed of her natural weapons, free argument and debate; errours ceasing to be dangerous when it is permitted **freely** to contract them. [*Id.* (emphasis added).]

It is this bedrock First Amendment principle, undergirding the nation's free marketplace of ideas, upon which Alvarez stands:

> Permitting the government to decree this speech to be a criminal offense ... would endorse government authority to compile a list of subjects about which false statements are punishable. That governmental power has no clear limiting principle. [Alvarez, 132 S.Ct. at 2547.]

California's legislative finding that facilities such as Petitioners' purportedly "'often confuse [and] misinform'"[9] pregnant women sets the California State Legislature up as Orwell's Ministry of Truth,[10] evaluating the truth of statements made by those who oppose abortion, unconstitutionally providing a state-drafted antidote.

III. THE FACT ACT PROHIBITS THE FREE EXERCISE OF RELIGION.

A. The Ninth Circuit Decision Conflicts with Employment Div. v. Smith.

NIFLA brought suit for a preliminary injunction based, *inter alia*, on the claim that the FACT Act violates the Free Exercise Clause. *Id.* at 829. The Ninth Circuit panel denied NIFLA's claim, concluding that, because "the Act is a neutral law of general applicability," the Act need only "survive[] rational basis review." *Id.* The Ninth Circuit is mistaken.

As the Ninth Circuit stated, this Court established in Employment Div. v. Smith, 494 U.S. 872, 879 (1990), that "'the right of free exercise does not relieve an individual of the obligation to comply with a [i] **valid** and [ii] **neutral law** of [iii] **general applicability** on the ground that [it] proscribes (or prescribes) conduct that his religion prescribes (or

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[9] Pet. at 6.

[10] The state's use of the phrase "non-misleading information" as a synonym for "truth" is an example of Orwell's "Newspeak."

proscribes).'" NIFLA at 844 (emphasis added). However, the panel applied only two parts of this Court's threefold rule, finding that the FACT Act was [i] "facially" and "operationally **neutral**," and [ii] "**generally applicable**." Upon those two grounds only, the Ninth Circuit determined that the FACT Act was subject to only "rational basis review," the virtual death warrant for any constitutional claim. *Id.* at 844-45. Indeed, since the Ninth Circuit apparently had already concluded that the FACT Act survived "any level of review" for free speech purposes, the panel simply presumed, without analysis or discussion, that the FACT Act is a constitutionally "valid" exercise of power, and on that basis, ruled that NIFLA's Free Exercise claim was not likely to succeed on the merits. *Id.* at 845.

But NIFLA's Free Exercise claim poses a threshold question: whether the conduct prohibited is conduct that the State is "free to control," that is, whether the subject of the law is a "valid" exercise of civil jurisdiction. *See* Smith at 879. Thus, in Smith, before this Court asked whether the law at issue was "neutral" and "generally applicable," it explored its Free Exercise precedents to ascertain what laws, if any, the Court previously had found to be a violation of the Free Exercise Clause because they were outside the jurisdiction of civil government. In its survey, the Smith Court discovered that the Free Exercise Clause had been consistently applied as a jurisdictional barrier to the exercise of civil power:

> The free exercise of religion means, **first** and **foremost**, the right to **believe** and **profess**

> whatever religious doctrine one desires. Thus, the First Amendment obviously **excludes** all "governmental regulation of religious *beliefs* as such...." The government may **not compel** affirmation of religious belief..., **punish** the expression of religious doctrines it believes to be **false**..., **impose** special disabilities on the basis of religious views or religious status ... or **lend its power** to one side or the other side in controversies over religious authority or dogma.... [*Id.* at 877 (internal citations omitted) (emphasis added).]

Having thereby documented that the Free Exercise Clause excluded the civil government from exercising jurisdiction over "belief and profession," the Smith Court then ruled that the "'exercise of religion'" also included "the performance of (or abstention from) physical acts." *Id.* It then set out a short list of such physical acts that are outside the government's jurisdiction: "assembling with others for a worship service, participating in sacramental use of bread and wine, **proselytizing**, abstaining from certain foods or certain modes of transportation." *Id.* (emphasis added).

Furthermore, having established this jurisdictional barrier to government regulation, the Smith Court turned to the Free Exercise claim before it, only to discover that the claimants had conceded that the conduct at issue there — the ingestion of peyote — fell within the civil government's sphere of power and, therefore, the Oregon law prohibiting the possession of a controlled substance was "an otherwise **valid** law

prohibiting **conduct** that the **State** is **free to regulate.**" *See* Smith at 878-79 (emphasis added).[11]

In summary, the Smith Court established the rule that "the right of free exercise does not relieve an individual of the obligation to comply with a ... '**neutral law of general applicability**'" so long as the statute is a **valid** exercise of civil government jurisdiction. *Id.* at 879 (emphasis added). Unlike the Smith claimants, however, NIFLA has not conceded that the FACT Act is a valid law. To the contrary, NIFLA vigorously contends that the FACT Act encroaches upon NIFLA's proselytizing activities — an area of conduct which the State of California is not free to regulate.

By omitting any discussion of the validity of the FACT Act as applied to its proselytizing activities, the Ninth Circuit decision conflicts with the rule in Smith, necessitating review by this Court.

B. The Ninth Circuit Decision Denies NIFLA Its Free Exercise Right to Proselytize.

In Smith, this Court affirmed that "the 'exercise of religion' often involves ... the performance of (or abstention from) physical acts," including "proselytizing." *Id.* at 877. To proselytize means "to recruit someone to join one's cause," especially a new cause. And that is exactly what the FACT Act is designed to do.

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[11] *See* H. Titus, "The Free Exercise Clause, Past, Present, and Future," 6 REGENT L. REV. 7, 27-29 (1995).

As the Ninth Circuit observed: "The FACT Act was created for the stated purpose of ensuring that '[a]ll California women, regardless of income, ... have access to reproductive health services.'" NIFLA at 829. Such services were "expanded under the Patient Protection and Affordable Care Act to include millions of California women," yet many allegedly remain "unaware of the public programs available to provide them with contraception, health education and counseling, family planning, prenatal care, abortion, or delivery." *Id.* Furthermore, the Ninth Circuit continued, the California State Legislature found that "the ability of California women to receive accurate information about their reproductive rights ... is **hindered** by the existence of crisis pregnancy centers [whose] 'aim [is] to discourage and prevent women from seeking abortions' in order to fulfill their goal of 'interfer[ing] with women's ability to be fully informed and exercise their reproductive rights.'" *Id.* (emphasis added). And, as the Ninth Circuit alleged, because "'pregnancy decisions are **time sensitive,** and care early in pregnancy is important,' the Legislature found that the most effective way to ensure that women are able to receive access to family planning services, and accurate information about such services, was to require licensed pregnancy-related clinics **unable**[12] to

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[12] Euphemistically "unable." In order to enroll patients in a Family PACT whereby clients have free access to family planning programs, a crisis pregnancy center would be required to abandon their exclusively pro-life ministry. *See* Pet. at 8-9. To paraphrase the Ninth Circuit, "the ability of California women to receive accurate information about [Biblical teachings on childbirth] is hindered by the existence of [California's state-funded abortion programs] whose 'aim [is] to discourage and prevent women from

enroll patients in state-sponsored programs to state the existence of these services [by] disseminat[ing] a notice ... stating":

> California has public programs that provide **immediate free or low-cost** access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and **abortion** for eligible women. To determine whether you qualify, contact the county social services office at [insert the telephone number]. [*Id.* at 830 (emphasis added).]

Finally, the legislature required that the notice be posted in a "conspicuous place where individuals wait that may be easily read by those seeking services" or made individually distributed in "14-point type." *Id.*

In addition to the notice required of licensed pregnancy centers, the Ninth Circuit noted that even unlicensed pregnancy centers are involuntarily enlisted to recruit and encourage women to choose the State's "family planning services" (*i.e.*, abortion), by requiring such centers to disseminate a notice stating: "'This facility is not licensed as a medical facility by the State of California and has no licensed medical provider who provides or directly supervises the provision of services.'" *Id.* at 830. Like the notice required of licensed centers, this disclaimer was

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[having children]' in order to fulfill their goal of 'interfer[ing] with women's ability to be fully informed and exercise their reproductive rights.'" NIFLA at 830.

deliberately chosen by the California legislature to encourage and promote participation in the State's new family planning program, including ready access to abortion. Indeed, as the petition points out, the Act is not just concerned that women know of the existence of its program, but is also designed so that they choose the state's program because it offers women the whole panoply of "reproductive" choices, especially including abortion. Pet. at 1-11.

This proselytizing purpose is especially evidenced by the FACT Act's exemption for any center that joins a Family PACT. *Id.* at 8. Yet as the Petition points out:

> But the Family PACT program provides "family planning services" that include "all FDA approved contraceptive methods and supplies," which includes abortifacients.... Petitioners, because of their pro-life religious beliefs, cannot in good conscience participate in the Family PACT program. By tying the Act's exemption ... to agreeing to dispense all contraceptives, including abortifacients, the exemption effectively includes only centers that support California's pro-abortion policies. This forces only those centers that oppose abortion to speak the State's message in support of it. [*Id.* at 8-9.]

By design and in effect, then, the California legislature has misused its power by "recruit[ing]" pro-life crisis pregnancy centers to join the State's new cause of "full reproductive rights," including abortion.

As Justice Scalia itemized in Smith, "proselytizing" is a protected "exercise of religion," the performance of which, or as here — the abstention from which — is conduct that the State is not free to regulate. *See id.* at 878-79. Rather, as James Madison reminds us in his great Memorial and Remonstrance: "Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate." J. Madison, Memorial and Remonstrance Against Religious Assessments reprinted in 5 The Founders' Constitution at 82, Item #43 (P. Kurland & R. Lerner R, eds.: Univ. Chi. Press:1987). Indeed, in the recently decided Hosanna-Tabor case, a unanimous Court ruled that the Free Exercise clause prohibited the EEOC's enforcement of the neutral and generally applicable Americans with Disabilities Act in a matter involving a church school teacher because she was "called" to the proselytizing work of the church. *See* Hosanna-Tabor Evangelical Church & Sch. v. EEOC, 565 U.S. 171, 177 (2012). As "[t]he church must be free to choose those who will guide it on its way" (*id.* at 196), private religious crisis pregnancy centers and other like centers must be free to recruit, or abstain from recruiting others, to choose which side of a cause one should support.

C. The Ninth Circuit Decision Conflicts with Hosanna-Tabor Evangelical Church & Sch. v. EEOC.

Not only does the Ninth Circuit's Free Exercise decision conflict with Smith, but it also is in direct and irreconcilable conflict with this Court's decision in

Hosanna-Tabor. In bringing suit against a church school alleging a violation of the Americans with Disabilities Act ("ADA"), the EEOC acted based on the same flawed principle that the Ninth Circuit does here. *Id.* at 178. Basing its defense on the Free Exercise Clause, the school claimed that the EEOC had no jurisdiction over the "employment relationship between a religious institution and one of its ministers." *Id.* at 180. This Court agreed with the church school, asserting that it was "impermissible for the government to contradict a church's determination of who can act as its ministers." *Id.* The Court explained:

> Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs. [*Id.* at 188.]

In an attempt to head off this ruling, the EEOC "contend[ed] that [this Court's] decision [in Smith] preclude[d] recognition of a ministerial exception," in that the ADA, like the Oregon criminal provision against "ingesting peyote," was a "'valid and neutral law of general applicability'" and therefore within the enforcement jurisdiction of the EEOC. *See id.* at 189-90. This Court disagreed, stating that a "church's selection of its ministers is unlike an individual's ingestion of peyote." *Id.* at 190. The latter, the Court stated, "involved government regulation of only outward physical acts," whereas "[t]he present case, in contrast, concerns government interference with an internal church decision that affects the faith and mission of the church itself." *Id.* at 190.

To be sure, the Hosanna-Tabor Court's reasoning was not anchored to the validity prong of the Smith threefold test. *See id.* at 190. Indeed, prior to engaging in its analysis that the EEOC had no enforcement jurisdiction over the church's employment of its ministers, the Court had simply assumed "that the ADA's prohibition on retaliation, like Oregon's prohibition on peyote use, is a valid and neutral law of general applicability." *Id.* Nevertheless, Hosanna-Tabor expressly ruled that "[t]he contention that Smith forecloses recognition of a ministerial exception rooted in the Religion Clauses has no merit." *Id.* Indeed, the result in Hosanna-Tabor rests upon the line of cases cited in Smith that the government may not "lend its power to one or the other side in controversies over religious authority or dogma." *Compare* Hosanna-Tabor at 185-87 *with* Smith at 878-79.

Likewise, at issue here is whether the State of California can "lend its power to one or the other side" in the abortion debate. The Ninth Circuit panel below sidestepped that question, erroneously assuming that, since the FACT Act was a "neutral law of general applicability," it was "subject to only rational basis review." NIFLA at 845. That position is incompatible with Hosanna-Tabor's reading of the Free Exercise Clause after Smith.

Unlike the Free Exercise inquiry undertaken by the Hosanna-Tabor Court into the difference between a "church's selection of its ministers" and "an individual's ingestion of peyote" (565 U.S. at 190), the Ninth Circuit utterly failed to address whether

California was free to regulate NIFLA's pro-life ministry in the same way as Oregon was free to criminalize the ingestion of peyote, or prohibited from interfering with the faith and mission of the CPCs, as in Hosanna-Tabor. That failure puts the Ninth Circuit in conflict with Hosanna-Tabor, necessitating review by this Court.

IV. THE NINTH CIRCUIT'S RATIONALE TO COMPEL THE SPEECH OF CALIFORNIA'S CRISIS PREGNANCY CENTERS COULD JUST AS EASILY BE USED TO JUSTIFY CLOSING THEM DOWN.

In enacting the FACT Act, the California legislature made numerous findings relating to the need of pregnant California women for immediate access to reproductive healthcare. The Ninth Circuit accepted them all.

- "The FACT Act was created for the stated purpose of ensuring that '[a]ll California women, regardless of income, ... have **access** to **reproductive health services**.'" [NIFLA at 829 (emphasis added).]
- "[A] great number of California women were **unaware** of the existence of state-sponsored healthcare programs." [*Id.* (emphasis added).]
- California's programs "provide 'low-income women ... **immediate access** to free or low-cost comprehensive family planning

services and pregnancy-related care." [*Id.* (emphasis added)]

- "Millions of California women are in **need** of publicly funded family planning services, contraception services and education, **abortion** services, and prenatal care and delivery." [*Id.* (emphasis added)]

The California legislature then identified one major threat to the reproductive healthcare of California women — the State's approximately 200 crisis pregnancy centers. *Id.* Thus, the California Legislature charged these centers with:

1. **Fraud:**

- "CPCs **'pose as** full-service women's health clinics...."
- CPCs employ "**intentionally deceptive** advertising and counseling practices."
- CPCs "often **confuse, misinform.**" [*Id.* (emphasis added).]

2. **Intimidation:**

- CPCs **"even intimidate** women from making fully-informed, time-sensitive decisions about critical health care."
- CPCs "aim to **discourage** and **prevent** women from seeking abortions...." [*Id.* (emphasis added).]

3. **Hindering The Exercise of an Alleged Constitutional Right:**

- CPCs have the goal of "**interfer[ing]** with women's ability to be fully informed and exercise their reproductive rights."
- "[T]he ability of California women to receive accurate information about their reproductive rights, and to exercise those rights, is **hindered by the existence of** crisis pregnancy centers (CPCs)." [*Id.* (emphasis added).]

As Petitioners point out repeatedly, none of these legislative findings has any basis in truth — the "legislative history contains no evidence that [CPCs] actually 'misinform' women."[13] Pet. at 6. As the Petition explains:

> The Ninth Circuit cited, and the State relies on, **no studies** showing that women are actually being harmed by unlicensed pregnancy centers. They advance **no evidence** demonstrating that if Petitioners recite the disclosures the law requires, the alleged harm will be alleviated. In fact, the Ninth Circuit and the State cite nothing but advocacy testimony by pro-choice organizations and the legislature... Such **bald, unsupported assertions** cannot meet this constitutional standard. [*Id.* at 34 (emphasis added).]

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[13] It is a common political tactic to accuse the other side of a debate of spreading lies, or that certain policy issues are "settled," and thereby beyond debate.

Nonetheless, based on these contrived findings, the Ninth Circuit deferred to the legislature's ultimate finding "that **the most effective way** to ensure that women are able to receive access to family planning services [abortion], and accurate information about such services" (abortion) was to compel CPCs to carry the state's message to the women who seek help with respect to a pregnancy.

Should the rule of the Ninth Circuit be allowed to stand, it surely will open the door to what would logically be an even more "effective way" to protect the women of California: to ban the existence of CPCs and other private providers from providing any health services to expectant mothers. After all, already included in the California legislature's findings is that the very "existence" of CPCs threatens the ability of women to abort their children. What limiting constitutional principle can be found in the Ninth Circuit decision that would stop the California legislature should it take that next step? Indeed, with respect to **unlicensed** pregnancy centers, the notice requirement compelling a pro-life center to promote and thereby facilitate abortion, will cause an unknown number, perhaps all, to close their doors. Those that resist the law no doubt would soon be bankrupted by civil fines imposed by the state. Additionally, there is no reason to expect the "other shoe" will not fall on **licensed** providers whose very existence the state has already found to "hinder" California women from exercising their full reproductive rights, including abortion on demand.

From the longstanding and concerted attack being waged against CPCs by organizations such as the National Abortion Rights Action League ("NARAL"), it is not difficult to imagine that efforts to ban all CPCs are not already in the works.[14] If validated here, why would the fraudulent legislative bill of particulars not be enough to justify shutting down those CPCs during the next session of the California legislature?

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

JOSEPH W. MILLER
U.S. Justice Foundation
932 D Street, Ste. 2
Ramona, CA 92065
Attorney for Amicus Curiae
U.S. Justice Foundation

JEREMIAH L. MORGAN*
HERBERT W. TITUS
WILLIAM J. OLSON
ROBERT J. OLSON
WILLIAM J. OLSON, P.C.
370 Maple Ave. W., Ste. 4
Vienna, VA 22180-5615
(703) 356-5070
wjo@mindspring.com
Attorneys for Amici Curiae

**Counsel of Record*
April 20, 2017

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[14] *See* Dr. John C. Wilke, NARAL Attacks Women Help Centers, Life Issues Institute (Apr. 1, 2002), http://www.lifeissues.org/2002/04/naral-attacks-women-help-centers/; D.J. Devine, "Emails reveal NARAL's plan to shut down crisis pregancy centers," World (Jan. 14, 2015), https://world.wng.org/2015/01/emails_reveal_narals_plan_to_shut_down_crisis_pregnancy_centers.

NO. 16-1140

IN THE

Supreme Court of the United States

NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES, D/B/A NIFLA, ET AL.,

Petitioners,

v.

XAVIER BECERRA, ATTORNEY GENERAL, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

JOINT APPENDIX

MICHAEL P. FARRIS
KRISTEN K. WAGGONER
DAVID A. CORTMAN
Counsel of Record
KEVIN H. THERIOT
JORDAN W. LORENCE
ELISSA M. GRAVES
ALLIANCE DEFENDING FREEDOM
440 1st Street N.W.
Suite 600
Washington, D.C. 20001
dcortman@ADFlegal.org
(202) 393-8690

Counsel for Petitioners

JOSHUA A. KLEIN
Counsel of Record
CA DEPARTMENT OF JUSTICE
455 Golden Gate Avenue
Suite 11000
San Francisco, CA 94102-7004
joshua.klein@doj.ca.gov
(415) 703-2543

Counsel for State Respondents

[ADDITIONAL COUNSEL LISTED ON INSIDE COVER]

Petition for Writ of Certiorari filed March 20, 2017
Petition for Writ of Certiorari granted November 13, 2017

Thomas D. Bunton
Counsel of Record
Office of County Counsel
1600 Pacific Highway
Room 355
San Diego, CA 92101
thomas.bunton@sdcounty.ca.gov
(619) 531-6456

Counsel for Respondent
Thomas E. Montgomery

CARRIE L. MITCHELL
Counsel of Record
MCDOUGAL, LOVE,
BOEHMER,
FOLEY, LYON & CANLAS
8100 La Mesa Blvd.
Suite 200
La Mesa, CA 91942
cmitchell@mcdougallove.com
(619) 440-4444

Counsel for Respondent
Morgan Foley

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Docket Entries:
United States District Court for the Southern District of California
No. 3:15-cv-02277-JAH-DHB

Date Filed	#	Docket Text
10/13/2015	1	COMPLAINT with Jury Demand against Edmund G. Brown, Jr, Morgan Foley, Kamala Harris, Thomas Montgomery (Filing fee $400 receipt number 0974-8485507) filed by Pregnancy Care Center, National Institute of Family and Life Advocates, Fallbrook Pregnancy Resource Center. (Attachments: # 1 Civil Case Cover Sheet, # 2 Exhibit A) The new case number is 3:15-cv-2277-JAH DHB. Judge John A. Houston and Magistrate Judge David H. Bartick are assigned to the case. (Hacker, David) (kcm) (Entered: 10/13/2015)

* * * *

Date Filed	#	Docket Text
10/21/2015	3	MOTION for Preliminary Injunction *Notice of Motion & Motion for Preliminary Injunction* by National Institute of Family and Life Advocates. (Attachments: # 1 Memo of Points and Authorities in Support of Motion for Preliminary Injunction) (Hacker, David) (jpp). (Entered: 10/21/2015)
		****
11/04/2015	8	MOTION to Dismiss for Lack of Jurisdiction *under Fed. R. Civ. P. 12(b)(1)*, MOTION to Dismiss for Failure to State a Claim *under Fed. R. Civ. P. 12(b)(6)* by Thomas Montgomery. (Attachments: # 1 Memo of Points and Authorities) (Bunton, Thomas) Attorney Thomas Dale Bunton added to party Thomas Montgomery (pty:dft) (jpp). (Entered: 11/04/2015)
		****
11/09/2015	19	MOTION to Dismiss for Failure to State a Claim by Morgan Foley. (Attachments:

Date Filed	#	Docket Text
		# 1 Notice, # 2 Proof of Service) (Boehmer, Steven) Attorney Steven Eugene Boehmer added to party Morgan Foley (pty:dft) (jpp). (Entered: 11/09/2015)
		****
11/13/2015	21	RESPONSE in Opposition re 3 MOTION for Preliminary Injunction *Notice of Motion & Motion for Preliminary Injunction* filed by Thomas Montgomery. (Bunton, Thomas) (jpp). (Entered: 11/13/2015)
11/13/2015	22	RESPONSE in Opposition re 3 MOTION for Preliminary Injunction *Notice of Motion & Motion for Preliminary Injunction* filed by Morgan Foley. (Attachments: # 1 Proof of Service) (Boehmer, Steven) (jpp). (Entered: 11/13/2015)
11/13/2015	23	RESPONSE in Opposition re 3 MOTION for Preliminary Injunction *Notice of Motion & Motion for Preliminary Injunction* filed by Kamala

Date Filed	#	Docket Text
		Harris. (Attachments: # 1 Declaration of Anthony R. Hakl) (Hakl, Anthony) (jjp). (Entered: 11/13/2015)
11/13/2015	24	REPLY - Other re 3 MOTION for Preliminary Injunction *Notice of Motion & Motion for Preliminary Injunction Objections to Evidence* filed by Kamala Harris. (Hakl, Anthony) (jpp). (Entered: 11/13/2015)
11/13/2015	25	MOTION to Dismiss, MOTION to Dismiss for Failure to State a Claim by Edmund G. Brown, Jr. (Attachments: # 1 Memo of Points and Authorities) (Hakl, Anthony) Attorney Anthony R Hakl, III added to party Edmund G. Brown, Jr (pty:dft) (jpp). (Entered: 11/13/2015)
11/13/2015	26	MOTION to Dismiss for Lack of Jurisdiction by Kamala Harris. (Attachments:# 1 Memo of Points and Authorities) (Hakl, Anthony) (jpp). (Entered: 11/13/2015)

Date Filed	#	Docket Text
		****
11/20/2015	30	REPLY to Response to Motion re 3 MOTION for Preliminary Injunction *Notice of Motion & Motion for Preliminary Injunction, Combined Reply to All Defendants Objections* filed by Fallbrook Pregnancy Resource Center, National Institute of Family and Life Advocates, Pregnancy Care Center. (Bowman, Matthew) (jpp). (Entered: 11/20/2015)
		****
12/23/2015	36	RESPONSE in Opposition re 8 MOTION to Dismiss for Lack of Jurisdiction *under Fed. R. Civ. P. 12(b)(1)* MOTION to Dismiss for Failure to State a Claim *under Fed. R. Civ. P. 12(b)(6),* 25 MOTION to Dismiss MOTION to Dismiss for Failure to State a Claim, 26 MOTION to Dismiss for Lack of Jurisdiction, 19 MOTION to Dismiss for Failure to State a Claim, *combined response brief,* filed by

Date Filed	#	Docket Text
		Fallbrook Pregnancy Resource Center, National Institute of Family and Life Advocates, Pregnancy Care Center. (Bowman, Matthew) (jpp). (Entered: 12/23/2015)
01/04/2016	37	REPLY to Response to Motion re 26 MOTION to Dismiss for Lack of Jurisdiction filed by Edmund G. Brown, Jr. (Hakl, Anthony) (jpp). (Entered: 01/04/2016)
01/04/2016	38	REPLY to Response to Motion re 26 MOTION to Dismiss for Lack of Jurisdiction filed by Kamala Harris. (Hakl, Anthony) (jpp). (Entered: 01/04/2016)
01/04/2016	39	REPLY to Response to Motion re 8 MOTION to Dismiss for Lack of Jurisdiction *under Fed. R. Civ. P. 12(b)(1)* MOTION to Dismiss for Failure to State a Claim *under Fed. R. Civ. P. 12(b)(6)* filed by Thomas Montgomery. (Bunton, Thomas) (jpp). (Entered: 01/04/2016)

Date Filed	#	Docket Text
		****
01/08/2016	43	NOTICE by Fallbrook Pregnancy Resource Center, National Institute of Family and Life Advocates, Pregnancy Care Center re *3* MOTION for Preliminary Injunction *Notice of Motion & Motion for Preliminary Injunction*, 8 MOTION to Dismiss for Lack of Jurisdiction *under Fed. R. Civ. P. 12(b)(1)* MOTION to Dismiss for Failure to State a Claim *under Fed. R. Civ. P.12(b)(6)*, 25 MOTION to Dismiss MOTION to Dismiss for Failure to State a Claim, 26 MOTION to Dismiss for Lack of Jurisdiction, 19 MOTION to Dismiss for Failure to State a Claim, *Notice of Supplemental Authority*, (Attachments: # 1 Exhibit AWF Opinion) (Bowman, Matthew) (jpp). (Entered: 01/08/2016)
		****

Date Filed	#	Docket Text
01/28/2016	45	Minute Order. for proceedings held before Judge John A. Houston: Motion for Preliminary Injunction; Motion Hearing held on 1/28/2016 submitting 3 MOTION for Preliminary Injunction filed by National Institute of Family and Life Advocates. (Court Reporter/ECR Cami Kircher). (Plaintiff Attorney Matthew Scott Bowman, Dean Broyles). (Defendant Attorney Thomas Dale Bunton, Anthony R. Hakl, Carrie Mitchell). (no document attached) (lwm) (Entered: 01/28/2016)
02/09/2016	46	ORDER denying 3 Plaintiff's Motion for Preliminary Injunction. Signed by Judge John A. Houston on 2/8/2016. (kcm) (Entered: 02/09/2016)
02/18/2016	47	NOTICE OF APPEAL to the 9th Circuit as to 46 Order denying Plaintiffs' Motion for Preliminary Injunction, by Fallbrook Pregnancy Resource Center, National Institute of Family and Life

Date Filed	#	Docket Text
		Advocates, Pregnancy Care Center. (Filing fee $505 receipt number 0974-8811466.) (Notice of Appeal electronically transmitted to US Court of Appeals.) (Attachments: # 1 Representation Statement) (Bowman, Matthew). (Modified on 2/18/2016 to edit docket text re linked Order and re attachment #1.) (akr). (Entered: 02/18/2016)
02/18/2016	48	USCA Case Number 16-55249 for 47 Notice of Appeal to 9th Circuit, filed by Pregnancy Care Center, Fallbrook Pregnancy Resource Center, National Institute of Family and Life Advocates. (akr) (Entered: 02/18/2016)
		* * * *
09/29/2017	62	ORDER granting in part and deny in part Defendants' Motions to dismiss. (Doc. Nos. 8, 19, 25, 26. Motions to dismiss filed by Defendants Becerra, Montgomery, and Foley (Doc. Nos. 8, 19, 26) are

Date Filed	#	Docket Text
		DENIED. Defendant Browns motion to dismiss (Doc. No. 25) is GRANTED. The remaining Defendants shall file an answer to the Complaint within the next forty-five (45) days from the date of this Order. Signed by Judge John A. Houston on 9/29/2017. (jpp) (Entered: 09/29/2017)
11/13/2017	63	ANSWER to 1 Complaint, *Verified Answer of Defendant Thomas Montgomery in His Official Capacity As County Counsel For San Diego County* by Thomas Montgomery. (Attachments: # 1 Proof of Service) (Bunton, Thomas) (jpp). (Entered: 11/13/2017)
11/13/2017	64	ANSWER to 1 Complaint, by Morgan Foley. (Attachments:# 1 Proof of Service) (Boehmer, Steven) (jpp). (Entered: 11/13/2017)
11/13/2017	65	ANSWER to 1 Complaint, *Xavier Becerra, in his official capacity as Attorney General of the State of California* by

Date Filed	#	Docket Text
		Kamala Harris. (Attachments: # 1 Proof of Service) (Hakl, Anthony) (Entered: 11/13/2017)

Docket Entries:
United States Court of Appeals
for the Ninth Circuit
No. 16-55249

Date Filed	#	Docket Text
02/18/2016	1	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. SEND MQ: Yes. The schedule is set as follows: to be set. Preliminary Injunction Appeal. C.R. 3-3. Mediation Questionnaire due on 02/25/2016. [9870158] (RT) [Entered: 02/18/2016 03:56 PM]
		* * * *
03/17/2016	9	Filed clerk order: The opening brief [7] submitted by appellants is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. Cover color: blue. The paper copies shall be printed from

Date Filed	#	Docket Text
		the PDF version of the brief created from the word processing application, not from PACER or Appellate ECF. The Court has reviewed the excerpts of record [8] submitted by appellants. Within 7 days of this order, filer is ordered to file 4 copies of the excerpts in paper format, with a white cover. The paper copies must be in the format described in 9th Circuit Rule 30-1.6. [9905816] (KT) [Entered: 03/17/2016 02:57 PM]
		* * * *
03/23/2016	14	Filed Appellants' paper copies of excerpts of record [8] in 2 volume(s). [9914328] (KT) [Entered: 03/24/2016 01:11 PM]
		* * * *
04/14/2016	19	Filed (ECF) Appellee Morgan Foley joinder to brief [16] submitted by Appellee Kamala Harris. Date of service: 04/14/2016.

Date Filed	#	Docket Text
		(9940963] [16-55249] (Boehmer, Steven) [Entered: 04/14/2016 05:21 PM]
04/15/2016	20	Filed clerk order: The answering brief [16] submitted by Kamala Harris is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. Cover color: red. The paper copies shall be printed from the PDF version of the brief created from the word processing application, not from PACER or Appellate ECF. (9942220] (KT) [Entered: 04/15/2016 03:06 PM]
04/15/2016	21	Filed clerk order: The answering brief [17] submitted by Thomas Montgomery is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper

Date Filed	#	Docket Text
		format, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. Cover color: red. The paper copies shall be printed from the PDF version of the brief created from the word processing application, not from PACER or Appellate ECF. The Court has reviewed the supplemental excerpts of record [18] submitted by Thomas Montgomery. Within 7 days of this order, filer is ordered to file 4 copies of the excerpts in paper format, with a white cover. The paper copies must be in the format described in 9th Circuit Rule 30-1.6. (9942225] (KT) [Entered: 04/15/2016 03:08 PM
		* * * *
04/19/2016	24	Filed Appellee Thomas Montgomery paper copies of supplemental excerpts of record [18] in 1 volume.

Date Filed	#	Docket Text
		(9946370] (KT) [Entered: 04/20/2016 09:24 AM]
		* * * *
04/29/2016	34	Filed clerk order: The reply brief [32] submitted by appellants is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. Cover color: gray. The paper copies shall be printed from the PDF version of the brief created from the word processing application, not from PACER or Appellate ECF. [9958027] (KT) [Entered: 04/29/2016 09:33 AM]
		* * * *
05/16/2016	36	Filed clerk order (Deputy Clerk: HL): Preliminary injunction appeal National Institute of Family and Life Advocates v. Harris, No. 16-

Date Filed	#	Docket Text
		55249, is calendared for oral argument on Tuesday, June 14, 2016, 9:00 AM in San Francisco. The Court sua sponte consolidates, for purposes of oral argument only, National Institute of Family and Life Advocates v. Harris, No. 16-55249; Livingwell Medical Clinic, Inc. v. Harris, No. 15-17497; and A Woman's Friend Pregnancy Resource Clinic v. Harris, No. 15-17517. Counsel will be allotted argument time of 30 minutes per side. [9978604] [15-17497, 15-17517, 16-55249] (AF) [Entered: 05/16/2016 04:04 PM]
		* * * *
06/14/2016	48	ARGUED AND SUBMITTED TO DOROTHY W. NELSON, A. WALLACE TASHIMA and JOHN B. OWENS. [10014266] [15-17517, 15-17497, 16-55249] (EU) [Entered: 06/14/2016 01 :08 PM]

Date Filed	#	Docket Text
08/26/2016	49	Filed (ECF) Appellants Fallbrook Pregnancy Resource Center, Pregnancy Care Center and National Institute of Family and Life Advocates citation of supplemental authorities. Date of service: 08/26/2016. [10102666] [16-55249] (Bowman, Matthew) [Entered: 08/26/2016 02:00 PM]
08/30/2016	50	Filed (ECF) Appellants Fallbrook Pregnancy Resource Center, National Institute of Family and Life Advocates and Pregnancy Care Center citation of supplemental authorities. Date of service: 08/30/2016. [10105841] [16-55249] (Bowman, Matthew) [Entered: 08/30/2016 09:45 AM]
10/14/2016	51	FILED OPINION (DOROTHY W. NELSON, A. WALLACE TASHIMA and JOHN B. OWENS) AFFIRMED. Judge: DWN Authoring, FILED AND ENTERED JUDGMENT.

Date Filed	#	Docket Text
		[10159221] (RMM) [Entered: 10/14/2016 07:39 AM]
10/28/2016	52	Filed (ECF) Appellants Fallbrook Pregnancy Resource Center, National Institute of Family and Life Advocates and Pregnancy Care Center petition for panel rehearing and petition for rehearing en banc (from 10/14/2016 opinion). Date of service: 10/28/2016. [10177820] [16-55249]--[COURT UPDATE: Attached opinion. 10/28/2016 by SLM] (Bowman, Matthew) [Entered: 10/28/2016 11:04 AM]
11/01/2016	53	Filed order (DOROTHY W. NELSON, A. WALLACE TASHIMA and JOHN B. OWENS): Appellees are directed to file a response to the Petition for Rehearing and Rehearing En Banc filed with this court on October 28, 2016. The response shall not exceed 15 pages or 4200 words and shall be filed within 21 days of the date of this order.

Date Filed	#	Docket Text
		Parties who are registered for ECF must file the response electronically without submission of paper copies. Parties who are not registered ECF filers must file the original response plus 50 paper copies. [10182510] (AF) [Entered: 11/01/2016 04:26 PM]
		****
11/21/2016	55	Filed (ECF) Appellants Fallbrook Pregnancy Resource Center, National Institute of Family and Life Advocates and Pregnancy Care Center citation of supplemental authorities. Date of service: 11/21/2016. [10204822] [16-55249] (Bowman, Matthew) [Entered: 11/21/2016 12:57 PM]
11/22/2016	56	Filed (ECF) Appellee Thomas Montgomery response to Combo PFR Panel and En Banc (ECF Filing), Combo PFR Panel and En Banc (ECF Filing) for panel and en banc

Date Filed	#	Docket Text
		rehearing, for panel and en banc rehearing (statistical entry). Date of service: 11/22/2016. [10206098]. [16-55249] (Bunton, Thomas) [Entered: 11/22/2016 08:55 AM]
11/22/2016	57	Filed (ECF) Appellees Kamala Harris and Edmund G. Brown, Jr. response to Combo PFR Panel and En Banc (ECF Filing), Combo PFR Panel and En Banc (ECF Filing) for panel and en banc rehearing, for panel and en banc rehearing (statistical entry). Date of service: 11/22/2016. [10207692]. [16-55249] (Hakl, Anthony) [Entered: 11/22/2016 04:00 PM]
12/20/2016	58	Filed order (DOROTHY W. NELSON, A. WALLACE TASHIMA and JOHN B. OWENS) The members of the panel that decided this case voted unanimously to deny the petition for rehearing. Judge Owens voted to deny the petition

Date Filed	#	Docket Text
		for rehearing en banc. Judge Nelson and Judge Tashima recommended denial of the petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. (Fed.R. App. P. 35.) The petition for rehearing and the petition for rehearing en banc are DENIED. [10239830] (WL) [Entered: 12/20/2016 10:24 AM]
12/28/2016	59	MANDATE ISSUED. (DWN, AWT and JBO) [10248281] (Turcios, Margoth) [Entered: 12/28/2016 01:16 PM]
		****
3/23/2017	63	Received notice from the Supreme Court: petition for certiorari filed on 03/20/2017. Supreme Court Number 16-1140. [10368603] (RR) [Entered: 03/23/2017 11:37 AM]

Date Filed	#	Docket Text
03/23/2017	64	**Supreme Court Case Info** Case number: 16-1140 Filed on: 03/20/2017 Cert Petition Action 1: Pending [10394982] (ASW) [Entered: 04/13/2017 12:14 PM]
06/19/2017	65	**Supreme Court Case Info** Case number: 16-1140 Filed on: 03/20/2017 Cert Petition Action 1: Pending Notes: Notified SC all 9th and DC docs available electronically [10478764] (SOS) [Entered: 06/19/2017 11:53 AM]
11/14/2017	66	**Supreme Court Case Info** Case number: 16-1140 Filed on: 03/20/2017 Cert Petition Action 1: Granted, 11/13/2017 Notes: Notified SC all 9th and DC docs available electronically [10653366] (RR) [Entered: 11/14/2017 12:59 PM]

KAMALA D. HARRIS
Attorney General of California
STEPAN A. HAYTAYAN
Supervising Deputy Attorney General
ANTHONY R. HAKL
Deputy Attorney General
State Bar No. 197335
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 322-9041
Fax: (916) 324-8835
E-mail: Anthony.Hakl@doj.ca.gov
Attorneys for Defendants
Attorney General Kamala D. Harris and
Governor Edmund G. Brown Jr.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF
CALIFORNIA

NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES d/b/a NIFLA, a Virginia corporation, et al., Plaintiffs, **v.**	Case No. 3:15-cv-02277-JAH-DHB **DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

KAMALA HARRIS, in her official capacity as Attorney General for the State of California, et al., Defendants.	Date: January 11, 2016 Time: 2:30 p.m. Dept.: 13B Judge: John A. Houston Trial Date: None Case Filed: October 13, 2015

* * * *

protection under the United States Constitution and under the laws of South Dakota").

Casey and its progeny hold that a state "can use its regulatory authority to require a physician to provide truthful, non-misleading information relevant to a patient's decision to have an abortion, even if that information might also encourage the patient to choose childbirth over abortion." *Rounds*, 530 F.3d at 734-35, citing *Casey* and *Gonzales v. Carhart*, 550 US 124, 157 (2007) (in the context of abortions, the "government may use its voice and its regulatory authority to show its profound respect for the life within the woman"). It would be incongruous with *Casey* to hold that the requirements of the Act here, which simply require an informational disclosure of available public services and the listing of a phone number, are not subject to regulation, while government may, as in *Casey*, require medical speech despite a physician's preference to remain silent. *See Pickup*, 740 F.3d at 1228 *(Casey*-like professional speech falls at mid-point of speech-conduct continuum and is entitled to "somewhat diminished" protection).

d. The notice requirement survives review under any level of scrutiny.

As indicated above, this Court should subject the notice requirement for licensed facilities to rational basis review only. Nevertheless, as explained below, even if the Court were to apply some form of heightened scrutiny[4], the requirement would survive constitutional review.

With respect to the governmental interests at stake, AB 775 explains that the Legislature enacted it "to ensure that California residents make their personal reproductive health care decisions knowing their rights and the health care services available to them." *See* Assem. Bill No. 775, § 2. Even when viewed in isolation, ensuring that pregnant women are fully advised of the range of health care options available to them in California is not only a legitimate state interest, but a compelling one. *See Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 767 (1994) ("[T]he State has a strong interest in protecting a woman's freedom to seek lawful medical

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[4] To be clear, the State Defendants' position is that strict scrutiny does not apply, despite Plaintiffs' claim to the contrary. The notice requirement for licensed facilities hardly regulates those facilities' speech in the broader public debate that exists separate from individual patient-provider relationships. Rather, the notice operates within the context of those relationships. It is to be disseminated "to clients on site" – either through "distribut[ion] to all clients" in print or digital form, or through the posting of a sign in the waiting area for those "seeking services from the facility." § 123472(a)(1)-(2). Thus, the requirement falls nowhere near that point on the continuum where "First Amendment protection is at its greatest." *Pickup*, 740 F.3d at 1227.

or counseling services in connection with her pregnancy."); *Am. Life League, Inc. v. Reno*, 47 F.3d 642, 656 (4th Cir. 1995) ("sufficiently compelling governmental interests" exist where law "protects public health by promoting unobstructed access to reproductive health facilities"); *see also Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975) ("States have a compelling interest in the practice of professions within their boundaries, and that as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions").

The interest is even more compelling when viewed in light of the history of so-called "crisis pregnancy centers" in California and across the country, as documented in AB 775's legislative history:

> The author contends that, unfortunately, there are nearly 200 licensed and unlicensed clinics known as crisis pregnancy centers (CPCs) in California whose goal is to interfere with women's ability to be fully informed and exercise their reproductive rights, and that CPCs pose as full-service women's health clinics, but aim to discourage and prevent women from seeking abortions. The author concludes that these intentionally deceptive advertising and counseling practices often confuse, misinform, and even intimidate women from

> making fully informed, time-sensitive decisions about critical health care.

Assem. Com. on Health, Analysis of Assembly Bill No. 775 (2015-2016 Reg. Sess.) April 14, 2015, at 3.[5]

The record also shows the licensed facilities notice requirement is appropriately tailored to advance the interest of ensuring that pregnant women are informed about their health care options. Indeed, the requirement is narrowly tailored. As the Legislature recognized, pregnancy decisions are time sensitive and care early in pregnancy is critical. Thus, women need to be notified of available resources as soon as possible. *See* Assem. Bill No. 775, § 1(a)-(d). The time-sensitive nature of pregnancy makes other policy options – such as a statewide advertising campaign, for example – unavailable to the Legislature. As the author of AB 775 stated, the most effective way to make sure that pregnant women obtain the information and services they need during pregnancy in a timely way is to require a licensed health care facility to provide the required notice, especially if the facility does not provide the full spectrum of health care services.

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[5] This and related legislative history are attached to the declaration of the undersigned filed in support of this opposition. Under Rule 201 of the Federal Rules of Evidence, the Court may take judicial notice of the legislative history of state statutes. *Anderson v. Holder*, 673 F.3d 1089, 1094, n.1 (9th Cir. 2012); *Louis v. McCormick & Schmick Restaurant Corp.*, 460 F. Supp. 2d 1153, 1155, n.4 (C.D. Cal. 2006). The State Defendants respectfully request that this Court take judicial notice of the relevant legislative history here.

The notice requirement is also narrowly tailored to the stated interest of ensuring that pregnant women are aware of the full spectrum of pregnancy-related health care services in California because the specific language of the notice speaks to that entire spectrum. In other words, the notice does not simply mention "abortion." Rather, the notice inclusively refers to "comprehensive *family planning services* (including all FDA-approved methods of *contraception), prenatal care,* and *abortion* for eligible women." § 123472(a)(1). To put it another way, the notice does not express a particular opinion or view, or make a specific recommendation. It simply conveys the objective range of information – no more,

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KAMALA D. HARRIS
Attorney General of California
STEPAN A. HAYTAYAN
Supervising Deputy Attorney General
ANTHONY R. HAKL
Deputy Attorney General
State Bar No. 197335
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 322-9041
Fax: (916) 324-8835
E-mail: Anthony.Hakl@doj.ca.gov
Attorneys for Defendants
Attorney General Kamala D. Harris and
Governor Edmund G. Brown Jr.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF
CALIFORNIA

NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES d/b/a NIFLA, a Virginia corporation, et al., Plaintiffs, **v.**	Case No. 3:15-cv-02277-JAH-DHB **DECLARATION OF ANTHONY R. HAKL IN SUPPORT OF DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

KAMALA HARRIS, in her official capacity as Attorney General for the State of California, et al., Defendants.	Date: January 11, 2016 Time: 2:30 p.m. Dept.: 13B Judge: John A. Houston Trial Date: None Case Filed: October 13, 2015

DECLARATION OF ANTHONY R. HAKL

I, Anthony R. Hakl, declare:

1. I am a Deputy Attorney General for the Office of the Attorney General in the California Department of Justice located in Sacramento, California. I am the attorney of record for the State Defendants. I make this declaration in support of their opposition to plaintiffs' motion for preliminary injunction. I have personal knowledge of the facts stated in this declaration, and if called as a witness, I could and would competently testify to them.

2. Attached as Exhibit A is a true and correct copy of Assem. Com. on Health, Analysis of Assembly Bill No. 775 (2015-2016 Reg. Sess.) April 14, 2015.

3. Attached as Exhibit B is a true and correct copy of Assem. Com. on Judiciary, Analysis of Assembly Bill No. 775 (2015-2016 Reg. Sess.) April 28, 2015.

4. Attached as Exhibit C is a true and correct copy of Assem. Com. on Health, Analysis of

Assembly Bill No. 775 (2015-2016 Reg. Sess.) May 4, 2015.

5. I retrieved these legislative history documents from the publicly-accessible web site http://leginfo.legislature.ca.gov/.

I declare under penalty of perjury under the laws of the State of California and the United States of America that the foregoing is true and correct of my own personal knowledge, and that this declaration is executed in Sacramento, California, this 13th day of November, 2015.

Dated: November 13, 2015

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
STEPAN A. HAYTAYAN
Supervising Deputy Attorney General

/s/ Anthony R. Hakl
ANTHONY R. HAKL
Deputy Attorney General
Attorneys for Defendants Attorney General Kamala D. Harris and Governor Edmud G. Brown, Jr.

* * * *

EXHIBIT A

Date of Hearing: April 14, 2015

ASSEMBLY COMMITTEE ON HEALTH
Rob Bonta, Chair
AB 775 (Chiu) – As Amended April 8, 2015

SUBJECT: Reproductive FACT Act.

SUMMARY: Requires licensed clinics that provide family planning or pregnancy-related services to provide a notice to consumers regarding their reproductive rights. Requires unlicensed facilities that provide pregnancy-related services to disseminate and post a notice informing consumers that they are not a licensed medical facility. Specifically, **this bill:**

1) Enacts the Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act (FACT Act).

2) Defines, for purposes of the FACT Act, a licensed covered facility as a licensed, or intermittent, clinic whose primary purpose is providing family planning or pregnancy-related services, and that satisfies two or more of the following:

    a) The facility offers obstetric ultrasounds, obstetric sonograms, or prenatal care to pregnant women;

b) The facility provides, or offers counseling about contraception, or contraceptive methods;

c) The facility offers pregnancy testing or pregnancy diagnosis;

d) The facility advertises or solicits patrons with offers to provide prenatal sonography, pregnancy tests, or pregnancy options counseling; and,

e) The facility has staff or volunteers who collect health information from clients.

3) Clarifies that the following types of clinics are not considered covered facilities for the purposes of this bill:

a) A clinic directly conducted, maintained, or operated by the United States or any of its departments, officers, or agencies; and,

b) A licensed primary care clinic that is enrolled as a Medi-Cal provider and a provider in the Family Planning, Access, Care, and Treatment Program.

4) Defines, for purposes of the FACT Act, an unlicensed covered facility as a facility that is not licensed by the State of California and does not have a licensed medical provider on staff whose primary purpose is providing pregnancy-related services and that satisfies two or more of the following:

a) The facility offers obstetric ultrasounds, obstetric sonograms, or prenatal care to pregnant women;

b) The facility offers pregnancy testing or pregnancy diagnosis;

c) The facility advertises or solicits patrons with offers to provide prenatal sonography, pregnancy tests, or pregnancy options counseling; and,

d) The facility has staff or volunteers who collect health information from clients.

5) Requires licensed covered facilities to disseminate the following notice in English and in minority languages pursuant to the federal Voting Rights Act, that states the following:

> "California has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion, for eligible women. To determine whether you qualify, contact the county social services office at [insert the telephone number]."

6) Requires the notice to be posted in a conspicuous place in the licensed clinic, specifies the size of the type on the notice, and requires a printed copy be given directly to the client, either in written or digital form. Allows

the notice to be combined with other mandated disclosures.

7) Requires an unlicensed facility to disseminate a notice to clients in English and in minority languages pursuant to the federal Voting Rights Act that states the following:

> "This facility is not licensed as a medical facility by the State of California and has no licensed medical provider who provides or directly supervises the provision of services."

8) Specifies the size of the notice, the size type the notice is printed in, and that the notice is to be posted conspicuously in the entrance to the unlicensed facility and in at least one other area where clients wait to receive services. Requires that the notice shall be given to clients onsite, and included in any print and digital advertising materials.

9) Establishes civil penalties for failure to comply with these provisions, enforceable by the Attorney General (AG), a city attorney, or county counsel if they have provided the facility with reasonable notice of noncompliance and verified that the violation was not corrected within 30 days from the date of the notice.

10) Specifies that any civil penalties be deposited into the General Fund if an action is brought by the AG, paid to the treasurer of the city if

an action is brought by a city attorney, and paid to the county treasurer if an action is brought by a county counsel.

11) Requires the AG to post and maintain of the Department of Justice's (DOJ) Internet Web site a list of the covered facilities upon which a penalty has been imposed.

12) Provides that if any provisions of this bill or its application is held invalid, that invalidity will not affect other provisions or applications that can be given effect without the invalid provision or application.

13) Makes various findings and declarations regarding Californian residents' rights to privacy and access to reproductive health services.

EXISTING LAW:

1) Licenses and regulates clinics, including primary care clinics and specialty clinics such as surgical clinics, by the Department of Public Health (DPH).

2) Provides for exemptions from licensing requirements for certain types of clinics, including federally operated clinics, local government primary care clinics, clinics affiliated with an institution of higher learning, clinics conducted as outpatient departments of hospitals, and community or free clinics. Also provides for exemptions for community or free clinics that are operated on

separate premises from the licensed clinic and are only open for limited services of no more than 20 hours a week (also known as intermittent clinics).

3) Authorizes DPH to take various types of enforcement actions against a primary care clinic that has violated state law or regulation, including imposing fines, sanctions, civil or criminal penalties, and suspension or revocation of the clinic's license.

4) Grants a specific right of privacy under the California Constitution and provides that the right to have an abortion may not be infringed upon without a compelling state interest.

5) Requires, under the federal Voting Rights Act, voting materials be translated in localities where there are more than 10,000 or over 5% of the total voting age citizens in a single political subdivision (usually a county, but a township or municipality in some states) who are members of a single minority language group, have depressed literacy rates, and do not speak English very well. The Census Bureau identifies specific language groups for specific jurisdictions.

FISCAL EFFECT: This bill has not been analyzed by a fiscal committee.

COMMENTS:

1) **PURPOSE OF THE BILL.** According to the author, California has a proud legacy of

respecting reproductive freedom and funding forward thinking programs to provide reproductive health assistance to low income women. The author notes that according to the Department of Health Care Services, the Patient Protection and Affordable Care Act expansion has made millions of Californians, 53% of them women, newly eligible for Medical. The author states because pregnancy decisions are time sensitive, California women should receive information about their rights and available services at the sites where they obtain care.

The author contends that, unfortunately, there are nearly 200 licensed and unlicensed clinics known as crisis pregnancy centers (CPCs) in California whose goal is to interfere with women's ability to be fully informed and exercise their reproductive rights, and that CPCs pose as full-service women's health clinics, but aim to discourage and prevent women from seeking abortions. The author concludes that these intentionally deceptive advertising and counseling practices often confuse, misinform, and even intimidate women from making fully-informed, time-sensitive decisions about critical health care.

2) **BACKGROUND.**

a) **Crisis Pregnancy Centers.** CPCs are facilities, both licensed and unlicensed, which present themselves as comprehensive reproductive health

centers, but are commonly affiliated with, or run by organizations whose stated goal is to prevent women from accessing abortions. A 2015 NARAL Pro-Choice America report on CPCs notes that the National Institute of Family and Life Advocates (an organization with over 1,300 CPC affiliates) states on its website that it is on the front line of the cultural battle over abortion, and its vision is to provide [CPCs] with legal resources and counsel, with the aim of developing a network of life-affirming ministries in every community across the nation in order to achieve an abortion-free America. The NARAL report also sent several researchers into CPCs to receive the counseling offered, and they widely reported that they were provided with inaccurate information, including only being given information regarding the risks of abortion, being told that many women commit suicide after having an abortion, and being told abortions can cause breast cancer.

b) **University of California, Hastings College of Law research report.** In fall of 2009 the Assembly Business, Professions and Consumer Protection Committee, concerned that CPCs throughout California were disseminating medically inaccurate information about pregnancy options

available in the state, requested a report by the University of California, Hastings College of Law regarding CPCs' practices and potential legislative options for regulating them Completed in December of 2010, "Pregnancy Resource Centers: Ensuring Access and Accuracy of Information," discusses several options for regulation CPCs, ranging from creating new regulations, leveraging existing regulations aimed specifically at medical services, as well as creating a new statute. Because approaches that have treated CPCs and full-service pregnancy centers differently have been challenged as violating the First Amendment, the report concludes that the best approach to a statutory change would regulate all pregnancy centers, not just CPCs, in a uniform manner, which is the approach that this bill adopts.

c) **Legal challenges to CPC regulation.** In November 2014, the Supreme Court rejected an appeal from several CPCs over a 2011 New York City law that requires CPCs to inform clients whether or not they have medical personnel on site. New York City officials argued that the law is meant to protect consumers from false advertising.

In February of this year, a federal judge upheld the City of San Francisco's regulation of CPCs, which prohibits clinics from engaging in false or misleading advertising. The law allows a judge to order clinics to post notices saying whether they offer abortions or abortion referrals. The ordinance was challenged by First Resort, a nonprofit clinic owner, as a violation of free speech. First Resort's print and online advertisements stated that the clinic offers "abortion information, resources and compassionate support for women facing the crucial decisions that surround unintended pregnancies and are considering abortion." In First Resort, Inc., v. Board of Supervisors of the City and County of San Francisco, the judges' ruling said the San Francisco law "only restricts false and misleading commercial speech, which is not protected by the First Amendment."

3) **SUPPORT.** Black Women for Wellness and NARAL Pro-Choice, California the co-sponsors of this bill as well as numerous other organizations, including, California Council of Churches IMPACT, California Latinas for Reproductive Justice, Maternal and Child Health Access, and Planned Parenthood, California, support this bill because it requires unlicensed facilities that provide pregnancy-related care to inform clients that they are not a licensed medical facility and do

not have a licensed provider on staff, enabling women to seek the care they wish to obtain and providing context for counseling given at these unlicensed facilities. They also state that distributing a notice of reproductive health services would ensure that women in any reproductive health or pregnancy counseling facility know that California respects their rights and provides assistance.

The California Primary Care Association (CPCA) states this bill will protect patients by allowing them to fully understand their rights when it comes to their reproductive freedom and to not be deceived by organizations whose sole purpose is to provide them with a biased view that does not allow them to make their own informed choice. CPCA notes that many of their community clinics and health centers grew out of the women's movement and their members believe a women's right to choose is a fundamental health right that must be protected.

The American Nurses Association, California (ANA\C) writes that all California residents should have access to reproductive health services, and more than 700,000 California women become pregnant every year, approximately half of them unintentionally. ANA\C states thousands of women do not know the legal options they have, or the funding resources available to them, and this bill will help ensure that pregnant women

receive the information they need to make an informed decision.

Forward Together supports this bill, opining; women in California face a threat from manipulative crisis pregnancy centers which pose as comprehensive reproductive health centers, but are, in fact, anti-choice organizations that target women with the goal of blocking them from considering abortion as an option and using proven contraceptive methods. Forward Together contends that CPCs use false and misleading advertising to appeal to women, who think they may be pregnant and are looking for comprehensive reproductive health care, and then manipulate and shame these women by peddling medically inaccurate information about abortion and contraception.

4) **OPPOSITION.** The California Catholic Conference (CCC) opposes this bill stating, on its surface, the bill proposes to regulate the state's pregnancy centers, but in actuality is aimed at discriminating against those pregnancy centers that hold a pro-life viewpoint. CCC contents that such unfair legislation may discourage women from getting the assistance that they need and deserve as well as expose many of these pregnancy centers to needless criminal or civil sanctions for failure to comply. CCC concludes that because they believe all life is sacred, they support programs which offer medical, economic and emotional support for pregnant

women and children, so that they can make life-affirming choices.

The California Right to Life Committee, Inc. (CRLC) opposes this bill and states that, if enacted, it could set a precedent for many other businesses that are not like or appreciated by one group in society which could bring a law suit against another business, company, or agency. CRLC asks us to consider car dealerships: what if they were to be seen as anti-environmental with misleading advertising, selling too many cars, and making citizens not anxious to take high speed rail? CRLC asks; would it not be possible that the California High Speed Rail Authority require that car dealerships advertise High Speed Rail locations, schedules, and fees? CRLC argues the provisions of this bill would not be best practice for the car industry any more that it would be for pro-life pregnancy centers to have to promote services which they consider morally reprehensible.

5) **DOUBLE REFERRAL.** This bill is double referred; upon passage in this committee, this bill will be referred to the Assembly Judiciary Committee.

6) **SUGGESTED AMENDMENT.** As noted in existing law above, the federal Voting Act applies to political subdivisions (usually a county, but sometimes a township or municipality) and refers to populations that,

"don't speak English very well." Because the covered facilities subject to the provisions of this bill are not likely to be familiar with federal Voting Act requirements, and state law already contains language that provides more specific guidance on which languages health related information should be translated into in each county, the Committee may wish to amend the bill to strike the references to federal law and instead require covered facilities to translate the notices required by this bill into the primary threshold languages for Medi-Cal beneficiaries as determined by the Department of Health Care Services for the county in which the covered facility is located.

7) **POLICY COMMENT.** This bill requires the AG to post and maintain on the DOJ Internet Web site a list of the covered facilities upon which a penalty has been imposed for noncompliance. Because an action against a covered facility may be brought by a city attorney or county counsel, as well as the AG, should this bill pass this committee, the author may wish to consider working with the Judiciary Committee to clarify how the AG will know a covered facility was cited when the action was brought by an agency other than the DOJ.

REGISTERED SUPPORT/OPPOSITION:

SupportBlack Women for Wellness (cosponsor)
NARAL Pro-Choice California (cosponsor)

Act for Women and Girls
American Congress of Obstetricians and Gynecologists
California Association for Nurse Practitioners
California Council of Churches IMPACT
California Latinas for Reproductive Justice
California Primary Care Association
California Women's Law Center
California Women Lawyers
Forward Together
League of Women Voters of California
Maternal And Child Health Access
National Abortion Federation
Planned Parenthood Affiliates of California
Religious Coalition for Reproductive Choice, California
Western Methodist Justice Movement
Women's Community Clinic
Women's Health Specialists

Opposition
Sacramento Life Center
The California Catholic Conference
The California Right to Life Committee, Inc.

Analysis Prepared by: Lara Flynn /HEALTH/ (916) 319-2097

EXHIBIT B

Date of Hearing: April 28, 2015

ASSEMBLY COMMITTEE ON JUDICIARY
Mark Stone, Chair
AB 775 (Chiu) – As Amended April 16, 2015

SUBJECT: REPRODUCTIVE FACT ACT

KEY ISSUES:

1) SHOULD LICENSED PRIMARY CARE CLINICS THAT PROVIDE FAMILY PLANNING OR PREGNANCY-RELATED SERVICES BE REQUIRED TO PROVIDE A SPECIFIED NOTICE INFORMING CONSUMERS ABOUT THE EXISTENCE OF A CONTINUUM OF FREE OR LOW-COST HEALTH CARE SERVICES?

2) SHOULD AN UNLICENSED FACILITY THAT PROVIDES PREGNANCY-RELATED SERVICES BE REQUIRED TO PROVIDE A SPECIFIED NOTICE INFORMING CONSUMERS THAT IT IS NOT A LICENSED MEDICAL FACILITY?

SYNOPSIS

This bill, co-sponsored by NARAL Pro-Choice America and Black Women for Wellness, seeks to that ensure that women who are pregnant are fully notified about the continuum of health care services available in the state. With respect to licensed health care facilities, the bill requires each client at the time

of her visit to be advised of the various publicly funded family planning and pregnancy-related resources available in California, and how to directly access these resources. Proponents of the bill contend that this notice is needed to ensure that women in California are fully informed of their options and are able to make their own healthcare and pregnancy-related decisions. Opponents of the bill, representing operators of pregnancy clinics impacted by this bill and other concerned citizens holding pro-life views, strongly object to this requirement and assert that it unfairly targets pro-life pregnancy clinics because of their anti-abortion viewpoint, forcing them to disseminate a message with which they do not agree, in violation of free speech protections. The Committee's analysis of the free speech issues indicates that the licensed facility notice is content-based and would likely be considered viewpoint-neutral commercial speech. As such, it would be subject to intermediate scrutiny. Furthermore, even if the licensed facility notice were subjected to strict scrutiny, it would likely be found to be constitutional if the court agreed with the proponents' argument that the most effective way to ensure that women timely obtain the information and services they need during pregnancy is to require licensed health facilities to provide the notice.

With respect to unlicensed facilities, the bill simply requires each client to be advised at the time of her visit that the facility is not licensed as a medical facility. Proponents of the bill contend that this notice is needed to ensure that pregnant women in California know when they are (and are not) getting medical care from licensed professionals. Opponents

generally do not allege this notice violates free speech protections, but some contend that this provision requires unlicensed clinics to post language that is untrue. They contend that many of the non-licensed clinics do have licensed medical staff on site as the clinics seek to become licensed. The Committee's analysis of the unlicensed facility notice concludes that it is content-based and would most likely be considered viewpoint-neutral commercial speech. As such, the required notice would be subject to rational basis scrutiny and would likely be found permissible under that standard. Even if the notice were to be subject to strict scrutiny, it would likely withstand strict scrutiny, especially in light of two recent court decisions from other states which have upheld, after applying strict scrutiny, requirements for unlicensed facilities to provide similar notices.

Finally, the bill authorizes modest civil penalties to be imposed if, after having been given notice of non-compliance and 30 days in which to correct a violation, the facility still fails to comply with these provisions. This bill previously passed the Health Committee by a 12-5 vote, and will be referred to Appropriations should it be approved in this Committee.

SUMMARY: Requires licensed facilities and unlicensed facilities whose purpose is to provide pregnancy-related services to provide specified notices to clients. Specifically, **this bill:**

1) Defines a licensed covered facility to mean a licensed, or intermittent, clinic whose primary purpose is providing family planning or

pregnancy-related services, and that satisfies two or more of the following:

a) The facility offers obstetric ultrasounds, obstetric sonograms, or prenatal care to pregnant women;

b) The facility provides, or offers counseling about contraception, or contraceptive methods;

c) The facility offers pregnancy testing or pregnancy diagnosis;

d) The facility advertises or solicits patrons with offers to provide prenatal sonography, pregnancy tests, or pregnancy options counseling; and,

e) The facility has staff or volunteers who collect health information from clients.

2) Clarifies that the following types of clinics are not considered covered facilities for the purposes of this bill:

a) A clinic directly conducted, maintained, or operated by the United States or any of its departments, officers, or agencies; and,

b) A licensed primary care clinic that is enrolled as a Medi-Cal provider and a provider in the Family Planning, Access, Care, and Treatment Program.

3) Defines an unlicensed covered facility to mean a facility that is not licensed by the State of

California and does not have a licensed medical provider on staff, whose primary purpose is providing pregnancy-related services and that satisfies two or more of the following:

a) The facility offers obstetric ultrasounds, obstetric sonograms, or prenatal care to pregnant women;

b) The facility offers pregnancy testing or pregnancy diagnosis;

c) The facility advertises or solicits patrons with offers to provide prenatal sonography, pregnancy tests, or pregnancy options counseling; and,

d) The facility has staff or volunteers who collect health information from clients.

4) Requires licensed covered facilities to disseminate the following notice in English and in minority languages pursuant to the federal Voting Rights Act, that states the following:

> "California has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion, for eligible women. To determine whether you qualify, contact the county social services office at [insert the telephone number]."

5) Requires the notice to be posted in a conspicuous place in the licensed clinic, specifies the size of the type on the notice, and requires a printed copy be given directly to the client, either in written or digital form. Allows the notice to be combined with other mandated disclosures.

6) Requires an unlicensed facility to disseminate a notice to clients in English and in minority languages pursuant to the federal Voting Rights Act that states the following:

> "This facility is not licensed as a medical facility by the State of California and has no licensed medical provider who provides or directly supervises the provision of services."

7) Specifies the size of the notice, the size type the notice is printed in, and that the notice is to be posted conspicuously in the entrance to the unlicensed facility and in at least one other area where clients wait to receive services. Requires that the notice shall be given to clients onsite, and included in any print and digital advertising materials.

8) Establishes civil penalties for failure to comply with these provisions, enforceable by the Attorney General (AG), a city attorney, or county counsel if they have provided the facility with reasonable notice of noncompliance and verified that the violation

was not corrected within 30 days from the date of the notice.

9) Specifies that any civil penalties be deposited into the General Fund if an action is brought by the AG, paid to the treasurer of the city if an action is brought by a city attorney, and paid to the county treasurer if an action is brought by a county counsel.

10) Requires the AG to post and maintain on the Department of Justice's (DOJ) Internet Web site a list of the covered facilities upon which a penalty has been imposed.

11) Provides that if any provisions of this bill or its application is held invalid, that invalidity will not affect other provisions or applications that can be given effect without the invalid provision or application.

12) Makes various findings and declarations, including, among other things:

    a) Because pregnancy decisions are time sensitive, and care early in pregnancy is important, California must supplement its own efforts to advise women of its reproductive health programs.

    b) The most effective way to ensure that women quickly obtain the information and services they need to make and implement timely reproductive decisions is to ensure licensed health care facilities that are unable to

immediately enroll patients into the Family PACT and Medi-Cal programs advise each patient at the time of her visit the various publicly funded family planning and pregnancy-related resources available in California and the manner in which to directly and efficiently access those resources.

c) The purpose of the Act is to ensure that California residents make their personal reproductive health care decisions by knowing their rights and health care services available to them.

EXISTING LAW:

1) Licenses and regulates clinics, including primary care clinics and specialty clinics such as surgical clinics, by the Department of Public Health (DPH). (Health and Safety Code Section 1200 *et seq.*)

2) Provides for exemptions from licensing requirements for certain types of clinics, including federally operated clinics, local government primary care clinics, clinics affiliated with an institution of higher learning, clinics conducted as outpatient departments of hospitals, and community or free clinics. (Health and Safety Code Section 1206.)

3) Prohibits any government body from making any law respecting an establishment of religion, or prohibiting the free exercise

thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances. (U.S. Constitution, Amendment I, made applicable to the states by Amendment XIV.)

4) Provides that every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right, and that no law shall restrain or abridge liberty of speech or press. (Cal. Const., Art. I, Section 2.)

5) Holds that the government is "free to prevent the dissemination to commercial speech that is false, deceptive, or misleading" without violating the First Amendment. (*Zauderer v. Office of Disciplinary Counsel of the Supreme Ct.* (1985) 471 U.S. 638.)

FISCAL EFFECT: As currently in print this bill is keyed fiscal.

COMMENTS: This bill, co-sponsored by NARAL Pro-Choice America and Black Women for Wellness, seeks to ensure that women who are pregnant are fully notified about the continuum of health care services available in the state. With respect to licensed health care facilities, the bill requires each client at the time of her visit to be advised of the various publicly funded family planning and pregnancy-related resources available in California, and how to directly access these resources. With respect to unlicensed facilities, the bill simply

requires each client to be advised at the time of her visit that the facility is not licensed to provide medical care. The bill authorizes modest civil penalties to be imposed if, after having been given notice of noncompliance and 30 days in which to correct a violation, the facility still fails to comply with these provisions.

Author's Statement. According to the author:

> California has a proud legacy of respecting reproductive freedom and funding forward-thinking programs to provide reproductive health assistance to low income women. The power of the law is only fully realized when California's women are fully informed of the rights and services available to them. Because family planning and pregnancy decisions are time sensitive, California women should receive information about their rights and available services at the sites where they obtain care.
>
> Millions of California women are in need of publicly funded family planning services, contraception services and education, abortion services, and prenatal care and delivery. More than 700,000 California women become pregnant every year and one-half of these pregnancies are unintended. Yet, at the moment they learn they are pregnant, thousands of women remain unaware of the public programs available to them, including contraception, health education and counseling, family planning, prenatal care, abortion or delivery.

It is in the best interest of the state, patients and providers that women are aware of available assistance to them – whether it is for preventing, continuing, or terminating a pregnancy. AB 775 ensures that women in California are fully informed of their options and are able to make their own healthcare and pregnancy-related decisions.

Background on Community Clinics. Community clinics and health centers are nonprofit, tax-exempt clinics that are licensed as community or free clinics, and provide services to patients on a sliding fee scale basis or, in the case of free clinics, at no charge to the patients. These include federally designated community health centers, migrant health centers, rural health centers, and frontier health centers. California is home to nearly 1,000 community clinics serving more than 5.6 million patients (or one in seven Californians) annually through over 17 million patient encounters. More than 50% of these patients are Hispanic and 43% speak a primary language other than English.

The non-statutory term "crisis pregnancy center" (CPC) refers to a subset of facilities that offer pregnancy-related services and are commonly affiliated with or operated by organizations whose stated goal is to prevent women from accessing abortions. Depending on factors like the personnel who are employed and the types of clinical or medical services offered, a CPC may operate as a licensed facility or, if exempted under Health and Safety Code Section 1206, an unlicensed facility. For the purpose of analyzing the free speech issues

raised by this bill, however, the only distinction that matters is whether a facility is considered a licensed covered facility or an unlicensed covered facility because the bill regulates all members within each category equally and each category contains both CPCs and non-CPCs.

I. FIRST AMENDMENT DOCTRINE: COMPELLED SPEECH. It is well-established that the First Amendment generally prohibits the government from compelling speech. "[T]he right of freedom of thought protected by the First Amendment ... includes both the right to speak freely and the right to refrain from speaking at all." (*Wooley v. Maynard*, 430 U.S. 705, 714; *see R.J. Reynolds Tobacco Co. v. Shewry* (9th Cir. 2005) 423 F.3d 906, 915.) However, the First Amendment's protections—including the right to not be compelled to speak—are not absolute. (*See Schenck v. United States* (1919) 249 U.S. 47, 52, "The most stringent protection of free speech would not protect a man [from] falsely shouting fire in a theatre and causing panic.")

In a compelled speech analysis, a court will uphold a law that compels speech if the law is tailored and the government's reasoning behind the law survives the applicable level of scrutiny. A court applies different levels of scrutiny depending on how the speech is classified. The higher the scrutiny, the more tailored the law must be, and the more compelling the government's interest must be. (*See Riley v. National Federation of the Blind of North Carolina* (1988) 487 U.S. 781, 796, "Our lodestars in deciding what level of scrutiny to apply to a compelled statement must

be the nature of the speech taken as a whole and the effect of the compelled statement thereon.")

A. Content-Based or Content-Neutral. The first classification of any regulation of speech is whether the regulation is "content-based" or "content-neutral." However, the Supreme Court has stated that "[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech." (*Riley v. National Federation of the Blind of North Carolina, Inc.* (1988) 487 U.S. 781, 795.) Accordingly, any compelled speech is viewed as a content-based regulation (i.e. a law proscribing certain content). (*Ibid.*)

Subject-Matter Discrimination vs. Viewpoint Discrimination. If the speech is a "content-based" regulation, a court will distinguish whether the law is "subject-matter discrimination" or "viewpoint discrimination." For example, a regulation prohibiting discussion of abortion in general would be "subject-matter discrimination," whereas a regulation prohibiting someone from speaking out against abortion would be "viewpoint discrimination." While both forms of discrimination are content-based, the courts have held that "viewpoint discrimination" is an especially suspect and "egregious form of content discrimination [and] ... the government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." (*Rosenberger v. Rector and Visitors of the Univ. of Va.* (1995) 515 U.S. 819, 829.)

B. Commercial Speech (including Professional Speech) or Noncommercial Speech. The second level of analysis for a speech regulation is whether the speech being regulated is commercial or noncommercial speech. If the regulation is content-based and the speech is noncommercial, a court will likely apply the strict scrutiny. Conversely, a similar regulation that is content-based but where the speech is commercial, a court will apply a more lenient standard. (*See Dex Media West, Inc. v. City of Seattle* (9th Cir. 2012) 696 F.3d 952, 956-957.) Indeed, regulations targeting misleading commercial speech need only survive rational basis scrutiny. (*See Zauderer v. Office of Disciplinary Counsel of the Supreme Ct.* (1985) 471 U.S. 626.)

Sometimes, the line between commercial speech and noncommercial speech is not clear. For example, in *Bolger v. Youngs Drug Products Corp.*, the Court struck down a federal law that prohibited unsolicited advertisements on contraception. There, a manufacturer and distributor of contraceptives-who challenged the law-distributed pamphlets which advertised its contraceptives and discussed in its pamphlets issues like venereal disease and family planning. Although the Court ultimately struck down the law, the Court held that the pamphlet was commercial speech. (*Bolger v. Youngs Drug Prods. Corp.* (1983) 463 U.S. 60, 75.)

Courts have established a test to help identify whether speech is more like commercial or noncommercial speech. In a close case where the regulation involves both commercial and noncommercial speech, a reviewing court looks at (i)

the advertising format of the speech, (ii) the speech's reference to a specific product, and (iii) the underlying economic motive of the speaker (collectively known as the "*Bolger*" factors). (*Ass'n of Nat. Advertisers, Inc. v. Lungren* (9th Cir. 1994) 44 F.3d 726, 728.)

(1) Commercial Speech. It is well-settled law that the government is "free to prevent the dissemination to commercial speech that is false, deceptive, or misleading" without violating the First Amendment. (*Zauderer v. Office of Disciplinary Counsel of the Supreme Ct.* (1985) 471 U.S. 638.) Specifically, "disclosure requirements trench much more narrowly on an advertiser's interests [because] warnings or disclaimers might be appropriately required in order to dissipate the possibility of consumer confusion or deception." (*Id.* at 651 [internal quotations omitted]). Accordingly, misleading commercial speech only needs to survive rational basis scrutiny. (*Ibid.*)

Indeed, "laws requiring a commercial speaker to make purely factual disclosures relating to its business affairs, whether to prevent deception or simply to promote informational transparency, have a purpose consistent with the reasons for according constitutional protection to commercial speech." (*Beeman v. Anthem Prescription Management, LLC* (2013) 58 Cal.4th 329, 356 [citations omitted].) Similarly, "[m]andated disclosure of accurate, factual, commercial information does not offend the core First Amendment values of promoting efficient exchange of information or protecting individual liberty interests. Such disclosure furthers, rather

than hinders, the First Amendment goal of the discovery of truth and contributes to the efficiency of the 'marketplace of ideas.'" (*National Electric Manufacturers Assn. v. Sorrell* (2d Cir. 2001) 272 F.3d 104, 113-114.)

(2) Professional Speech. Courts have established a doctrine, like the commercial speech doctrine, that applies when government regulates professional speech. Justice Jackson provided the following explanation for why a professional speech doctrine exists:

> The modern state owes and attempts to perform a duty to protect the public from those who seek for one purpose or another to obtain its money. When one does so through the practice of a calling, the state may have an interest in shielding the public against the untrustworthy, the incompetent, or the irresponsible, or against unauthorized representation of agency. A usual method of performing this function is through a licensing system.... Very many are the interests which the state may protect against the practice of an occupation, very few are those it may assume to protect against the practice of propagandizing by speech or press. (*Thomas v. Collins* (1945) 323 U.S. 516, 545 (Jackson, J., concurring).)

In other words, a state or federal government may regulate professional speech because "[i]t is the State's imprimatur (and the regulatory oversight that accompanies it) that provide clients with the confidence ... to put their health or their livelihood in

the hands of those [professionals] who utilize knowledge and methods with which the clients ordinarily have little or no familiarity. (*King v. Governor of the State of New Jersey* (3d Cir. 2014) 767 F.3d 216, 232.)

Professional speech, similar to commercial speech, is subject to lower level of scrutiny. The Ninth Circuit Court of Appeals, in *Pickup v. Brown*, explains this principle:

> The First Amendment tolerates a substantial amount of speech regulation within the professional-client relationship that it would not tolerate outside of it. And that toleration makes sense: When professionals, by means of their state-issued licenses, form relationships with clients, the purpose of those relationships is to advance the welfare of the clients, rather than to contribute to public debate. (*Pickup v. Brown* (9th Cir. 2014) 740 F.3d 1208, 1228.)

To determine whether speech is professional speech, the inquiry is whether the "speaker takes the affairs of a client personally in hand and purports to exercise judgment on behalf of the client in the light of the client's individual needs and circumstances." (*Moore-King v. County of Chesterfield, Va.* (4th Cir. 2013) 708 F.3d 560, 569 [citations omitted].)

II. APPLYING FREE SPEECH ANALYSIS TO THE REQUIRED NOTICE FOR LICENSED HEALTH CARE FACILITIES. This bill requires a licensed covered facility, as defined, to disseminate

to all clients on site the following notice ("licensed facility notice"):

> "California has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women. To determine whether you qualify, contact the county social services office at [insert the telephone number]."

Proponents of the bill contend that this notice is needed to ensure that women in California are fully informed of their options and are able to make their own healthcare and pregnancy-related decisions. Opponents of the bill, however, strongly object to this requirement and assert that it unfairly targets operators of CPCs because of their anti-abortion viewpoint, forcing them to disseminate a message with which they do not agree, in violation of free speech protections.

As detailed below, the Committee's analysis of the free speech issues indicates that the licensed facility notice is content-based, and would likely be considered viewpoint-neutral commercial speech that would be subject to intermediate scrutiny. Even if the notice were subjected to strict scrutiny, the notice may very well be held constitutional if a court accepted proponents' argument that the most effective way to ensure that women timely obtain the information about services they need during pregnancy is to require licensed health facilities to provide the notice on site.

A. The Licensed Facility Notice will Likely be Construed as a Content-Based Regulation. Because the licensed facility notice relates to pregnancy-related services, the speech regulated will likely be considered content-based, and not content-neutral. Moreover, any compelled speech regulation is generally analyzed as a content-based restriction. (*See Riley, supra*, at p. 795.) Accordingly, the level of scrutiny a court would apply depends on whether the notice triggers viewpoint discrimination, or is commercial speech.

B. The Licensed Facility Notice Does Not Create Viewpoint Discrimination, and is Viewpoint Neutral. Viewpoint discrimination occurs when the government not only targets a certain subject matter, but also targets a particular point of view on that specific subject matter. (*See Rosenberger, supra*, at p. 829.) Here, the government's compelling interest is consistent with the licensed facility notice, which does not convey a particular viewpoint about the services it mentions. The stated purpose of the bill is to ensure that women who are pregnant are fully notified about the full spectrum of health care services available in the state. The notice in this bill is likely to be construed as viewpoint-neutral because the notice speaks to the entire continuum of pregnancy-related health care services, like family planning services, contraception, prenatal care, and abortion. Moreover, the regulation applies to all primary care clinics whose primary purpose is providing family planning or pregnancy-related services, and provides at least two of the following: ultrasounds, contraceptives, pregnancy testing, advertising, or data collection. This means that the

notice requirement will apply to different types of health care facilities represented on the spectrum (as described in the notice).

C. Exemption of Certain Facilities Under this Bill Does Not Create Viewpoint Discrimination. Similar to the disputed exemption in *McCullen*, discussed above, the exemption provided under this bill does not demonstrate viewpoint discrimination. The first exemption is provided to clinics operated by the federal government, which is aimed at addressing preemption concerns. The second exemption is provided to a licensed primary care clinic that is enrolled as a Medi-Cal provider *and* enrolled as a provider in the Family Planning, Access, Care, and Treatment Program (Family PACT).

According to the author, a licensed primary care clinic that is both a Medi-Cal provider and a Family PACT provider offers the full continuum of health care services as described in the Notice above (i.e. comprehensive family planning services, contraception, prenatal care, and abortion). Under Medi-Cal a patient is covered for pregnancy-related services, maternity and new born care, prenatal care, and emergency and abortion services. Under Family PACT, a patient is covered for comprehensive clinical family planning services, including but not limited to methods and services to limit or enhance fertility (including contraceptives); natural family planning; abstinence methods; limited fertility management; preconception counseling; maternal and fetal health counseling; general reproductive health care (including

diagnosis and treatment of infections and conditions, including cancer, that threaten reproductive capability); medical family planning treatment; and family planning procedures.

Thus, the entire spectrum of services, as specified in the notice, will be provided by a Medi-Cal and Family PACT provider. Accordingly, there is appropriate justification for those clinics to be exempted from the requirement to provide the licensed facility notice.

D. The Licensed Facility Notice Will Likely be Construed as Commercial or Professional Speech. As previously stated, the speech being regulated is professional speech if "the speaker takes the affairs of a client personally in hand and purports to exercise judgment on behalf of the client in the light of the client's individual needs and circumstances." (*Moore-King v. County of Chesterfield, Va.* (4th Cir.2013) 708 F.3d 560,569 [citations omitted].)

Under this bill, a licensed facility means a facility licensed under Section 1204, or an intermittent clinic operating under a primary care clinic pursuant to subdivision (h) of Section 1206 of the Health and Safety Code. This class of primary care clinics generally includes a community clinic, a free clinic, a surgical clinic, a chronic dialysis clinic, a rehabilitation clinic, and an alternative birth center (collectively "primary care clinics").

In order to be licensed as a primary care clinic, an applicant must apply to the California Department

of Public Health and comply with a series of licensing requirements to provide care. A clinic must provide "diagnostic, therapeutic, radiological, laboratory and other services for the care and treatment of patients for whom the clinic accepts responsibility." (22 Cal Code Regs. Section 75026.) Moreover, "[e]very medical clinic shall have a licensed physician designated as the professional director" and "[a] physician, physician's assistant, or a registered nurse shall be present whenever medical services are provided." (22 Cal Code Regs. Section 75027.)

Given that a primary care clinic accepts to provide treatment for patients whom the clinic accepts responsibility, and provides medically-supervised care, a notice requirement for primary care clinic is likely to be construed a professional speech. (*See Moore-King, supra*, at p. 569.) Accordingly, a court would likely apply intermediate scrutiny.

E. The Licensed Facility Notice Will Likely Survive Intermediate Scrutiny. Because the licensed family notice will likely be construed as professional speech, a reviewing court will probably subject the notice to intermediate scrutiny. To survive intermediate scrutiny, the law must directly advance a substantial governmental interest. (*See Association of National Advertisers, Inc. v. Lungren* (9th Cir. 1994) 44 F.3d 726, 729.)

Here, the interest is to ensure that women who are pregnant are fully notified about the continuum of health care options available in the state. (Indeed, public health has always been viewed as a

compelling governmental interest.) The government's interest here in ensuring that pregnant women are informed about their health care options is directly advanced by a notice provided by primary care facilities, especially if the facility does not provide the full spectrum of health care services. Thus, the licensed facility notice will survive intermediate scrutiny.

F. Even if a Court were to Apply Strict Scrutiny, the Licensed Facility Notice Will Likely Pass Constitutional Muster. To survive strict scrutiny, the law must be narrowly tailored to satisfy a compelling government interest. As previously stated, the interest is to ensure that women who are pregnant are fully notified about the continuum of health care options available in the state. The interest is compelling and narrowly tailored because the time-sensitive nature of any pregnancy affects the policy options that this Legislature can enact. As this author has stated, the most effective way to ensure that women obtain information and services they need during pregnancy in a timely way is to require a licensed health care facility to provide the notice.

An alternative, like a statewide campaign, would not achieve the compelling interest because it would not sufficiently provide information to the consumer about the services provided available at a particular primary care facility, especially if that facility does not provide the full spectrum of medical options. (*See Evergreen Ass'n, Inc., supra*; at p. 247.) Thus, the licensed facility notice will likely pass constitutional

muster, whether a court reviews the law under intermediate or strict scrutiny.

III. APPLYING FREE SPEECH ANALYSIS TO THE REQUIRED NOTICE FOR UNLICENSED FACILITIES. The bill requires an unlicensed covered facility, as defined, to disseminate to clients on site the following notice ("unlicensed facility notice"):

> "This facility is not licensed as a medical facility by the State of California and has no licensed medical provider who provides or directly supervises the provision of services."

Proponents of the bill contend that this notice is needed to ensure that pregnant women in California know when they are getting medical care from licensed professionals. According to the author, the bill is intended to ensure that unlicensed facilities that advertise and provide pregnancy testing and care must advise clients, at the time they are seeking or obtaining care, that these facilities are not licensed to provide medical care.

Most of the opposition letters received by the Committee object to the licensed facility notice as violation of free speech rights, but the letters make no allegation that the unlicensed facility notice is in similar violation of those rights. Some opponents, however, object that this provision requires non-licensed clinics to post language that is untrue because, they contend, many of the non-licensed clinics have licensed medical staff on site as the clinics prepare to obtain their licenses.

As detailed below, the Committee's analysis of the free speech issues indicates that the unlicensed facility notice is content-based and would likely be considered viewpoint-neutral commercial speech. As such, the required notice would be subject to rational basis scrutiny and would likely be found to be permissible under that standard. Even if the notice were subjected to strict scrutiny, the notice may very well be held constitutional in light of two recent court decisions, described below, that upheld similar notices required for unlicensed facilities after applying strict scrutiny.

A. The Unlicensed Facility Notice will be Construed a Content-Based Regulation. Since the unlicensed facility notice relates to a specific subject matter, the notice will be construed as a content-based regulation. Moreover, any compelled speech regulation is generally analyzed as a content-based restriction. (*See Riley, supra,* at p. 795.) Accordingly, the level of scrutiny a court applied would depend on whether this bill were found to trigger viewpoint discrimination, or to be targeting commercial speech.

B. The Unlicensed Facility Notice is Viewpoint Neutral. As stated above, viewpoint discrimination occurs when the government not only targets a certain subject matter, but also targets a particular point of view taken by speakers on that a specific subject matter. (*See Rosenberger, supra,* at p. 829.)

Here, the notice required of an unlicensed facility does not take a particular point of view. The notice simply requires an unlicensed facility to state

uncontrovertibly that it is not a medical facility (if it is not licensed). Accordingly, the notice is viewpoint neutral.

C. The Unlicensed Facility Notice Will be Likely be Construed as Commercial Speech. As previously mentioned, the line between commercial and noncommercial speech is not always clear. To determine whether the speech that is being regulated is commercial or noncommercial, a reviewing court looks at the *Bolger* factors: (i) the advertising format of the speech, (ii) the speech's reference to a specific product, and (iii) the underlying economic motive of the speaker. (*Lungren, supra*, at p. 728.)

Here, the speech and notice likely meets the *Bolger* factors. First, the format of the notice is required to be in advertising materials, and onsite in areas where there is an initial contact between the client and the facility. (*See American Academy of Pain Management v. Joseph* (9th Cir. 2004) 353 F .3d 1099, 1106, finding that "advertising" was sufficient for the first *Bolger* "format" factor.) Second, the speech here is related to a pregnancy-related health service, which is considered a product. (*See Joseph, supra*, at p. 1106, finding that "medical services" was a specific product for the second *Bolger* factor.)

While the third *Bolger* factor for the unlicensed facilities notice may be a closer question, a court would likely find that the unlicensed facility has an economic motive. If the facility charges a fee, that is generally sufficient to establish an economic motive. However, a facility that does not charge a fee may

still be construed as having an economic motive because it attracts clients and patients in order to perform health services, rather than to exchange ideas. (*See Greater Baltimore Center for Pregnancy Concerns, Inc. v. Mayor and City Council of Baltimore* (4th Cir. 2013) 721 F.3d 264, 286, *citing Fargo Women's Health Organization, Inc. v. Larson* (1986) 381 N.W.2d 176, 180-81, "the degree, if any, that monies are received by the [nonprofit] from its clients is not dispositive of the commercial speech issue" [internal citations omitted].)Accordingly, it seems likely that the speech required under this bill would be construed as commercial speech, and a reviewing court would likely apply rational basis scrutiny. (*Zauderer*, *supra*, at p. 638.)

D. The Unlicensed Facility Notice Will Likely Survive Rational Basis Scrutiny. As previously stated, the author has stated that the government's compelling interest is to ensure that women who are pregnant are fully notified about the continuum of health care services available in the state.

Given that the notice required of unlicensed facilities is about promoting transparency and avoiding consumer confusion, a court is likely to apply rational basis scrutiny. Here, the notice required of unlicensed facilities is reasonably related to the state's interest in ensuring that pregnant women are fully notified about the continuum of health care services available in the state. The notice is a fact-specific, incontrovertible statement aimed at informing a patient about the kinds of services a facility provides. (*See Sorrell*, *supra*, at pp. 113-114.)

Additionally, because the state wants to ensure that a woman knows about all of her health care options, a notice informing the woman about the lack of a health care professional informs her that certain health care services are unavailable. Understanding that certain health care services are not available assists a consumer of health-related services to avoid confusion or deception about the kind of care that an unlicensed facility may provide. (*See Zauderer, supra*, at p. 638.) Thus, the unlicensed facility notice will likely survive rational basis scrutiny.

E. Even If A Court Were to Apply Strict Scrutiny, The Unlicensed Facility Notice Will Likely Pass Constitutional Muster. Similar notices—like the notice that is required of an unlicensed facility under this bill—were upheld in two Circuit Courts of Appeals that applied strict scrutiny.

In *Centro Tepayac v. Montgomery County*, the Fourth Circuit reviewed a 2010 resolution passed by the Montgomery County Council that regulated pregnancy service centers. (*Centro Tepayac v. Montgomery County*. (4th Cir. 2013) 722 F.3d 184, 189.) The Montgomery Resolution required a pregnancy service center that did not have a licensed medical professional on staff to post a sign stating that "the Center does not have a licensed medical professional on staff." (*Id.* at p. 189.) The Centro Tepayac, a nonprofit organization that operated a limited pregnancy resource center, challenged the law. The Fourth Circuit upheld the law and the lower court's application of strict scrutiny. The court found that the government had a compelling interest

to ensure that women were able to obtain needed medical care, and that women did not forgo medical treatment. The notice was narrowly tailored because it notified patients "in neutral language [stating] the truth that a licensed medical professional is not on staff, [and the notice] does not require any other specific message." (*Id.* at p. 190 [internal quotations omitted.) Accordingly, the Resolution was constitutional.

In *Evergreen Ass'n, Inc. v. City of New York*, the Second Circuit reviewed a 2011 City of New York ordinance that regulated pregnancy service centers. (*Evergreen Ass'n, Inc. v. City of New York* (2nd Cir. 2014) 740 F.3d 233, 238.) Among other things, the New York Ordinance required a pregnancy service center to disclose whether the center had "a licensed medical provider on staff who provides or directly supervises the provision of all of the services at such pregnancy service center." (*Ibid.*) Evergreen Association, Inc. challenged the law on several arguments, including on First Amendment grounds. Similar to the Fourth Circuit, the Second Circuit applied strict scrutiny to the notice and upheld the law. The court held that "striking down the [disclosure] would deprive the City of its ability to protect the health of its citizens and combat consumer deception in even the most minimal way." (*Id*, at p. 247.)

Specifically, the *Evergreen* court stated that the government had a compelling interest "to ensure that women have prompt access to the type of care they seek" and "to prevent [women] from mistakenly concluding that pregnancy services centers, which

look like medical facilities, are medical facilities, whether or not the centers engage in deception." (*Evergreen Ass'n, Inc., supra*, at p. 247.) The law was narrowly tailored because alternatives like city-sponsored advertisements and prosecuting fraud, false advertising, or the unauthorized practice of medicine would not achieve the City's interest. (*Ibid.*) Specifically, the alternatives would not alert consumers "as to whether a *particular* pregnancy services center employs a licensed medical provider, because, among other things, this is discrete factual information known only to the particular center." (*Ibid* [original emphasis].) Moreover, "[e]nforcement of fraud or other laws occurs only after the fact, at which point the reproductive service sought may be ineffectual or unobtainable." (*Ibid.*) Thus, the notice required of unlicensed facilities will likely pass constitutional muster, whether a court reviews the law under rational basis or strict scrutiny.

ENFORCEMENT PROVISIONS. The bill authorizes modest civil penalties to be imposed if, after having been given notice of noncompliance and 30 days in which to correct a violation, the facility still fails to comply with these provisions. This bill also requires the Attorney General (AG) to post and maintain on the DOJ Internet Web site a list of the covered facilities upon which a penalty has been imposed for noncompliance. Because the bill allows an enforcement action against a covered facility to be brought by a city attorney or county counsel in addition to the AG, the author may wish to consider clarifying how the list of previous violators will be maintained and kept current to reflect actions brought by an entity other than the AG.

ARGUMENTS IN SUPPORT: In support of the bill, NARAL Pro-Choice California writes:

> As a national leader for reproductive freedom, the state of California has numerous laws on the books supporting women and providing assistance for low-income residents. However, many women are unaware of the truly comprehensive support the state has to offer. This legislation ensures California women receive the information they need to access affordable health care and make the best decisions regarding family planning.
>
> Distributing a notice of reproductive health services would ensure that women in any reproductive health or pregnancy counseling facility know that California respects their rights and provides assistance. Disclosing the unlicensed status of a facility allows women to make fully informed decisions. AB 775, the Reproductive FACT Act, will help ensure that the intent of California's strong laws that protect reproductive freedom is fully realized.

In support of the bill, the League of Women Voters of California writes:

> AB 775 requires licensed and unlicensed facilities to provide their parents information they need to understand their rights and the full range of medical care available to them so as to make the best decisions regarding

> family planning. It also ensures that women are informed that the facility they use is a licensed medical facility that provides actual medical services or is an unlicensed facility that cannot provide the full range of services...
>
> [A] woman's constitutional right of privacy to make reproductive choices and to have access to a basic level of health care includes all aspects of family planning. The right to make reproductive choices is empty of content if a woman lacks the ability to obtain the services she chooses because she lacks information about her rights, the services available, and the ability of the facility she is in to provide them.

ARGUMENTS IN OPPOSITION: The California Catholic Conference (CCC) opposes this bill, stating:

> The bill proposes to regulate the state's pregnancy centers, but in actuality is aimed at discriminating against those pregnancy centers that hold a pro-life viewpoint. Such unfair legislation may discourage women from getting the assistance that they need and deserve as well as expose many of these pregnancy centers to needless criminal or civil sanctions for failure to comply. Because we believe all life is sacred, we support programs which offer medical, economic and emotional support for pregnant women and children, so that they can make life-affirming choices.

The Committee has received hundreds of letters expressing opposition to the bill from operators of pregnancy centers and their supporters. For example, Pregnancy Counseling Center writes:

> Women are smart and they know that they have options regarding their pregnancy. Not all pregnant women want a referral to a government agency that funds abortions. Pregnant women seek out abortion-alternative organizations because they do not want to go to an abortion-provider to discuss their options.

The National Institute of Family & Life Advocates writes in opposition:

> AB 775 basically requires non-profit organizations that lawfully promote a woman's right to make a fully informed decision about her pregnancy to announce what services they do not provide and force them to refer in violation of their conscience. A law such as this, while targeted at pro-women groups, would set a terrible precedent and its rational could be used against many other forms of speech... There are alternative methods to spread the word about public healthcare programs other than to force one type of organization, targeted for their religious and philosophical beliefs, to advertise them. There are other laws that are in effect, such as laws against fraud and deceptive practices, which are available to remedy a situation where deceptive practices

are in fact occurring. Forcing speech is not the solution.

REGISTERED SUPPORT/OPPOSITION:

Support

Black Women for Wellness (co-sponsor)
NARAL Pro Choice California (co-sponsor)
ACT for Women and Girls
American Congress of Obstetricians and Gynecologists
American Nurses Association, California
California Association for Nurse Practitioners
California Council of Churches IMPACT
California Latinas for Reproductive Justice
California Pan-Ethnic Health Network
California Primary Care Association
California Women's Law Center
California Women Lawyers
The Center on Reproductive Rights and Justice
Forward Together
Fresno Barrios Unidos
League of Women Voters of California
Maternal And Child Health Access
National Abortion Federation
National Council of Jewish Women, California
Planned Parenthood Affiliates of California
Religious Coalition for Reproductive Choice, California
Western Methodist Justice Movement
Women's Community Clinic
Women's Health Specialists

Opposition

Alliance Defending Freedom
Birth Choice
California Catholic Conference
California Right to Life Committees, Inc.
Caring for Women Pregnancy Resource Center
Conejo Pregnancy Center
Fallbrook Pregnancy Resource Center
Horizon Pregnancy Clinic
Life Choices
Network Medical Women's Center
Pacific Justice Institute Center for Public Policy
Pregnancy Care Center
Pregnancy Care Clinic
Pregnancy Counseling Center
Whittier Life Centers, Inc.
Women's Pregnancy Care Clinic
Hundreds of Individuals

Analysis Prepared by: Eric Dang and Anthony Lew / JUD. / (916) 319-2334

EXHIBIT C

ASSEMBLY THIRD READING
AB 775 (Chiu and Burke)
As Amended May 4, 2015
Majority Vote

Committee	Votes	Ayes	Noes
Health	12-5	Bonta, Bonilla, Burke, Chiu, Gomez, Gonzalez, Nazarian, Ridley-Thomas, Rodriguez, Santiago, Thurmond, Wood	Maienschein, Chavez, Lackey, Patterson, Waldron
Judiciary	7-3	Mark Stone, Alejo, Chau, Chiu, Cristina Garcia, Holden, O'Donnell	Wagner, Gallagher, Maienschein

SUMMARY: Requires licensed clinics that provide family planning or pregnancy-related services to provide a notice to consumers regarding their reproductive rights and the availability of services in California. Requires unlicensed facilities that provide pregnancy-related services to disseminate and post a notice informing consumers that they are not a licensed medical facility and to include the notice in their advertising materials.

FISCAL EFFECT: None

COMMENTS:

1) **Purpose of this bill.** According to the author, California has a proud legacy of respecting reproductive freedom and funding forward thinking programs to provide reproductive health assistance to low income women. The author notes that according to the Department of Health Care Services, the Patient Protection and Affordable Care Act expansion has made millions of Californians, 53% of them women, newly eligible for Medi-cal. The author states because pregnancy decisions are time sensitive, California women should receive information about their rights and available services at the sites where they obtain care.

   The author contends that, unfortunately, there are nearly 200 licensed and unlicensed clinics known as crisis pregnancy centers (CPCs) in California whose goal is to interfere with a woman's ability to be fully informed

and exercise their reproductive rights, and that CPCs pose as full-service women's health clinics, but aim to discourage and prevent women from seeking abortions. The author concludes that these intentionally deceptive advertising and counseling practices often confuse, misinform, and even intimidate women from making fully-informed, time-sensitive decisions about critical health care.

2) **Background.** CPCs are facilities, both licensed and unlicensed, which present themselves as comprehensive reproductive health centers, but are commonly affiliated with, or run by organizations whose stated goal is to prevent women from accessing abortions. A 2015 NARAL Pro-Choice America report on CPCs notes that the National Institute of Family and Life Advocates (an organization with over 1,300 CPC affiliates) states on its Web site that it is on the front line of the cultural battle over abortion, and its vision is to provideCPCs with legal resources and counsel, with the aim of developing a network of life-affirming ministries in every community across the nation in order to achieve an abortion-free America. The NARAL report also sent several researchers into CPCs to receive the counseling offered, and they widely reported that they were provided with inaccurate information, including only being given information regarding the risks of abortion, being told that many women commit suicide

after having an abortion, and being told abortions can cause breast cancer.

In fall of 2009 the Assembly Business, Professions and Consumer Protection Committee, concerned that CPCs throughout California were disseminating medically inaccurate information about pregnancy options available in the state, requested a report by the University of California, Hastings College of Law regarding CPCs' practices and potential legislative options for regulating them Completed in December of 2010, "Pregnancy Resource Centers: Ensuring Access and Accuracy of Information," discusses several options for regulation of CPCs, ranging from creating new regulations, leveraging existing regulations aimed specifically at medical services, as well as creating a new statute. Because approaches that have treated CPCs and full-service pregnancy centers differently have been challenged as violating the First Amendment, the report concludes that the best approach to a statutory change would regulate all pregnancy centers, not just CPCs, in a uniform manner, which is the approach that this bill adopts.

3) **Support.** Black Women for Wellness and NARAL Pro-Choice, California the co-sponsors of this bill as well as numerous other organizations, including, California Council of Churches IMPACT, California Latinas for Reproductive Justice, Maternal and Child

Health Access, and Planned Parenthood, California, support this bill because it requires unlicensed facilities that provide pregnancy-related care to inform clients that they are not a licensed medical facility and do not have a licensed provider on staff, enabling women to seek the care they wish to obtain and providing context for counseling given at these unlicensed facilities. They also state that distributing a notice of reproductive health services would ensure that women in any reproductive health or pregnancy counseling facility know that California respects their rights and provides assistance.

4) **Opposition.** The California Catholic Conference (CCC) opposes this bill stating, on its surface, this bill proposes to regulate the state's pregnancy centers, but in actuality is aimed at discriminating against those pregnancy centers that hold a pro-life viewpoint. CCC contends that such unfair legislation may discourage women from getting the assistance that they need and deserve as well as expose many of these pregnancy centers to needless criminal or civil sanctions for failure to comply. CCC concludes that because they believe all life is sacred, they support programs which offer medical, economic and emotional support for pregnant women and children, so that they can make life-affirming choices.

Analysis Prepared by: Lara Flynn / HEALTH / (916) 319-2097 FN: 0000399

THOMAS E. MONTGOMERY, County Counsel
County of San Diego
By THOMAS D. BUNTON, Chief Deputy (SBN 193560)
1600 Pacific Highway, Room 355
San Diego, California 92101-2469
Telephone: (619) 531-6456
Email: thomas.bunton@sdcounty.ca.gov

Attorneys for Thomas Montgomery, in his official capacity
As County Counsel for San Diego County

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES d/b/a NIFLA, a Virginia corporation; PREGNANCY CARE CENTER d/b/a PREGNANCY CARE CLINIC, a California corporation; and FALLBROOK PREGNANCY RESOURCE CENTER, Plaintiffs, v.	Case No. 15CV2277 JAH DHB Action Filed: October 13, 2015 **VERIFIED ANSWER OF DEFENDANT THOMAS MONTGOMERY IN HIS OFFICIAL CAPACITY AS COUNTY COUNSEL FOR SAN DIEGO COUNTY**

KAMALA HARRIS, in her official capacity as Attorney General for the State of California; THOMAS MONTGOMERY, in his official capacity as County Counsel for San Diego County; MORGAN FOLEY, in his official capacity as City Attorney for the City of El Cajon, CA; and EDMUND G. BROWN, JR., in his official capacity as Governor of the State of California, Defendants.	)))

3. Thomas Montgomery denies the allegations contained in paragraph 3.

4. Thomas Montgomery admits the allegations contained in paragraph 4.

5. Thomas Montgomery denies the allegations contained in paragraph 5.

6. Thomas Montgomery admits the allegations contained in paragraph 6.

7. Thomas Montgomery denies the allegations contained in paragraph 7.

8. Thomas Montgomery denies the allegations contained in paragraph 8.

9. Thomas Montgomery denies the allegations contained in paragraph 9.

10. Thomas Montgomery denies the allegations contained in paragraph 10.

11. Thomas Montgomery is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 11.

12. Thomas Montgomery denies the allegations contained in paragraph 12.

13. Thomas Montgomery admits the allegations contained in paragraph 13.

14. Thomas Montgomery denies the allegations contained in paragraph 14

JURISDICTION AND VENUE

15. Thomas Montgomery admits the allegations contained in paragraph 15.

16. Thomas Montgomery admits the allegations contained in paragraph 16.

JURISDICTION AND VENUE

Plaintiffs

17. Thomas Montgomery is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 17.

18. Thomas Montgomery is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 18.

19. Thomas Montgomery is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 19.

20. Thomas Montgomery is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 20.

21. Thomas Montgomery is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 21.

22. Thomas Montgomery is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 22.

Defendants

23. Thomas Montgomery admits the allegations contained in paragraph 23.

24. Thomas Montgomery denies the allegations contained in paragraph 24.

25. Thomas Montgomery is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 25.

26. Thomas Montgomery is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 26.

FACTUAL ALLEGATIONS

27. Thomas Montgomery is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 27.

Pregnancy Care Clinic

28. Thomas Montgomery is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 28.

29. Thomas Montgomery is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 29.

30. Thomas Montgomery is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 30.

31. Thomas Montgomery is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 31.

32. Thomas Montgomery is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 32.

33. Thomas Montgomery is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 33.

34. Thomas Montgomery is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 34.

35. Thomas Montgomery is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 35.

36. Thomas Montgomery is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 36.

Fallbrook Pregnancy Center

37. Thomas Montgomery is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 37.

38. Thomas Montgomery is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 38.

39. Thomas Montgomery is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 39.

40. Thomas Montgomery is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 40.

National Institute of Family and Life Advocates

41. Thomas Montgomery is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 41.

42. Thomas Montgomery is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 42.

43. Thomas Montgomery is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 43.

44. Thomas Montgomery is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 44.

45. Thomas Montgomery is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 45.

46. Thomas Montgomery is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 46.

47. Thomas Montgomery is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 47.

48. Thomas Montgomery is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 48.

49. Thomas Montgomery is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 49.

50. Thomas Montgomery is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 50.

51. Thomas Montgomery is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 51.

52. Thomas Montgomery denies the allegations contained in paragraph 52.

53. Thomas Montgomery denies the allegations contained in paragraph 53.

54. Thomas Montgomery denies the allegations contained in paragraph 54.

55. Thomas Montgomery denies the allegations contained in paragraph 55.

Assembly Bill 775, the Reproductive FACT Act

56. Thomas Montgomery admits the allegations contained in paragraph 56.

57. Thomas Montgomery admits the allegations contained in paragraph 57.

58. Thomas Montgomery admits the allegations contained in paragraph 58.

59. Thomas Montgomery admits the allegations contained in paragraph 59.

60. Thomas Montgomery admits the allegations contained in paragraph 60.

61. Thomas Montgomery is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 61.

62. Thomas Montgomery denies the allegations contained in paragraph 62.

63. Thomas Montgomery is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 63.

64. Thomas Montgomery is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 64.

65. Thomas Montgomery is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 65.

66. Thomas Montgomery is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 66.

67. Thomas Montgomery is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 67.

68. Thomas Montgomery is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 68.

69. Thomas Montgomery is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 69.

70. Thomas Montgomery is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 70.

71. Thomas Montgomery is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 71.

72. Thomas Montgomery admits the allegations contained in paragraph 72.

73. Thomas Montgomery admits the allegations contained in paragraph 73.

74. Thomas Montgomery admits the allegations contained in paragraph 74.

75. Thomas Montgomery admits the allegations contained in paragraph 75.

76. Thomas Montgomery admits the allegations contained in paragraph 76.

77. Thomas Montgomery admits the allegations contained in paragraph 77.

78. Thomas Montgomery denies the allegations contained in paragraph 78.

79. Thomas Montgomery is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 79.

80. Thomas Montgomery is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 80.

81. Thomas Montgomery denies the allegations contained in paragraph 81.

82. Thomas Montgomery is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 82.

83. Thomas Montgomery is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 83.

84. Thomas Montgomery is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 84.

85. Thomas Montgomery is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 85.

86. Thomas Montgomery is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 86.

87. Thomas Montgomery is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 87.

88. Thomas Montgomery is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 88.

89. Thomas Montgomery is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 89.

90. Thomas Montgomery is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 90.

91. Thomas Montgomery denies the allegations contained in paragraph 91.

92. Thomas Montgomery denies the allegations contained in paragraph 92.

93. Thomas Montgomery is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 93.

94. Thomas Montgomery is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 94.

95. Thomas Montgomery is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 95.

96. Thomas Montgomery is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 96.

97. Thomas Montgomery admits the allegations contained in paragraph 97.

98. Thomas Montgomery denies the allegations contained in paragraph 98.

99. Thomas Montgomery is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 99.

100. Thomas Montgomery is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 100.

101. Thomas Montgomery is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 101.

102. Thomas Montgomery is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 102.

103. Thomas Montgomery is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 103.

104. Thomas Montgomery is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 104.

105. Thomas Montgomery admits the allegations contained in paragraph 105.

106. Thomas Montgomery denies the allegations contained in paragraph 106.

107. Thomas Montgomery is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 107.

108. Thomas Montgomery denies the allegations contained in paragraph 108.

109. Thomas Montgomery denies the allegations contained in paragraph 109.

110. Thomas Montgomery denies the allegations contained in paragraph 110.

111. Thomas Montgomery denies the allegations contained in paragraph 111.

112. Thomas Montgomery denies the allegations contained in paragraph 112.

113. Thomas Montgomery admits the allegations contained in paragraph 113.

114. Thomas Montgomery is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 114.

115. Thomas Montgomery is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 115.

116. Thomas Montgomery admits the allegations contained in paragraph 116.

117. Thomas Montgomery admits the allegations contained in paragraph 117.

118. Thomas Montgomery denies the allegations contained in paragraph 118.

119. Thomas Montgomery denies the allegations contained in paragraph 119.

120. Thomas Montgomery is without knowledge or information sufficient to form a belief

as to the truth of the allegations contained in paragraph 120.

121. Thomas Montgomery denies the allegations contained in paragraph 121.

122. Thomas Montgomery is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 122.

123. Thomas Montgomery is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 123.

124. Thomas Montgomery is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 124.

125. Thomas Montgomery is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 125.

126. Thomas Montgomery is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 126.

127. Thomas Montgomery is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 127.

128. Thomas Montgomery denies the allegations contained in paragraph 128.

129. Thomas Montgomery denies the allegations contained in paragraph 129.

130. Thomas Montgomery denies the allegations contained in paragraph 130.

131. Thomas Montgomery denies the allegations contained in paragraph 131.

132. Thomas Montgomery denies the allegations contained in paragraph 132.

133. Thomas Montgomery denies the allegations contained in paragraph 133.

134. Thomas Montgomery denies the allegations contained in paragraph 134.

135. Thomas Montgomery denies the allegations contained in paragraph 135.

136. Thomas Montgomery denies the allegations contained in paragraph 136.

137. Thomas Montgomery is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 137.

138. Thomas Montgomery is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 138.

139. Thomas Montgomery is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 139.

140. Thomas Montgomery is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 140.

141. Thomas Montgomery is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 141.

142. Thomas Montgomery is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 142.

143. Thomas Montgomery denies the allegations contained in paragraph 143.

144. Thomas Montgomery admits the allegations contained in paragraph 144.

145. Thomas Montgomery denies the allegations contained in paragraph 145.

146. Thomas Montgomery denies the allegations contained in paragraph 146.

147. Thomas Montgomery denies the allegations contained in paragraph 147.

148. Thomas Montgomery denies the allegations contained in paragraph 148

CLAIMS FOR RELIEF

FIRST CLAIM

VIOLATION OF THE FREE SPEECH CLAUSE OF THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION

149. Thomas Montgomery incorporates by reference his responses to paragraphs 1 through 148.

150. Thomas Montgomery admits the allegations contained in paragraph 70.

151. Thomas Montgomery admits the allegations contained in paragraph 151.

152. Thomas Montgomery denies the allegations contained in paragraph 152.

153. Thomas Montgomery denies the allegations contained in paragraph 153.

154. Thomas Montgomery denies the allegations contained in paragraph 154.

155. Thomas Montgomery denies the allegations contained in paragraph 155.

156. Thomas Montgomery denies the allegations contained in paragraph 156.

157. Thomas Montgomery denies the allegations contained in paragraph 157.

158. Thomas Montgomery denies the allegations contained in paragraph 158.

159. Thomas Montgomery denies the allegations contained in paragraph 159.

160. Thomas Montgomery denies the allegations contained in paragraph 160.

161. Thomas Montgomery denies the allegations contained in paragraph 161.

162. Thomas Montgomery denies the allegations contained in paragraph 162.

163. Thomas Montgomery denies the allegations contained in paragraph 163.

164. Thomas Montgomery denies the allegations contained in paragraph 164.

165. Thomas Montgomery denies the allegations contained in paragraph 165.

166. Thomas Montgomery denies the allegations contained in paragraph 166.

167. Thomas Montgomery denies the allegations contained in paragraph 167.

168. Thomas Montgomery denies the allegations contained in paragraph 168.

169. Thomas Montgomery denies the allegations contained in paragraph 169.

SECOND CLAIM

VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION: ALLEGED BY THE NON-LICENSED PLAINTIFF FACILITIES

170. Thomas Montgomery incorporates by reference his responses to paragraphs 1 through 170.

171. Thomas Montgomery denies the allegations contained in paragraph 171.

172. Thomas Montgomery admits the allegations contained in paragraph 172.

173. Thomas Montgomery denies the allegations contained in paragraph 173.

174. Thomas Montgomery is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 174.

175. Thomas Montgomery denies the allegations contained in paragraph 175.

176. Thomas Montgomery denies the allegations contained in paragraph 176.

177. Thomas Montgomery denies the allegations contained in paragraph 177.

178. Thomas Montgomery denies the allegations contained in paragraph 178.

179. Thomas Montgomery denies the allegations contained in paragraph 179.

THIRD CLAIM

VIOLATION OF THE RIGHTS OF PLAINTIFF FACILITIES UNDER THE FIRST AMENDMENT'S FREE EXERCISE OF RELIGION CLAUSE

180. Thomas Montgomery incorporates by reference his responses to paragraphs 1 through 179.

181. Thomas Montgomery is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 181.

182. Thomas Montgomery is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 182.

183. Thomas Montgomery denies the allegations contained in paragraph 183.

184. Thomas Montgomery denies the allegations contained in paragraph 184.

185. Thomas Montgomery denies the allegations contained in paragraph 185.

186. Thomas Montgomery denies the allegations contained in paragraph 186.

187. Thomas Montgomery denies the allegations contained in paragraph 187.

188. Thomas Montgomery denies the allegations contained in paragraph 188.

189. Thomas Montgomery denies the allegations contained in paragraph 189.

190. Thomas Montgomery denies the allegations contained in paragraph 190.

191. Thomas Montgomery denies the allegations contained in paragraph 191.

192. Thomas Montgomery denies the allegations contained in paragraph 192.

FOURTH CLAIM

VIOLATION OF THE COATS-SNOWE AMENDMENT, 42 U.S.C. §238N, ALLEGED BY THE LICENSED MEDICAL PLAINTIFF FACILITIES.

193. Thomas Montgomery incorporates by reference his responses to paragraphs 1 through 192.

194. Thomas Montgomery denies the allegations contained in paragraph 194.

195. Thomas Montgomery denies the allegations contained in paragraph 195.

196. Thomas Montgomery denies the allegations contained in paragraph 196.

197. Thomas Montgomery denies the allegations contained in paragraph 197.

FIFTH CLAIM

VIOLATION OF THE FREE SPEECH CLAUSE OF THE CALIFORNIA CONSTITUTION, ART. 1, SEC 2(A), ALLEGED BY ALL PLAINTIFF FACILITIES

198. Thomas Montgomery incorporates by reference his responses to paragraphs l through 197.

199. Thomas Montgomery admits the allegations contained in paragraph 199.

200. Thomas Montgomery admits the allegations contained in paragraph 200.

201. Thomas Montgomery denies the allegations contained in paragraph 201.

202. Thomas Montgomery denies the allegations contained in paragraph 202.

203. Thomas Montgomery denies the allegations contained in paragraph 203.

204. Thomas Montgomery denies the allegations contained in paragraph 204.

205. Thomas Montgomery denies the allegations contained in paragraph 205.

206. Thomas Montgomery denies the allegations contained in paragraph 206.

207. Thomas Montgomery denies the allegations contained in paragraph 207.

208. Thomas Montgomery denies the allegations contained in paragraph 208.

209. Thomas Montgomery denies the allegations contained in paragraph 209.

210. Thomas Montgomery denies the allegations contained in paragraph 210.

211. Thomas Montgomery denies the allegations contained in paragraph 211.

212. Thomas Montgomery denies the allegations contained in paragraph 212.

213. Thomas Montgomery denies the allegations contained in paragraph 213.

214. Thomas Montgomery denies the allegations contained in paragraph 214.

215. Thomas Montgomery denies the allegations contained in paragraph 215.

216. Thomas Montgomery denies the allegations contained in paragraph 216.

217. Thomas Montgomery denies the allegations contained in paragraph 217.

AFFIRMATIVE DEFENSES

1

(Failure to State Causes of Action)

As a first, separate and distinct affirmative defense, defendant Thomas Montgomery alleges that the complaint fails to state facts sufficient to constitute a cause of action upon which relief can be granted.

2

(Ripeness)

As a second, separate and distinct affirmative defense, defendant Thomas Montgomery alleges that all the plaintiffs' causes of action are barred because they are not ripe for adjudication.

WHEREFORE, said defendants pray as follows:

1. That the action be dismissed with prejudice;

2. That plaintiffs take nothing by their action;

3. That defendant Thomas Montgomery recovers his costs of suit incurred herein, including attorneys' fees; and

4. For such other and further relief as the Court deems proper and just.

DATED:

THOMAS E. MONTGOMERY,
County Counsel

By **s/Thomas D. Bunton**
THOMAS D. BUNTON,
Chief Deputy
Attorneys for Defendant
Thomas Montgomery

* * * *

Steven E. Boehmer, Esq. (SBN 144817)
e-mail: sboehmer@mcdougallove.com
Carrie L. Mitchell, Esq. (SBN 221845)
e-mail: cmitchell@mcdougallove.com
McDOUGAL LOVE BOEHMER FOLEY
LYON & CANLAS
8100 La Mesa Blvd., Suite 200
La Mesa, California 91942
Telephone: (619) 440-4444
Facsimile: (619) 440-4907

EXEMPT FROM FILING FEES PURSUANT TO GOVERNMENT CODE SECTION 6103

Attorneys for Defendant Morgan Foley, in his official capacity as City Attorney for the City of El Cajon

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES d/b/a NIFLA, a Virginia corporation; PREGNANCY CARE CENTER d/b/a PREGNANCY CARE CLINIC, a California corporation; and FALLBROOK PREGNANCY RESOURCE CENTER, a California corporation, Plaintiffs,	CASE NO. 15-cv-2277 JAH DHB **ANSWER TO VERIFIED COMPLAINT FOR DECLARATORY, INJUNCTIVE AND OTHER RELIEF** Judge: John A. Houston Courtroom: 13B Magistrate Judge: David H. Bartick

v. KAMALA HARRIS, in her official capacity as Attorney General for the State of California; THOMAS MONTGOMERY, in his official capacity as County General Counsel for San Diego County; MORGAN FOLEY, in his official capacity as City Attorney for the City of El Cajon, CA; and EDMOND G. BROWN, JR., in his official capacity as Governor of the State of California; Defendants.	Complaint Filed: October 13, 2015

Defendant, Morgan Foley, in his official capacity as City Attorney for the City of El Cajon ("Foley"), hereby answers plaintiffs' verified complaint as follows:

INTRODUCTION

1. In response to paragraph 1, defendant Foley states that the averments contained therein are conclusions of law to which no request is required. To the extent a response is deemed required, defendant Foley is without sufficient knowledge or information to either admit or deny the

allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

2. In response to paragraph 2 of the complaint, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

3. In response to paragraph 3, defendant Foley states that the averments contained therein are conclusions of law to which no request is required. To the extent a response is deemed required, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

4. In response to paragraph 4, defendant Foley states that the averments contained therein are conclusions of law to which no request is required. To the extent a response is deemed required, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

5. In response to paragraph 5, defendant Foley states that the averments contained therein are conclusions of law to which no request is required. To the extent a response is deemed required, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

6. In response to paragraph 6 of the complaint, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

7. In response to paragraph 7, defendant Foley states that the averments contained therein are conclusions of law to which no request is required. To the extent a response is deemed required, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

8. In response to paragraph 8, defendant Foley states that the averments contained therein are conclusions of law to which no request is required. To the extent a response is deemed required, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

9. In response to paragraph 9, defendant Foley states that the averments contained therein are conclusions of law to which no request is required. To the extent a response is deemed required, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

10. In response to paragraph 10, defendant Foley states that the averments contained therein

are conclusions of law to which no request is required. To the extent a response is deemed required, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

11. In response to paragraph 11 of the complaint, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

12. In response to paragraph 12, defendant Foley states that the averments contained therein are conclusions of law to which no request is required. To the extent a response is deemed required, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

13. In response to paragraph 13, defendant Foley states that the averments contained therein are conclusions of law to which no request is required. To the extent a response is deemed required, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

14. In response to paragraph 14 of the complaint, defendant Foley is without sufficient knowledge or information to either admit or deny the

allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

JURISDICTION AND VENUE

15. In response to paragraph 15, defendant Foley states that the averments contained therein are conclusions of law to which no request is required.

16. In answer to paragraph 16, defendant Foley acknowledges that venue appears to be appropriate at this point in time.

IDENTIFICATION OF THE PARTIES

17. In response to paragraph 17 of the complaint, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

18. In response to paragraph 18 of the complaint, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

19. In response to paragraph 19 of the complaint, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

20. In response to paragraph 20 of the complaint, defendant Foley is without sufficient

knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

21. In response to paragraph 21 of the complaint, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

22. In response to paragraph 22 of the complaint, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

23. In response to paragraph 23 of the complaint, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

24. In response to paragraph 24 of the complaint, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

25. In response to paragraph 25 of the complaint, defendant Foley admits that defendant Morgan Foley is and was at all times herein mentioned the City Attorney for the City of El Cajon. Regarding the remainder of the allegations, defendant Foley denies the allegations contained therein.

26. In response to paragraph 26 of the complaint, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

FACTUAL ALLEGATIONS

27. In response to paragraph 27 of the complaint, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

28. In response to paragraph 28 of the complaint, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

29. In response to paragraph 29 of the complaint, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

30. In response to paragraph 30 of the complaint, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

31. In response to paragraph 31 of the complaint, defendant Foley is without sufficient knowledge or information to either admit or deny the

allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

32. In response to paragraph 32 of the complaint, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

33. In response to paragraph 33 of the complaint, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

34. In response to paragraph 34 of the complaint, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

35. In response to paragraph 35 of the complaint, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

36. In response to paragraph 36 of the complaint, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

37. In response to paragraph 37 of the complaint, defendant Foley is without sufficient knowledge or information to either admit or deny the

allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

38. In response to paragraph 38 of the complaint, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

39. In response to paragraph 39 of the complaint, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

40. In response to paragraph 40 of the complaint, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

41. In response to paragraph 41 of the complaint, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

42. In response to paragraph 42 of the complaint, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

43. In response to paragraph 43 of the complaint, defendant Foley is without sufficient knowledge or information to either admit or deny the

allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

44. In response to paragraph 44 of the complaint, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

45. In response to paragraph 45 of the complaint, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

46. In response to paragraph 46 of the complaint, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

47. In response to paragraph 47 of the complaint, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

48. In response to paragraph 48 of the complaint, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

49. In response to paragraph 49 of the complaint, defendant Foley is without sufficient knowledge or information to either admit or deny the

allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

50. In response to paragraph 50 of the complaint, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

51. In response to paragraph 51 of the complaint, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

52. In response to paragraph 52 of the complaint, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

53. In response to paragraph 53 of the complaint, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

54. In response to paragraph 54 of the complaint, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

55. In response to paragraph 55, defendant Foley states that the averments contained therein are conclusions of law to which no request is

required. To the extent a response is deemed required, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

56. In response to paragraph 56 of the complaint, defendant Foley states that no affirmative answer or denial is required. To the extent a response is required, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

57. In response to paragraph 57 of the complaint, defendant Foley states that no affirmative answer or denial is required. To the extent a response is required, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

58. In response to paragraph 58 of the complaint, defendant Foley states that no affirmative answer or denial is required. To the extent a response is required, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

59. In response to paragraph 59 of the complaint, defendant Foley states that no

affirmative answer or denial is required. To the extent a response is required, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

60. In response to paragraph 60 of the complaint, defendant Foley states that no affirmative answer or denial is required. To the extent a response is required, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

61. In response to paragraph 61 of the complaint, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

62. In response to paragraph 62 of the complaint, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

63. In response to paragraph 63 of the complaint, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

64. In response to paragraph 64 of the complaint, defendant Foley is without sufficient

knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

65. In response to paragraph 65 of the complaint, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

66. In response to paragraph 66 of the complaint, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

67. In response to paragraph 67 of the complaint, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

68. In response to paragraph 68 of the complaint, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

69. In response to paragraph 69 of the complaint, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

70. In response to paragraph 70 of the complaint, defendant Foley is without sufficient

knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

71. In response to paragraph 71 of the complaint, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

72. In response to paragraph 72 of the complaint, defendant Foley states that no affirmative answer or denial is required. To the extent a response is required, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

73. In response to paragraph 73 of the complaint, defendant Foley states that no affirmative answer or denial is required. To the extent a response is required, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

74. In response to paragraph 74 of the complaint, defendant Foley states that no affirmative answer or denial is required. To the extent a response is required, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and

therefore denies same and leaves plaintiffs to their proof.

75. In response to paragraph 75 of the complaint, defendant Foley states that no affirmative answer or denial is required. To the extent a response is required, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

76. In response to paragraph 76 of the complaint, defendant Foley states that no affirmative answer or denial is required. To the extent a response is required, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

77. In response to paragraph 77 of the complaint, defendant Foley states that no affirmative answer or denial is required. To the extent a response is required, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

78. In response to paragraph 78 of the complaint, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

79. In response to paragraph 79 of the complaint, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

80. In response to paragraph 80 of the complaint, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

81. In response to paragraph 81 of the complaint, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

82. In response to paragraph 82 of the complaint, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

83. In response to paragraph 83, defendant Foley states that the averments contained therein are conclusions of law to which no request is required. To the extent a response is deemed required, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

84. In response to paragraph 84 of the complaint, defendant Foley is without sufficient knowledge or information to either admit or deny the

allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

85. In response to paragraph 85 of the complaint, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

86. In response to paragraph 86 of the complaint, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

87. In response to paragraph 87 of the complaint, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

88. In response to paragraph 88 of the complaint, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

89. In response to paragraph 89 of the complaint, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

90. In response to paragraph 90 of the complaint, defendant Foley is without sufficient knowledge or information to either admit or deny the

allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

91. In response to paragraph 91 of the complaint, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

92. In response to paragraph 92, defendant Foley states that the averments contained therein are conclusions of law to which no request is required. To the extent a response is deemed required, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

93. In response to paragraph 93, defendant Foley states that the averments contained therein are conclusions of law to which no request is required. To the extent a response is deemed required, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

94. In response to paragraph 94 of the complaint, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

95. In response to paragraph 95 of the complaint, defendant Foley is without sufficient knowledge or information to either admit or deny the

allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

96. In response to paragraph 96 of the complaint, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

97. In response to paragraph 97 of the complaint, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

98. In response to paragraph 98 of the complaint, defendant Foley denies each and every allegation contained therein.

99. In response to paragraph 99 of the complaint, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

100. In response to paragraph 100 of the complaint, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

101. In response to paragraph 101 of the complaint, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

102. In response to paragraph 102 of the complaint, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

103. In response to paragraph 103 of the complaint, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

104. In response to paragraph 104 of the complaint, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

105. In response to paragraph 105 of the complaint, defendant Foley denies each and every allegation contained therein.

106. In response to paragraph 106 of the complaint, defendant Foley denies each and every allegation contained therein.

107. In response to paragraph 107, defendant Foley states that the averments contained therein are conclusions of law to which no request is required. To the extent a response is deemed required, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

108. In response to paragraph 108 of the complaint, defendant Foley denies each and every allegation contained therein.

109. In response to paragraph 109 of the complaint, defendant Foley denies each and every allegation contained therein.

110. In response to paragraph 110 of the complaint, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

111. In response to paragraph 111, defendant Foley states that the averments contained therein are conclusions of law to which no request is required. To the extent a response is deemed required, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

112. In response to paragraph 112, defendant Foley states that the averments contained therein are conclusions of law to which no request is required. To the extent a response is deemed required, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

113. In response to paragraph 113, defendant Foley states that the averments contained therein are conclusions of law to which no request is required. To the extent a response is deemed

required, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

114. In response to paragraph 114 of the complaint, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

115. In response to paragraph 115, defendant Foley states that the averments contained therein are conclusions of law to which no request is required. To the extent a response is deemed required, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

116. In response to paragraph 116, defendant Foley states that the averments contained therein are conclusions of law to which no request is required. To the extent a response is deemed required, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

117. In response to paragraph 117 of the complaint, defendant Foley denies that Morgan Foley is empowered to bring an action to impose a civil penalty pursuant to the Act. Regarding the remainder of the allegations, defendant Foley is without sufficient knowledge or information to either

admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

118. In response to paragraph 118 of the complaint, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

119. In response to paragraph 119, defendant Foley states that the averments contained therein are conclusions of law to which no request is required. To the extent a response is deemed required, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

120. In response to paragraph 120 of the complaint, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

121. In response to paragraph 121 of the complaint, defendant Foley denies each and every allegation contained therein.

122. In response to paragraph 122 of the complaint, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

123. In response to paragraph 123 of the complaint, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

124. In response to paragraph 124 of the complaint, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

125. In response to paragraph 125, defendant Foley states that the averments contained therein are conclusions of law to which no request is required. To the extent a response is deemed required, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

126. In response to paragraph 126 of the complaint, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

127. In response to paragraph 127 of the complaint, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

128. In response to paragraph 128 of the complaint, defendant Foley is without sufficient knowledge or information to either admit or deny the

allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

129. In response to paragraph 129, defendant Foley states that the averments contained therein are conclusions of law to which no request is required. To the extent a response is deemed required, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

130. In response to paragraph 130 of the complaint, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

131. In response to paragraph 131 of the complaint, defendant Foley denies each and every allegation contained therein.

132. In response to paragraph 132 of the complaint, defendant Foley denies each and every allegation contained therein.

133. In response to paragraph 133 of the complaint, defendant Foley denies each and every allegation contained therein.

134. In response to paragraph 134 of the complaint, defendant Foley denies each and every allegation contained therein.

135. In response to paragraph 135 of the complaint, defendant Foley denies each and every allegation contained therein.

136. In response to paragraph 136 of the complaint, defendant Foley denies each and every allegation contained therein.

137. In response to paragraph 137, defendant Foley states that the averments contained therein are conclusions of law to which no request is required. To the extent a response is deemed required, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

138. In response to paragraph 138, defendant Foley states that the averments contained therein are conclusions of law to which no request is required. To the extent a response is deemed required, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

139. In response to paragraph 139 of the complaint, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

140. In response to paragraph 140, defendant Foley states that the averments contained therein are conclusions of law to which no request is required. To the extent a response is deemed

required, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

141. In response to paragraph 141, defendant Foley states that the averments contained therein are conclusions of law to which no request is required. To the extent a response is deemed required, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

142. In response to paragraph 142, defendant Foley states that the averments contained therein are conclusions of law to which no request is required. To the extent a response is deemed required, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

143. In response to paragraph 143 of the complaint, defendant Foley denies each and every allegation contained therein.

144. In response to paragraph 144 of the complaint, defendant Foley denies that Morgan Foley is vested with enforcing the Act against Plaintiff Facilities. Regarding the remainder of the allegations, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

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145. In response to paragraph 145 of the complaint, defendant Foley denies each and every allegation contained therein.

146. In response to paragraph 146 of the complaint, defendant Foley denies each and every allegation contained therein.

147. In response to paragraph 147 of the complaint, defendant Foley denies each and every allegation contained therein.

148. In response to paragraph 148 of the complaint, defendant Foley denies each and every allegation contained therein.

CLAIMS FOR RELIEF

FIRST CLAIM: VIOLATION OF THE FREE SPEECH CLAUSE OF THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION

149. In response to paragraph 149, defendant Foley incorporates by reference each response to his responses set forth in paragraphs 1 through 148 inclusive, as though fully set forth herein.

150. In response to paragraph 150 of the complaint, defendant Foley admits the allegations contained therein.

151. In response to paragraph 151 of the complaint, defendant Foley admits the allegations contained therein.

152. In response to paragraph 152 of the complaint, defendant Foley denies each and every allegation contained therein.

153. In response to paragraph 153 of the complaint, defendant Foley denies each and every allegation contained therein.

154. In response to paragraph 154 of the complaint, defendant Foley denies each and every allegation contained therein.

155. In response to paragraph 155 of the complaint, defendant Foley denies each and every allegation contained therein.

156. In response to paragraph 156 of the complaint, defendant Foley denies each and every allegation contained therein.

157. In response to paragraph 157 of the complaint, defendant Foley denies each and every allegation contained therein.

158. In response to paragraph 158 of the complaint, defendant Foley denies each and every allegation contained therein.

159. In response to paragraph 159 of the complaint, defendant Foley denies each and every allegation contained therein.

160. In response to paragraph 160 of the complaint, defendant Foley denies each and every allegation contained therein.

161. In response to paragraph 161 of the complaint, defendant Foley denies each and every allegation contained therein.

162. In response to paragraph 162 of the complaint, defendant Foley denies each and every allegation contained therein.

163. In response to paragraph 163 of the complaint, defendant Foley denies each and every allegation contained therein.

164. In response to paragraph 164 of the complaint, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiff to their proof.

165. In response to paragraph 165 of the complaint, defendant Foley denies each and every allegation contained therein.

166. In response to paragraph 166 of the complaint, defendant Foley denies each and every allegation contained therein.

167. In response to paragraph 167, defendant Foley states that the averments contained therein are conclusions of law to which no request is required. To the extent a response is deemed required, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

168. In response to paragraph 168, defendant Foley states that the averments contained therein are conclusions of law to which no request is required. To the extent a response is deemed required, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

169. In response to paragraph 169 of the complaint, defendant Foley states that no affirmative answer or denial is required. To the extent a response is required, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

SECOND CLAIM: VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION: ALLEGED BY THE NON-LICENSED PLAINTIFF FACILITIES

170. Defendant Foley incorporates by reference each response to its responses set forth in response to all previous paragraphs 1 through 170, inclusive, as though fully set forth herein.

171. In response to paragraph 171, defendant Foley states that the averments contained therein are conclusions of law to which no request is required. To the extent a response is deemed required, defendant Foley is without sufficient knowledge or information to either admit or deny the

allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

172. In response to paragraph 172 of the complaint, defendant Foley states that no affirmative answer or denial is required. To the extent a response is required, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

173. In response to paragraph 173 of the complaint, defendant Foley denies each and every allegation contained therein.

174. In response to paragraph 174 of the complaint, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

175. In response to paragraph 175, defendant Foley states that the averments contained therein are conclusions of law to which no request is required. To the extent a response is deemed required, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

176. In response to paragraph 176, defendant Foley states that the averments contained therein are conclusions of law to which no request is required. To the extent a response is deemed required, defendant Foley is without sufficient

knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

177. In response to paragraph 177 of the complaint, defendant Foley denies each and every allegation contained therein.

178. In response to paragraph 178, defendant Foley states that the averments contained therein are conclusions of law to which no request is required. To the extent a response is deemed required, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

179. In response to paragraph 179 of the complaint, defendant Foley states that no affirmative answer or denial is required. To the extent a response is required, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

THIRD CLAIM: VIOLATION OF THE RIGHTS OF PLAINTIFF FAMILITIES UNDER THE FIRST AMENDMENT'S FREE EXERCISE OF RELIGION CLAUSE

180. Defendant Foley incorporates by reference each response to its responses set forth in response to all previous paragraphs 1 through 180, inclusive, as though fully set forth herein.

181. In response to paragraph 181 of the complaint, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

182. In response to paragraph 182 of the complaint, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

183. In response to paragraph 183 of the complaint, defendant Foley denies each and every allegation contained therein.

184. In response to paragraph 184 of the complaint, defendant Foley denies each and every allegation contained therein.

185. In response to paragraph 185 of the complaint, defendant Foley denies each and every allegation contained therein.

186. In response to paragraph 186 of the complaint, defendant Foley denies each and every allegation contained therein.

187. In response to paragraph 187 of the complaint, defendant Foley denies each and every allegation contained therein.

188. In response to paragraph 188 of the complaint, defendant Foley denies each and every allegation contained therein.

189. In response to paragraph 189 of the complaint, defendant Foley denies each and every allegation contained therein.

190. In response to paragraph 190 of the complaint, defendant Foley denies each and every allegation contained therein.

191. In response to paragraph 191 of the complaint, defendant Foley denies each and every allegation contained therein.

192. In response to paragraph 192 of the complaint, defendant Foley states that no affirmative answer or denial is required. To the extent a response is required, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

FOURTH CLAIM: VIOLATION OF THE COATS-SNOWE AMENDMENT, 42 U.S.C. § 238N, ALLEGED BY THE LICENSED MEDICAL PLAINTIFF FACILITIES

193. Defendant Foley incorporates by reference each response to its responses set forth in response to all previous paragraphs 1 through 193, inclusive, as though fully set forth herein.

194. In response to paragraph 194 of the complaint, defendant Foley denies each and every allegation contained therein.

195. In response to paragraph 195 of the complaint, defendant Foley denies each and every allegation contained therein.

196. In response to paragraph 196 of the complaint, defendant Foley denies each and every allegation contained therein.

197. In response to paragraph 197 of the complaint, defendant Foley states that no affirmative answer or denial is required. To the extent a response is required, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

FIFTH CLAIM: VIOLATION OF THE FREE SPEECH CLAUSE OF THE CALIFORNIA CONSTITUTION, ART. I, SEC.2(A) ALLEGED BY ALL PLAINTIFF FACILITIES

198. Defendant Foley incorporates by reference each response to its responses set forth in response to all previous paragraphs 1 through 198, inclusive, as though fully set forth herein.

199. In response to paragraph 199, defendant Foley states that the averments contained therein are conclusions of law to which no request is required. To the extent a response is deemed required, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

200. In response to paragraph 200, defendant Foley states that the averments contained therein are conclusions of law to which no request is required. To the extent a response is deemed required, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

201. In response to paragraph 201 of the complaint, defendant Foley denies each and every allegation contained therein.

202. In response to paragraph 202 of the complaint, defendant Foley denies each and every allegation contained therein.

203. In response to paragraph 203 of the complaint, defendant Foley denies each and every allegation contained therein.

204. In response to paragraph 204 of the complaint, defendant Foley denies each and every allegation contained therein.

205. In response to paragraph 205 of the complaint, defendant Foley denies each and every allegation contained therein.

206. In response to paragraph 206 of the complaint, defendant Foley denies each and every allegation contained therein.

207. In response to paragraph 207 of the complaint, defendant Foley denies each and every allegation contained therein.

208. In response to paragraph 208 of the complaint, defendant Foley denies each and every allegation contained therein.

209. In response to paragraph 209 of the complaint, defendant Foley denies each and every allegation contained therein.

210. In response to paragraph 210 of the complaint, defendant Foley denies each and every allegation contained therein.

211. In response to paragraph 211 of the complaint, defendant Foley denies each and every allegation contained therein.

212. In response to paragraph 212 of the complaint, defendant Foley denies each and every allegation contained therein.

213. In response to paragraph 213 of the complaint, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

214. In response to paragraph 214 of the complaint, defendant Foley denies each and every allegation contained therein.

215. In response to paragraph 215 of the complaint, defendant Foley denies each and every allegation contained therein.

216. In response to paragraph 216, defendant Foley states that the averments contained

therein are conclusions of law to which no request is required. To the extent a response is deemed required, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

217. In response to paragraph 217 of the complaint, defendant Foley states that no affirmative answer or denial is required. To the extent a response is required, defendant Foley is without sufficient knowledge or information to either admit or deny the allegations contained therein and therefore denies same and leaves plaintiffs to their proof.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

1. As a first and separate affirmative defense, defendant Foley alleges that plaintiffs lack standing and as such the complaint should be dismissed.

SECOND AFFIRMATIVE DEFENSE

2. As a second and separate affirmative defense, defendant Foley alleges that plaintiffs' claims are moot or are not ripe for adjudication and as such the complaint should be dismissed.

THIRD AFFIRMATIVE DEFENSE

3. As a third and separate affirmative defense, defendant Foley alleges that to the extent

that any claim fails to state a claim on which relief can be granted, it should be dismissed.

FOURTH AFFIRMATIVE DEFENSE

(Estoppel-All claims for relief)

4. As a fourth and separate affirmative defense, defendant Foley alleges that plaintiffs' claims are barred by estoppel.

FIFTH AFFIRMATIVE DEFENSE

(Waiver-All claims for relief)

5. As a fifth and separate affirmative defense, defendant Foley alleges that plaintiffs' claims are barred by waiver

SIXTH AFFIRMATIVE DEFENSE

(Sovereign Immunity-All claims for relief)

6. As a sixth and separate affirmative defense, defendant Foley alleges that plaintiffs' amended complaint is barred by sovereign immunity under the Eleventh Amendment of the United States Constitution.

SEVENTH AFFIRMATIVE DEFENSE

(Uncertainty-All claims for relief)

7. As a seventh and separate affirmative defense, defendant Foley alleges that the complaint is uncertain, vague, ambiguous, improper and unintelligible.

EIGHTH AFFIRMATIVE DEFENSE

(Right to apply all other affirmative defenses reserved-All claims for relief)

8. Defendant Foley cannot fully anticipate all affirmative defenses that may be applicable to this action. Accordingly, the right to assert additional affirmative defenses, if and to the extent that such affirmative defenses are applicable, is hereby reserved.

WHEREFORE, the defendant Foley prays as follows:

1. That the complaint be dismissed with prejudice;

2. That plaintiffs take nothing by their complaint;

3. That defendant Foley be awarded its attorney fees and cost of suit; and

4. For such further relief as the Court deems proper.

Dated:
November 13, 2017

MCDOUGAL LOVE BOEHMER FOLEY LYON & CANLAS

By: *s/Steven E. Boehmer*
Steven E. Boehmer
Attorneys for Defendant, Morgan Foley, in his official capacity as City Attorney for the City of El Cajon

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XAVIER BECERRA
Attorney General of California
STEPAN A. HAYTAYAN
Supervising Deputy Attorney General
ANTHONY R. HAKL
Acting Supervising Deputy Attorney General
State Bar No. 197335
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 210-6065
Fax: (916) 324-8835
E-mail: Anthony.Hakl@doj.ca.gov
Attorneys for Defendant Xavier Becerra, in his official capacity as Attorney General of the State of California

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES dba NIFLA, a Virginia corporation; PREGNANCY CARE CENTER dba PREGNANCY CARE CLINIC, a California corporation; and FALLBROOK PREGNANCY RESOURCE CENTER,	3:15-cv-02277-JAH-DHB **ANSWER TO COMPLAINT** Judge: The Honorable John A. Houston Trial Date: N/A Action Filed: 10/13/2015

a California corporation,

Plaintiffs,

v.

XAVIER BECERRA, in his official capacity as Attorney General of the State of California; THOMAS MONTGOMERY, in his official capacity as County Counsel for San Diego County; MORGAN FOLEY, in his official capacity as City Attorney for the City of El Cajon, CA; and EDMUND G. BROWN, JR., in his official capacity as Governor of the State of California,

Defendants.

Defendant Xavier Becerra ("Becerra"), in his official capacity as Attorney General of the State of California, answers plaintiffs' complaint as follows:

ANSWER TO PLAINTIFFS' INTRODUCTION

1. Answering paragraph 1 of the complaint, Becerra admits these allegations.

2. Answering paragraph 2 of the complaint, Becerra lacks sufficient information or knowledge to form a belief about the truth of each and every allegation and denies them on that basis.

3. Answering paragraphs 3 through 10 of the complaint, Becerra avers the allegations are plaintiffs' argument regarding the law to which no response is required. To the extent that a response is required, Becerra denies each and every allegation.

4. Answering paragraph 11 of the complaint, Becerra lacks sufficient information or knowledge to form a belief about the truth of each and every allegation and denies them on that basis.

5. Answering paragraph 12 of the complaint, Becerra avers the allegations are plaintiffs' argument regarding the law to which no response is required. To the extent that a response is required, Becerra denies each and every allegation.

6. Answering paragraph 13 of the complaint, Becerra admits these allegations.

7. Answering paragraph 14 of the complaint, Becerra denies these allegations.

ANSWER TO JURISDICTION AND VENUE ALLEGATIONS

8. Answering paragraph 15 of the complaint, Becerra avers the allegations are conclusions of law to which no response is required. To the extent that a response is required, Becerra denies each and every allegation.

9. Answering paragraph 16 of the complaint, Becerra admits the allegations of the first sentence. Becerra lacks sufficient information or knowledge to form a belief about the truth of each and every allegation of the second sentence and denies them on that basis.

ANSWER TO PLAINTIFFS' IDENTIFICATION OF THE PARTIES

10. Answering paragraphs 17 through 22 of the complaint, Becerra lacks sufficient information or knowledge to form a belief about the truth of each and every allegation and denies them on that basis.

11. Answering paragraph 23 of the complaint, Becerra avers that he is the current Attorney General of the State of California and is authorized to enforce the provisions of the Act. Becerra otherwise denies the allegations of this paragraph.

12. Answering paragraphs 24 and 25 of the complaint, Becerra lacks sufficient information or knowledge to form a belief about the truth of each and every allegation and denies them on that basis.

13. Answering paragraph 26 of the complaint, Becerra avers that Edmund G. Brown Jr. is the current Governor of California and that the Court has dismissed the Governor from this case. Becerra otherwise denies the allegations of this paragraph.

ANSWER TO PLAINTIFFS' FACTUAL ALLEGATIONS

14. Answering paragraphs 27 through 55 of the complaint, Becerra lacks sufficient information or knowledge to form a belief about the truth of each and every allegation and denies them on that basis.

15. Answering paragraphs 56 through 60 of the complaint, Becerra avers the allegations are plaintiffs' argument regarding the law to which no response is required. To the extent that a response is required, Becerra denies each and every allegation.

16. Answering paragraph 61 of the complaint, Becerra lacks sufficient information or knowledge to form a belief about the truth of each and every allegation and denies them on that basis.

17. Answering paragraphs 62 through 64 of the complaint, Becerra avers the allegations are plaintiffs' argument regarding the law to which no response is required. To the extent that a response is required, Becerra denies each and every allegation.

18. Answering paragraphs 65 through 71 of the complaint, Becerra lacks sufficient information or knowledge to form a belief about the truth of each and every allegation and denies them on that basis.

19. Answering paragraphs 72 through 78 of the complaint, Becerra avers the allegations are plaintiffs' argument regarding the law to which no response is required. To the extent that a response is required, Becerra denies each and every allegation.

20. Answering paragraphs 79 through 90 of the complaint, Becerra lacks sufficient information or knowledge to form a belief about the truth of each and every allegation and denies them on that basis.

21. Answering paragraphs 91 and 92 of the complaint, Becerra avers the allegations are plaintiffs' argument regarding the law to which no response is required. To the extent that a response is required, Becerra denies each and every allegation.

22. Answering paragraphs 93 through 96 of the complaint, Becerra lacks sufficient information or knowledge to form a belief about the truth of each and every allegation and denies them on that basis.

23. Answering paragraphs 97 and 98 of the complaint, Becerra avers the allegations are plaintiffs' argument regarding the law to which no response is required. To the extent that a response is required, Becerra denies each and every allegation.

24. Answering paragraphs 99 through 104 of the complaint, Becerra lacks sufficient information or knowledge to form a belief about the truth of each and every allegation and denies them on that basis.

25. Answering paragraphs 105 and 106 of the complaint, Becerra avers the allegations are plaintiffs' argument regarding the law to which no response is required. To the extent that a response is required, Becerra denies each and every allegation.

26. Answering paragraph 107 of the complaint, Becerra lacks sufficient information or knowledge to

form a belief about the truth of each and every allegation and denies them on that basis.

27. Answering paragraphs 108 and 109 of the complaint, Becerra avers the allegations are plaintiffs' argument regarding the law to which no response is required. To the extent that a response is required, Becerra denies each and every allegation.

28. Answering paragraphs 110 through 111 of the complaint, Becerra lacks sufficient information or knowledge to form a belief about the truth of each and every allegation and denies them on that basis.

29. Answering paragraphs 112 and 113 of the complaint, Becerra avers the allegations are plaintiffs' argument regarding the law to which no response is required. To the extent that a response is required, Becerra denies each and every allegation.

30. Answering paragraph 114 of the complaint, Becerra lacks sufficient information or knowledge to form a belief about the truth of each and every allegation and denies them on that basis.

31. Answering paragraphs 115 through 117 of the complaint, Becerra avers the allegations are plaintiffs' argument regarding the law to which no response is required. To the extent that a response is required, Becerra denies each and every allegation.

32. Answering paragraphs 118 through 132 of the complaint, Becerra lacks sufficient information or knowledge to form a belief about the truth of each and every allegation and denies them on that basis.

33. Answering paragraphs 133 through 148 of the complaint, Becerra avers the allegations are plaintiffs' argument regarding the law to which no response is required. To the extent that a response is required, Becerra denies each and every allegation.

ANSWER TO FIRST CLAIM FOR RELIEF

34. Answering paragraph 149 of the complaint, Becerra incorporates by reference his responses to paragraphs 1 through 148 of the complaint to the same extent plaintiffs have incorporated the allegations of those paragraphs into the First Claim for relief.

35. Answering paragraphs 150 through 169 of the complaint, Becerra states that the matters asserted in those paragraphs constitute plaintiffs' arguments regarding the law, particularly the Act and the First Amendment to the United States Constitution, as opposed to allegations of fact. Because those provisions speak for themselves, no response to the legal and policy arguments in those paragraphs is required. To the extent the paragraphs contain any material allegations of fact, Becerra denies the allegations.

ANSWER TO SECOND CLAIM FOR RELIEF

36. Answering paragraph 170 of the complaint, Becerra incorporates by reference his responses to paragraphs 1 through 148 of the complaint to the same extent plaintiffs have incorporated the allegations of those paragraphs into the Second Claim for relief.

37. Answering paragraphs 171 through 179 of the complaint, Becerra states that the matters asserted in those paragraphs constitute plaintiffs' arguments regarding the law, particularly the Act and the Fourteenth Amendment to the United States Constitution, as opposed to allegations of fact. Because those provisions speak for themselves, no response to the legal and policy arguments in those paragraphs is required. To the extent the paragraphs contain any material allegations of fact, Becerra denies the allegations.

ANSWER TO THIRD CLAIM FOR RELIEF

38. Answering paragraph 180 of the complaint, Becerra incorporates by reference his responses to paragraphs 1 through 148 of the complaint to the same extent plaintiffs have incorporated the allegations of those paragraphs into the Third Claim for relief.

39. Answering paragraphs 181 through 192 of the complaint, Becerra states that the matters asserted in those paragraphs constitute plaintiffs' arguments regarding the law, particularly the Act and the First Amendment to the United States Constitution, as opposed to allegations of fact. Because those provisions speak for themselves, no response to the legal and policy arguments in those paragraphs is required. To the extent the paragraphs contain any material allegations of fact, Becerra denies the allegations.

ANSWER TO FOURTH CLAIM FOR RELIEF

40. Answering paragraph 193 of the complaint, Becerra incorporates by reference his responses to paragraphs 1 through 148 of the complaint to the same extent plaintiffs have incorporated the allegations of those paragraphs into the Fourth Claim for relief.

41. Answering paragraphs 194 through 197 of the complaint, Becerra states that the matters asserted in those paragraphs constitute plaintiffs' arguments regarding the law, particularly the Act and 42 U.S.C. section 238n, as opposed to allegations of fact. Because those provisions speak for themselves, no response to the legal and policy arguments in those paragraphs is required. To the extent the paragraphs contain any material allegations of fact, Becerra denies the allegations.

ANSWER TO FIFTH CLAIM FOR RELIEF

42. Answering paragraph 198 of the complaint, Becerra incorporates by reference his responses to paragraphs 1 through 148 of the complaint to the same extent plaintiffs have incorporated the allegations of those paragraphs into the Fifth Claim for relief.

43. Answering paragraphs 199 through 217 of the complaint, Becerra states that the matters asserted in those paragraphs constitute plaintiffs' arguments regarding the law, particularly the Act and California Constitution, as opposed to allegations of fact. Because those provisions speak for themselves, no response to the legal and policy

arguments in those paragraphs is required. To the extent the paragraphs contain any material allegations of fact, Becerra denies the allegations.

FIRST AFFIRMATIVE DEFENSE

(No Ripe Controversy)

44. The complaint fails to present a case or controversy that is ripe for this Court's consideration.

SECOND AFFIRMATIVE DEFENSE

(Lack of Standing)

45. All of the plaintiffs lack standing to bring this action because there is no injury or credible threat of injury. National Institute of Family and Life Advocates also lack associational standing.

PRAYER FOR RELIEF

Defendant Becerra prays for judgment as follows:

1. That plaintiffs take nothing by way of their complaint;

2. That the Court enter judgment in favor of Becerra on all claims and causes of action alleged in the complaint;

3. For costs incurred in the defense of this action; and

4. For such other and further relief as the Court may deem proper.

Dated:
November 13, 2017

Respectfully submitted,

XAVIER BECERRA
Attorney General of
California
STEPAN A. HAYTAYAN
Supervising Deputy Attorney
General

S/ *Anthony R. Hakl*

ANTHONY R. HAKL
Acting Supervising Deputy
Attorney General
Attorneys for Defendant
Xavier Becerra, in his official
capacity as Attorney General
of the State of California

* * * *

Cal. Health & Safety Code § 1204

Clinic eligible for licensure, primary care clinics and specialty clinics; classes as defined

Effective: January 1, 2001

Clinics eligible for licensure pursuant to this chapter are primary care clinics and specialty clinics.

(a)(1) Only the following defined classes of primary care clinics shall be eligible for licensure:

(A) A "community clinic" means a clinic operated by a tax-exempt nonprofit corporation that is supported and maintained in whole or in part by donations, bequests, gifts, grants, government funds or contributions, that may be in the form of money, goods, or services. In a community clinic, any charges to the patient shall be based on the patient's ability to pay, utilizing a sliding fee scale. No corporation other than a nonprofit corporation, exempt from federal income taxation under paragraph (3) of subsection (c) of Section 501 of the Internal Revenue Code of 1954 as amended, or a statutory successor thereof, shall operate a community clinic; provided, that the licensee of any community clinic so licensed on the effective date of this section shall not be required to obtain tax-exempt status under either federal or state law in order to be eligible for, or as a condition of, renewal of its license. No natural person or persons shall operate a community clinic.

(B) A "free clinic" means a clinic operated by a tax-exempt, nonprofit corporation supported in whole or in part by voluntary donations, bequests, gifts, grants, government funds or contributions, that may be in the form of money, goods, or services. In a free clinic there shall be no charges directly to the patient for services rendered or for drugs, medicines, appliances, or apparatuses furnished. No corporation other than a nonprofit corporation exempt from federal income taxation under paragraph (3) of subsection (c) of Section 501 of the Internal Revenue Code of 1954 as amended, or a statutory successor thereof, shall operate a free clinic; provided, that the licensee of any free clinic so licensed on the effective date of this section shall not be required to obtain tax-exempt status under either federal or state law in order to be eligible for, or as a condition of, renewal of its license. No natural person or persons shall operate a free clinic.

(2) Nothing in this subdivision shall prohibit a community clinic or a free clinic from providing services to patients whose services are reimbursed by third-party payers, or from entering into managed care contracts for services provided to private or public health plan subscribers, as long as the clinic meets the requirements identified in subparagraphs (A) and (B). For purposes of this subdivision, any payments made to a community clinic by a third-party payer, including, but not limited to, a health care service plan, shall not constitute a charge to the patient. This paragraph is a clarification of existing law.

(b) The following types of specialty clinics shall be eligible for licensure as specialty clinics pursuant to this chapter:

(1) A "surgical clinic" means a clinic that is not part of a hospital and that provides ambulatory surgical care for patients who remain less than 24 hours. A surgical clinic does not include any place or establishment owned or leased and operated as a clinic or office by one or more physicians or dentists in individual or group practice, regardless of the name used publicly to identify the place or establishment, provided, however, that physicians or dentists may, at their option, apply for licensure.

(2) A "chronic dialysis clinic" means a clinic that provides less than 24-hour care for the treatment of patients with end-stage renal disease, including renal dialysis services.

(3) A "rehabilitation clinic" means a clinic that, in addition to providing medical services directly, also provides physical rehabilitation services for patients who remain less than 24 hours. Rehabilitation clinics shall provide at least two of the following rehabilitation services: physical therapy, occupational therapy, social, speech pathology, and audiology services. A rehabilitation clinic does not include the offices of a private physician in individual or group practice.

(4) An "alternative birth center" means a clinic that is not part of a hospital and that provides comprehensive perinatal services and delivery care

to pregnant women who remain less than 24 hours at the facility.

Cal. Health & Safety Code § 1206

§ 1206. Exemptions

Effective: January 1, 2016

This chapter does not apply to the following:

(a) Except with respect to the option provided with regard to surgical clinics in paragraph (1) of subdivision (b) of Section 1204 and, further, with respect to specialty clinics specified in paragraph (2) of subdivision (b) of Section 1204, any place or establishment owned or leased and operated as a clinic or office by one or more licensed health care practitioners and used as an office for the practice of their profession, within the scope of their license, regardless of the name used publicly to identify the place or establishment.

(b) Any clinic directly conducted, maintained, or operated by the United States or by any of its departments, officers, or agencies, and any primary care clinic specified in subdivision (a) of Section 1204 that is directly conducted, maintained, or operated by this state or by any of its political subdivisions or districts, or by any city. Nothing in this subdivision precludes the state department from adopting regulations that utilize clinic licensing standards as eligibility criteria for participation in programs funded wholly or partially under Title XVIII or XIX of the federal Social Security Act.

(c)(1) Any clinic conducted, maintained, or operated by a federally recognized Indian tribe or tribal

organization, as defined in Section 450 or 1603 of Title 25 of the United States Code, that is located on land recognized as tribal land by the federal government.

(2) Any clinic conducted, maintained, or operated by a federally recognized Indian tribe or tribal organization, as defined in Section 450 or 1603 of Title 25 of the United States Code, under a contract with the United States pursuant to the Indian Self-Determination and Education Assistance Act (Public Law 93-638), regardless of the location of the clinic, except that if the clinic chooses to apply to the State Department of Public Health for a state facility license, then the State Department of Public Health will retain authority to regulate that clinic as a primary care clinic as defined by subdivision (a) of Section 1204.

(d) Clinics conducted, operated, or maintained as outpatient departments of hospitals.

(e) Any facility licensed as a health facility under Chapter 2 (commencing with Section 1250).

(f) Any freestanding clinical or pathological laboratory licensed under Chapter 3 (commencing with Section 1200) of Division 2 of the Business and Professions Code.

(g) A clinic operated by, or affiliated with, any institution of learning that teaches a recognized healing art and is approved by the state board or commission vested with responsibility for regulation of the practice of that healing art.

(h) A clinic that is operated by a primary care community or free clinic and that is operated on separate premises from the licensed clinic and is only open for limited services of no more than 30 hours a week. An intermittent clinic as described in this subdivision shall, however, meet all other requirements of law, including administrative regulations and requirements, pertaining to fire and life safety.

(i) The offices of physicians in group practice who provide a preponderance of their services to members of a comprehensive group practice prepayment health care service plan subject to Chapter 2.2 (commencing with Section 1340).

(j) Student health centers operated by public institutions of higher education.

(k) Nonprofit speech and hearing centers, as defined in Section 1201.5. Any nonprofit speech and hearing clinic desiring an exemption under this subdivision shall make application therefor to the director, who shall grant the exemption to any facility meeting the criteria of Section 1201.5. Notwithstanding the licensure exemption contained in this subdivision, a nonprofit speech and hearing center shall be deemed to be an organized outpatient clinic for purposes of qualifying for reimbursement as a rehabilitation center under the Medi-Cal Act (Chapter 7 (commencing with Section 14000) of Part 3 of Division 9 of the Welfare and Institutions Code).

(l) A clinic operated by a nonprofit corporation exempt from federal income taxation under paragraph (3) of subsection (c) of Section 501 of the Internal Revenue Code1 of 1954, as amended, or a statutory successor thereof, that conducts medical research and health education and provides health care to its patients through a group of 40 or more physicians and surgeons, who are independent contractors representing not less than 10 board-certified specialties, and not less than two-thirds of whom practice on a full-time basis at the clinic.

(m) Any clinic, limited to in vivo diagnostic services by magnetic resonance imaging functions or radiological services under the direct and immediate supervision of a physician and surgeon who is licensed to practice in California. This shall not be construed to permit cardiac catheterization or any treatment modality in these clinics.

(n) A clinic operated by an employer or jointly by two or more employers for their employees only, or by a group of employees, or jointly by employees and employers, without profit to the operators thereof or to any other person, for the prevention and treatment of accidental injuries to, and the care of the health of, the employees comprising the group.

(o) A community mental health center, as defined in Section 5667 of the Welfare and Institutions Code.

(p)(1) A clinic operated by a nonprofit corporation exempt from federal income taxation under paragraph (3) of subsection (c) of Section 501 of the Internal Revenue Code of 1954, as amended, or a

statutory successor thereof, as an entity organized and operated exclusively for scientific and charitable purposes and that satisfied all of the following requirements on or before January 1, 2005:

(A) Commenced conducting medical research on or before January 1, 1982, and continues to conduct medical research.

(B) Conducted research in, among other areas, prostatic cancer, cardiovascular disease, electronic neural prosthetic devices, biological effects and medical uses of lasers, and human magnetic resonance imaging and spectroscopy.

(C) Sponsored publication of at least 200 medical research articles in peer-reviewed publications.

(D) Received grants and contracts from the National Institutes of Health.

(E) Held and licensed patents on medical technology.

(F) Received charitable contributions and bequests totaling at least five million dollars ($5,000,000).

(G) Provides health care services to patients only:

(i) In conjunction with research being conducted on procedures or applications not approved or only partially approved for payment (I) under the Medicare program pursuant to Section 1359y(a)(1)(A) of Title 42 of the United States Code, or (II) by a health care service plan registered under Chapter 2.2 (commencing with Section 1340), or a

disability insurer regulated under Chapter 1 (commencing with Section 10110) of Part 2 of Division 2 of the Insurance Code; provided that services may be provided by the clinic for an additional period of up to three years following the approvals, but only to the extent necessary to maintain clinical expertise in the procedure or application for purposes of actively providing training in the procedure or application for physicians and surgeons unrelated to the clinic.

(ii) Through physicians and surgeons who, in the aggregate, devote no more than 30 percent of their professional time for the entity operating the clinic, on an annual basis, to direct patient care activities for which charges for professional services are paid.

(H) Makes available to the public the general results of its research activities on at least an annual basis, subject to good faith protection of proprietary rights in its intellectual property.

(I) Is a freestanding clinic, whose operations under this subdivision are not conducted in conjunction with any affiliated or associated health clinic or facility defined under this division, except a clinic exempt from licensure under subdivision (m). For purposes of this subparagraph, a freestanding clinic is defined as "affiliated" only if it directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, a clinic or health facility defined under this division, except a clinic exempt from licensure under subdivision (m). For purposes of this subparagraph, a freestanding clinic is defined as

"associated" only if more than 20 percent of the directors or trustees of the clinic are also the directors or trustees of any individual clinic or health facility defined under this division, except a clinic exempt from licensure under subdivision (m). Any activity by a clinic under this subdivision in connection with an affiliated or associated entity shall fully comply with the requirements of this subdivision. This subparagraph shall not apply to agreements between a clinic and any entity for purposes of coordinating medical research.

(2) By January 1, 2007, and every five years thereafter, the Legislature shall receive a report from each clinic meeting the criteria of this subdivision and any other interested party concerning the operation of the clinic's activities. The report shall include, but not be limited to, an evaluation of how the clinic impacted competition in the relevant health care market, and a detailed description of the clinic's research results and the level of acceptance by the payer community of the procedures performed at the clinic. The report shall also include a description of procedures performed both in clinics governed by this subdivision and those performed in other settings. The cost of preparing the reports shall be borne by the clinics that are required to submit them to the Legislature pursuant to this paragraph.

Cal. Welf. & Inst. Code § 24005

Family planning medical services; eligibility; application to Family Planning, Access, Care, and Treatment Program

Effective: January 1, 2017

(a) This section applies to the Family Planning, Access, Care, and Treatment Program identified in subdivision (aa) of Section 14132 and this program.

(b) Only licensed medical personnel with family planning skills, knowledge, and competency may provide the full range of family planning medical services covered in this program.

(c) Medi-Cal enrolled providers, as determined by the department, shall be eligible to provide family planning services under the program when these services are within their scope of practice and licensure. Those clinical providers electing to participate in the program and approved by the department shall provide the full scope of family planning education, counseling, and medical services specified for the program, either directly or by referral, consistent with standards of care issued by the department.

(d) The department shall require providers to enter into clinical agreements with the department to ensure compliance with standards and requirements to maintain the fiscal integrity of the program. Provider applicants, providers, and persons with an ownership or control interest, as defined in federal

Medicaid regulations, shall be required to submit to the department their social security numbers to the full extent allowed under federal law. All state and federal statutes and regulations pertaining to the audit or examination of Medi-Cal providers apply to this program.

(e) Clinical provider agreements shall be signed by the provider under penalty of perjury. The department may screen applicants at the initial application and at any reapplication pursuant to requirements developed by the department to determine provider suitability for the program.

(f) The department may complete a background check on clinical provider applicants for the purpose of verifying the accuracy of information provided to the department for purposes of enrolling in the program and in order to prevent fraud and abuse. The background check may include, but not be limited to, unannounced onsite inspection prior to enrollment, review of business records, and data searches. If discrepancies are found to exist during the preenrollment period, the department may conduct additional inspections prior to enrollment. Failure to remediate significant discrepancies as prescribed by the director may result in denial of the application for enrollment. Providers that do not provide services consistent with the standards of care or that do not comply with the department's rules related to the fiscal integrity of the program may be disenrolled as a provider from the program at the sole discretion of the department.

(g) The department shall not enroll any applicant who, within the previous 10 years:

(1) Has been convicted of any felony or misdemeanor that involves fraud or abuse in any government program, that relates to neglect or abuse of a patient in connection with the delivery of a health care item or service, or that is in connection with the interference with, or obstruction of, any investigation into health care related fraud or abuse.

(2) Has been found liable for fraud or abuse in any civil proceeding, or that has entered into a settlement in lieu of conviction for fraud or abuse in any government program.

(h) In addition, the department may deny enrollment to any applicant that, at the time of application, is under investigation by the department or any local, state, or federal government law enforcement agency for fraud or abuse. The department shall not deny enrollment to an otherwise qualified applicant whose felony or misdemeanor charges did not result in a conviction solely on the basis of the prior charges. If it is discovered that a provider is under investigation by the department or any local, state, or federal government law enforcement agency for fraud or abuse, that provider shall be subject to immediate disenrollment from the program.

(i)(1) The program shall disenroll as a program provider any individual who, or any entity that, has a license, certificate, or other approval to provide health care that is revoked or suspended by a federal, California, or other state's licensing,

certification, or other approval authority, has otherwise lost that license, certificate, or approval, or has surrendered that license, certificate, or approval while a disciplinary hearing on the license, certificate, or approval was pending. The disenrollment shall be effective on the date the license, certificate, or approval is revoked, lost, or surrendered.

(2) A provider shall be subject to disenrollment if the provider submits claims for payment for the services, goods, supplies, or merchandise provided, directly or indirectly, to a program beneficiary, by an individual or entity that has been previously suspended, excluded, or otherwise made ineligible to receive, directly or indirectly, reimbursement from the program or from the Medi-Cal program and the individual has previously been listed on either the Suspended and Ineligible Provider List, which is published by the department, to identify suspended and otherwise ineligible providers or any list published by the federal Office of the Inspector General regarding the suspension or exclusion of individuals or entities from the federal Medicare and Medicaid programs, to identify suspended, excluded, or otherwise ineligible providers.

(3) The department shall deactivate, immediately and without prior notice, the provider numbers used by a provider to obtain reimbursement from the program when warrants or documents mailed to a provider's mailing address, its pay to address, or its service address, if any, are returned by the United States Postal Service as not deliverable or when a provider has not submitted a claim for

reimbursement from the program for one year. Prior to taking this action, the department shall use due diligence in attempting to contact the provider at its last known telephone number and to ascertain if the return by the United States Postal Service is by mistake and shall use due diligence in attempting to contact the provider by telephone or in writing to ascertain whether the provider wishes to continue to participate in the Medi-Cal program. If deactivation pursuant to this section occurs, the provider shall meet the requirements for reapplication as specified in regulation.

(4) For purposes of this subdivision:

(A) "Mailing address" means the address that the provider has identified to the department in its application for enrollment as the address at which it wishes to receive general program correspondence.

(B) "Pay to address" means the address that the provider has identified to the department in its application for enrollment as the address at which it wishes to receive warrants.

(C) "Service address" means the address that the provider has identified to the department in its application for enrollment as the address at which the provider will provide services to program beneficiaries.

(j) Subject to Article 4 (commencing with Section 19130) of Chapter 5 of Part 2 of Division 5 of Title 2 of the Government Code, the department may enter into contracts to secure consultant services or

information technology including, but not limited to, software, data, or analytical techniques or methodologies for the purpose of fraud or abuse detection and prevention. Contracts under this section shall be exempt from the Public Contract Code.

(k) Enrolled providers shall attend specific orientation approved by the department in comprehensive family planning services. Enrolled providers who insert IUDs or contraceptive implants shall have received prior clinical training specific to these procedures.

(*l*) Upon receipt of reliable evidence that would be admissible under the administrative adjudication provisions of Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code, of fraud or willful misrepresentation by a provider under the program or commencement of a suspension under Section 14123, the department may do any of the following:

(1) Collect any State-Only Family Planning program or Family Planning, Access, Care, and Treatment Program overpayment identified through an audit or examination, or any portion thereof from any provider. Notwithstanding Section 100171 of the Health and Safety Code, a provider may appeal the collection of overpayments under this section pursuant to procedures established in Article 5.3 (commencing with Section 14170) of Chapter 7 of Part 3 of Division 9. Overpayments collected under this section shall not be returned to the provider during the pendency of any appeal and may be offset

to satisfy audit or appeal findings, if the findings are against the provider. Overpayments shall be returned to a provider with interest if findings are in favor of the provider.

(2) Withhold payment for any goods or services, or any portion thereof, from any State-Only Family Planning program or Family Planning, Access, Care, and Treatment Program provider. The department shall notify the provider within five days of any withholding of payment under this section. The notice shall do all of the following:

(A) State that payments are being withheld in accordance with this paragraph and that the withholding is for a temporary period and will not continue after it is determined that the evidence of fraud or willful misrepresentation is insufficient or when legal proceedings relating to the alleged fraud or willful misrepresentation are completed.

(B) Cite the circumstances under which the withholding of the payments will be terminated.

(C) Specify, when appropriate, the type or types of claimed payments being withheld.

(D) Inform the provider of the right to submit written evidence that is evidence that would be admissible under the administrative adjudication provisions of Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code, for consideration by the department.

(3) Notwithstanding Section 100171 of the Health and Safety Code, a provider may appeal a withholding of payment under this section pursuant to Section 14043.65. Payments withheld under this section shall not be returned to the provider during the pendency of any appeal and may be offset to satisfy audit or appeal findings.

(m) As used in this section:

(1) "Abuse" means either of the following:

(A) Practices that are inconsistent with sound fiscal or business practices and result in unnecessary cost to the Medicaid program, the Medicare program, the Medi-Cal program, including the Family Planning, Access, Care, and Treatment Program, identified in subdivision (aa) of Section 14132, another state's Medicaid program, or the State-Only Family Planning program, or other health care programs operated, or financed in whole or in part, by the federal government or any state or local agency in this state or any other state.

(B) Practices that are inconsistent with sound medical practices and result in reimbursement, by any of the programs referred to in subparagraph (A) or other health care programs operated, or financed in whole or in part, by the federal government or any state or local agency in this state or any other state, for services that are unnecessary or for substandard items or services that fail to meet professionally recognized standards for health care.

(2) "Fraud" means an intentional deception or misrepresentation made by a person with the knowledge that the deception could result in some unauthorized benefit to himself or herself or some other person. It includes any act that constitutes fraud under applicable federal or state law.

(3) "Provider" means any individual, partnership, group, association, corporation, institution, or other entity, and the officers, directors, owners, managing employees, or agents of any partnership, group, association, corporation, institution, or other entity, that provides services, goods, supplies, or merchandise, directly or indirectly, to a beneficiary and has been enrolled in the program.

(4) "Convicted" means any of the following:

(A) A judgment of conviction has been entered against an individual or entity by a federal, state, or local court, regardless of whether there is a post-trial motion or an appeal pending or the judgment of conviction or other record relating to the criminal conduct has been expunged or otherwise removed.

(B) A federal, state, or local court has made a finding of guilt against an individual or entity.

(C) A federal, state, or local court has accepted a plea of guilty or nolo contendere by an individual or entity.

(D) An individual or entity has entered into participation in a first offender, deferred

adjudication, or other program or arrangement in which judgment of conviction has been withheld.

(5) "Professionally recognized standards of health care" means statewide or national standards of care, whether in writing or not, that professional peers of the individual or entity whose provision of care is an issue, recognize as applying to those peers practicing or providing care within a state. When the United States Department of Health and Human Services has declared a treatment modality not to be safe and effective, practitioners that employ that treatment modality shall be deemed not to meet professionally recognized standards of health care. This definition shall not be construed to mean that all other treatments meet professionally recognized standards of care.

(6) "Unnecessary or substandard items or services" means those that are either of the following:

(A) Substantially in excess of the provider's usual charges or costs for the items or services.

(B) Furnished, or caused to be furnished, to patients, whether or not covered by Medicare, Medicaid, or any of the state health care programs to which the definitions of applicant and provider apply, and which are substantially in excess of the patient's needs, or of a quality that fails to meet professionally recognized standards of health care. The department's determination that the items or services furnished were excessive or of unacceptable quality shall be made on the basis of information,

including sanction reports, from the following sources:

(i) The professional review organization for the area served by the individual or entity.

(ii) State or local licensing or certification authorities.

(iii) Fiscal agents or contractors, or private insurance companies.

(iv) State or local professional societies.

(v) Any other sources deemed appropriate by the department.

(7) "Enrolled or enrollment in the program" means authorized under any and all processes by the department or its agents or contractors to receive, directly or indirectly, reimbursement for the provision of services, goods, supplies, or merchandise to a program beneficiary.

(n) In lieu of, or in addition to, the imposition of any other sanctions available, including the imposition of a civil penalty under Section 14123.2 or 14171.6, the program may impose on providers any or all of the penalties pursuant to Section 14123.25, in accordance with the provisions of that section. In addition, program providers shall be subject to the penalties contained in Section 14107.

(o)(1) Notwithstanding any other law, every primary supplier of pharmaceuticals, medical equipment, or supplies shall maintain accounting records to demonstrate the manufacture, assembly, purchase, or acquisition and subsequent sale, of any pharmaceuticals, medical equipment, or supplies, to providers. Accounting records shall include, but not be limited to, inventory records, general ledgers, financial statements, purchase and sales journals, and invoices, prescription records, bills of lading, and delivery records.

(2) For purposes of this subdivision, the term "primary supplier" means any manufacturer, principal labeler, assembler, wholesaler, or retailer.

(3) Accounting records maintained pursuant to paragraph (1) are subject to audit or examination by the department or its agents. The audit or examination may include, but is not limited to, verification of what was claimed by the provider. These accounting records shall be maintained for three years from the date of sale or the date of service.

(p) Each provider of health care services rendered to any program beneficiary shall keep and maintain records of each service rendered, the beneficiary to whom rendered, the date, and any additional information that the department may by regulation require. Records required to be kept and maintained pursuant to this subdivision shall be retained by the provider for a period of three years from the date the service was rendered.

(q) A program provider applicant or a program provider shall furnish information or copies of records and documentation requested by the department. Failure to comply with the department's request shall be grounds for denial of the application or automatic disenrollment of the provider.

(r) A program provider may assign signature authority for transmission of claims to a billing agent subject to Sections 14040, 14040.1, and 14040.5.

(s) Moneys payable or rights existing under this division shall be subject to any claim, lien, or offset of the State of California, and any claim of the United States of America made pursuant to federal statute, but shall not otherwise be subject to enforcement of a money judgment or other legal process, and no transfer or assignment, at law or in equity, of any right of a provider of health care to any payment shall be enforceable against the state, a fiscal intermediary, or carrier.

(t)(1) Notwithstanding any other law, within 30 calendar days of receiving a complete application for enrollment into the Family PACT Program from an affiliate primary care clinic licensed under Section 1218.1 of the Health and Safety Code, the department shall do one of the following:

(A) Approve the provider's Family PACT Program application, provided the applicant meets the Family PACT Program provider enrollment requirements set forth in this section.

(B) If the provider is an enrolled Medi-Cal provider in good standing, notify the applicant in writing of any discrepancies in the Family PACT Program enrollment application. The applicant shall have 30 days from the date of written notice to correct any identified discrepancies. Upon receipt of all requested corrections, the department shall approve the application within 30 calendar days.

(C) If the provider is not an enrolled Medi-Cal provider in good standing, the department shall not proceed with the actions described in this subdivision until the department receives confirmation of good standing and enrollment as a Medi-Cal provider.

(2) The effective date of enrollment into the Family PACT Program shall be the later of the date the department receives confirmation of enrollment as a Medi-Cal provider, or the date the applicant meets all Family PACT Program provider enrollment requirements set forth in this section.

(u) Providers, or the enrolling entity, shall make available to all applicants and beneficiaries prior to, or concurrent with, enrollment, information on the manner in which to apply for insurance affordability programs, in a manner determined by the State Department of Health Care Services. The information provided shall include the manner in which applications can be submitted for insurance affordability programs, information about the open enrollment periods for the California Health Benefit Exchange, and the continuous enrollment aspect of the Medi-Cal program.

No. 16-1140

IN THE

Supreme Court of the United States

NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES, D/B/A NIFLA, ET AL.,

Petitioners,

v.

XAVIER BECERRA, ATTORNEY GENERAL, ET AL.,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF FOR PETITIONERS

JOHN C. EASTMAN
CENTER FOR CONSTITUTIONAL JURISPRUDENCE
c/o Chapman University
Fowler School of Law
One University Drive
Orange, CA 92866
(877) 855-3330

ANNE O'CONNOR
NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES
5601 Southpoint Centre Blvd.
Fredericksburg, VA 22407
(540) 372-3930

MICHAEL P. FARRIS
KRISTEN K. WAGGONER
DAVID A. CORTMAN
Counsel of Record
KEVIN H. THERIOT
DENISE M. HARLE
ELISSA M. GRAVES
ALLIANCE DEFENDING FREEDOM
440 1st Street N.W.
Suite 600
Washington, D.C. 20001
(202) 393-8690
dcortman@ADFlegal.org

Counsel for Petitioners

[ADDITIONAL COUNSEL LISTED ON INSIDE COVER]

DEAN R. BROYLES
THE NATIONAL CENTER FOR LAW
AND POLICY
539 West Grand Avenue
Escondido, CA 92025
(760) 747-4529

QUESTION PRESENTED

Whether the disclosures required by the California Reproductive FACT Act violate the protections set forth in the Free Speech Clause of the First Amendment, applicable to the States through the Fourteenth Amendment.

PARTIES TO THE PROCEEDING

Petitioners are National Institute of Family and Life Advocates, d/b/a NIFLA, a Virginia corporation; Pregnancy Care Center, d/b/a Pregnancy Care Clinic, a California corporation; and Fallbrook Pregnancy Resource Center, a California corporation.

Respondents are Xavier Becerra, in his official capacity as Attorney General for the State of California; Thomas Montgomery, in his official capacity as County Counsel for San Diego County; Morgan Foley, in his official capacity as City Attorney for the City of El Cajon, California; and Edmund D. Brown, Jr., in his official capacity as Governor of the State of California.

CORPORATE DISCLOSURE STATEMENT

National Institute of Family and Life Advocates, Pregnancy Care Clinic, and Fallbrook Pregnancy Resource Center are nonprofit corporations with no parent corporations. None of these entities have any stock; accordingly, no public corporation owns 10% or more of their stock.

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INTRODUCTION

Forcing a pro-life group to advertise for abortion has to be unconstitutional, yet that is what California's Reproductive FACT Act does. Compelled speech strikes at the heart of constitutional liberties. "[T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). Free speech is at its greatest peril when the government targets speakers because officials disagree with the speakers' thoughts and ideas. *See Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 565 (2011) (striking down a law with the "express purpose" of targeting speakers). The Act violates both of these cardinal First Amendment principles: it targets disfavored speakers and compels them to deliver the State's message. And it does so in the context of speech on a subject where there is profound moral and ideological disagreement.

Petitioners are nonprofit pregnancy centers, licensed and unlicensed, with the sole mission of encouraging expectant mothers to give their children the opportunity for life. They do so by providing women with free information and resources like prenatal vitamins, diapers, and baby clothes; the licensed centers also provide limited medical services such as ultrasounds. All of their speech is designed to encourage childbirth.

The Act purposely hampers this advocacy at the very beginning of a pregnancy center's interaction with expectant mothers. While the centers exist to support childbirth, the Act forces them to point the

way to ending unborn babies' lives. It requires licensed centers to display a message to all women entering the facility, directing them to a government agency where they can obtain information about "free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception) ... and abortion." Pet.App.80a. It also requires unlicensed centers to begin their conversation with women by saying what they are *not* and do not claim to be—medical facilities—and to do so in up to 13 different languages, which could result in hundreds of words, in every advertisement. This not only is cost prohibitive but drowns out Petitioners' message.

The legislative record demonstrates that the State chose to mandate these compelled messages precisely because of the pregnancy centers' pro-life views. The legislative committee report described the centers' messages as "unfortunate[]" because they "aim to discourage and prevent women from seeking abortions." JA84–85. The Legislature created exceptions within the Act, seeking to ensure that it applies only to centers that express this disfavored view. Such government targeting of viewpoints runs afoul of this Court's cases "establish[ing] that the State cannot advance some points of view by burdening the expression of others." *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 20 (1986) (plurality opinion).

The Ninth Circuit upheld the Act's directive that licensed centers must speak pro-abortion messages, without applying strict scrutiny. Instead, it applied intermediate scrutiny under a so-called "professional

speech doctrine." But that doctrine has never been adopted by this Court. Even among the few lower courts that have adopted it, the doctrine applies only to the speech of professionals within an established professional-client relationship, and to speech concerning the client's particular circumstances in the context of the professional's specific services. Neither is present here. And even lower courts using that doctrine hold that regulations of professional speech cannot target speakers based on their viewpoint. The Ninth Circuit also upheld the Act's provision compelling speech by unlicensed centers, purporting to apply strict scrutiny, but failing to account for the Act's lack of narrow tailoring or the State's failure to meet its burden to show a compelling interest.

This Court has long held that compelled speech is highly disfavored because it imperils freedom by giving government control of the voices of private actors—and that laws targeting particular speakers because of their views are especially dangerous. The government "may not substitute its judgment as to how best to speak for that of speakers and listeners; free and robust debate cannot thrive if directed by the government." *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 791 (1988). This Court should continue its steadfast defense of this fundamental freedom against governmental attempts to compel speech, and reverse the judgment of the Ninth Circuit.

DECISIONS BELOW

The Ninth Circuit's opinion is reported at 839 F.3d 823 (2016), and reproduced in the Petition for Writ of Certiorari Appendix ("Pet.App.") at 1a–43a. The order of the Ninth Circuit denying rehearing and rehearing en banc is unreported. Pet.App.72a–73a. The District Court's opinion denying the motion for preliminary injunction is unreported, but is available at 2016 WL 3627327 (S.D. Cal. Feb. 9, 2016). Pet.App.44a–71a.

STATEMENT OF JURISDICTION

The Ninth Circuit entered its judgment on October 14, 2016, Pet.App.1a–43a, and denied a timely petition for rehearing en banc on December 20, 2016, Pet.App.72a–73a. Petitioners timely filed their petition for writ of certiorari with this Court on March 20, 2017. This Court granted review on November 13, 2017. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The text of the First and Fourteenth Amendments to the United States Constitution is set forth at Pet.App.74a.

The text of California's Reproductive FACT Act, CAL. HEALTH & SAFETY CODE § 123470, is set forth at Pet.App.75a.

STATEMENT OF THE CASE

A. Statement of the Facts

1. *Petitioners' Activity.* Petitioners are the National Institute of Family and Life Advocates (NIFLA), an organization with over 130 nonprofit pro-life pregnancy center members in California, and two such centers in San Diego County: Pregnancy Care Clinic and Fallbrook Pregnancy Resource Center. Pet.App.89a–90a.[1] Because of Petitioners' pro-life views, they seek to provide help and information to women in unplanned pregnancies so they will be supported in choosing to give birth. Pet.App.91a–93a. Petitioners, licensed and unlicensed centers, provide all of their services and resources free of charge. *Id.* Petitioners are all incorporated as religious organizations, and they pursue their activities based on their pro-life religious beliefs. *Id.*

Petitioner Pregnancy Care Clinic and many of NIFLA's California member centers are licensed medical facilities that provide pro-life information, non-medical services, and certain limited medical services. Pregnancy Care Clinic is licensed by the California Department of Public Health as a free community clinic, and is a licensed clinical laboratory. Pet.App.91a. Non-medical services provided by Pregnancy Care Clinic include childbirth education, maternity clothing, baby blankets, layettes, diapers, baby wipes, emotional support groups, Bible studies,

---

[1] When the verified complaint was filed in 2015, NIFLA had 111 California members; its California membership has since increased to over 130. *See also Find a NIFLA Member Center Near You*, NIFLA, http://bit.ly/2ABSkdG (last visited Jan. 5, 2018) (current member list).

adoption resources, parenting classes, information on sexually transmitted diseases and natural family planning, and healthy family support. *Id.* at 92a.[2] Pregnancy Care Clinic also provides the following medical services: pregnancy testing, prenatal vitamins, ultrasound examinations, medical referrals, STD testing, health provider consultation, and other clinical services. Pet.App.91a–92a. Pregnancy Care Clinic provides all of these services free of charge to advance its pro-life mission. *Id.* Currently, at least 90 of NIFLA's California member centers are similar to Pregnancy Care Clinic as licensed medical clinics providing a comparable array of medical and non-medical support services. *Id.* at 93a.[3]

Petitioner Fallbrook Pregnancy Resource Center, like many of NIFLA's other California members, is an unlicensed center that offers non-medical pregnancy-related information and services for free in furtherance of its pro-life views. Pet.App.92a. Fallbrook Pregnancy Resource Center provides pregnancy test kits that women administer and diagnose themselves, maternity clothing, baby clothes, baby food and formula, baby bottles, diapers, strollers, high chairs, baby toys, nursery furniture, play yards, educational programs, resources on maternal and prenatal health, emotional support, spiritual resources, preparation for parenting, and

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[2] *See also Services*, Pregnancy Care Clinic, http://bit.ly/2Fb8iik (last visited Jan. 5, 2018) (describing services); *Our Story*, Pregnancy Care Clinic, http://bit.ly/2BxBuOy (last visited Jan. 5, 2018) (same).

[3] *See Find a NIFLA Member Center Near You*, *supra* note 1.

community referrals. *Id.*[4] There are currently more than 40 NIFLA member centers in California that are similar to Fallbrook Pregnancy Resource Center, operating as unlicensed centers offering pregnant women a comparable variety of non-medical services. Pet.App.94a.[5] To reach the women they hope to support, Fallbrook Pregnancy Resource Center and similar NIFLA centers advertise on the internet and elsewhere their free information and services. Pet.App.102a.

2. *The California Reproductive FACT Act.* The legislative record expressly states that the impetus for the Reproductive FACT (Freedom, Accountability, Comprehensive Care, and Transparency) Act, CAL. HEALTH & SAFETY CODE § 123470, was disagreement with pro-life centers' messages. Legislative committee reports with bill sponsor statements noted "that, unfortunately, there are nearly 200 licensed and unlicensed clinics known as crisis pregnancy centers (CPCs) in California," which "aim to discourage and prevent women from seeking abortions." JA84–85. Although the bill sponsor claimed that these centers "often confuse [and] misinform" women, JA85, neither the legislative history nor the record contains any objective or impartial evidence that pregnancy centers like Petitioners actually "misinform" anyone about their medical status or services, *see infra* note 17. Nonetheless, the State imposed the Act's compelled speech provisions on all centers prophylactically.

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[4] *See also Our Services*, Fallbrook Pregnancy Resource Center, http://bit.ly/2FdzFZi (last visited Jan. 5, 2018).

[5] *See Find a NIFLA Member Center Near You*, *supra* note 1.

The Act's express purpose was predicated on the view that "California women should receive information about their rights and available services at the sites where they obtain care." JA84. But rather than ensuring that all California women get this information at their chosen healthcare providers—which number in the thousands—the Act's requirements fall almost exclusively on about 200 nonprofit pro-life clinics whose existence was deemed "unfortunate[ ]" by the bill's sponsor. *See id.*

3. *Operation of the Act.* The Act imposes different messaging requirements based on whether a pregnancy center is a licensed medical facility or an unlicensed center.

Licensed Centers — Compelled Abortion Referral. The Act requires licensed medical facilities covered by the Act, such as Pregnancy Care Clinic and NIFLA's other licensed California members, to provide all clients with the following statement:

> California has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women. To determine whether you qualify, contact the county social services office at [phone number].

Pet.App.80a ("Compelled Abortion Referral"). Those calling the number listed will be referred to providers accepting state-funded forms of insurance, including

private abortion providers such as Planned Parenthood.[6]

Although the Act states that the Compelled Abortion Referral applies to all "licensed covered facilities" in California, it then contains numerous limitations and exemptions, discussed below, that substantially narrow its application both facially and in practice. A "licensed covered facility" is defined as:

> [A] facility licensed under Section 1204 or an intermittent clinic operating under a primary care clinic pursuant to subdivision (h) of Section 1206, whose primary purpose is providing family planning or pregnancy-related services, and that satisfies two or more of the following:
>
> (1) The facility offers obstetric ultrasounds, obstetric sonograms, or prenatal care to pregnant women.
>
> (2) The facility provides, or offers counseling about, contraception or contraceptive methods.
>
> (3) The facility offers pregnancy testing or pregnancy diagnosis.

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[6] *See Health Centers In California*, Planned Parenthood, http://bit.ly/2F9OCLP (last visited Jan. 5, 2018) (listing numerous California Planned Parenthood locations that include Medi-Cal and Family PACT as accepted forms of insurance); *Provider Search*, Family PACT, http://bit.ly/2i0VBM1 (last updated May 3, 2016) (search tool listing Planned Parenthood clinics as Family PACT providers).

> (4) The facility advertises or solicits patrons with offers to provide prenatal sonography, pregnancy tests, or pregnancy options counseling.
>
> (5) The facility offers abortion services.
>
> (6) The facility has staff or volunteers who collect health information from clients.

Pet.App.78a–79a.

In other words, not all clinics licensed under the two specified sections are "covered" by the Act. Only clinics licensed under section 1204 or operating pursuant to 1206(h) that also have the "primary purpose [of] providing family planning or pregnancy-related services" must comply. Clinics offering a broader array of medical services are not covered, even though they may routinely see pregnant women.

From there, the Act's application narrows further. As explained more below, any licensed covered facility that participates in both Medi-Cal and California's Family PACT program is exempt from the Act's requirements. But participation in Family PACT requires a center to provide abortifacients and birth control. Therefore, pro-life centers cannot qualify for this exemption because of their pro-life views.

Licensed covered facilities must post the Compelled Abortion Referral in one of the following ways:

> (A) A "conspicuous" and "easily read" public notice in the waiting room, "in no less than 22-point type." Pet.App.80a.

(B) "A printed notice distributed to all clients in no less than 14-point type." *Id.* at 81a.

(C) "A digital notice distributed to all clients ... at the time of check-in or arrival." *Id.*

In addition, the Compelled Abortion Referral must be published in numerous languages: "in English and in the primary threshold languages for Medi-Cal beneficiaries as determined by the State Department of Health Care Services for the county in which the facility is located." *Id.* at 80a. For San Diego County, where Pregnancy Care Clinic is located, "threshold" languages include English, Spanish, Arabic, Vietnamese, Tagalog, and Farsi. A center in Los Angeles County would have to publish the statement in English and 12 additional languages.[7]

Unlicensed Centers — Compelled Disclaimer. The Act compels unlicensed non-medical pregnancy centers, such as Fallbrook Pregnancy Resource Center, to begin any interactions with expectant women by informing them of what they are not. The centers must prominently post a notice ("Compelled Disclaimer") at their entrance and in any advertisement, in up to 13 different languages, stating that the "facility is not licensed as a medical facility by the State of California and has no licensed medical provider who provides or directly supervises

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[7] *See* State of California, Department of Health Care Services, *Frequency of Threshold Language Speakers in the Medi-Cal Population by County for January 2015* (Sept. 2016) www.dhcs.ca.gov/dataandstats/statistics/Documents/Threshold_Language_Brief_Sept2016_ADA.pdf.

the provision of services." Pet.App.81a. The Act defines "unlicensed covered facility" as:

> [A] facility that is not licensed by the State of California and does not have a licensed medical provider on staff or under contract who provides or directly supervises the provision of all of the services, whose primary purpose is providing pregnancy-related services, and that satisfies two or more of the following:
>
> (1) The facility offers obstetric ultrasounds, obstetric sonograms, or prenatal care to pregnant women.
>
> (2) The facility offers pregnancy testing or diagnosis.
>
> (3) The facility advertises or solicits patrons with offers to provide prenatal sonography, pregnancy tests, or pregnancy options counseling.
>
> (4) The facility has staff or volunteers who collect health information from clients.

Id. at 79a.

The Compelled Disclaimer must be "disseminate[d] to clients on site and in any print and digital advertising materials including Internet Web sites." *Id.* at 81a. In each advertisement and notice, the Compelled Disclaimer must appear "in English and in the primary threshold languages," which could include as many as 13 distinct languages. *Id.* The Compelled Disclaimer must appear—in all of the required languages—"in no less than 48-point type"

and be "posted conspicuously in the entrance of the facility and at least one additional area where clients wait to receive services." *Id.* The Compelled Disclaimer contained in all advertising material must be "clear and conspicuous"—which "means in larger point type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from the surrounding text of the same size by symbols or other marks that call attention to the language"—in all of the required languages. *Id.* at 81a–82a.

4. *Exemptions from Compelled Statements.* The Act exempts any licensed covered facility that accepts Medi-Cal and participates in the Family PACT program. *Id.* at 80a (CAL. HEALTH & SAFETY CODE § 123471(c)(2)). Family PACT is California's program for family planning and "reproductive health care." *See* CAL. WELF. & INST. CODE § 14132. To participate, a clinic must "provide the full scope of family planning education, counseling, and medical services specified for the program, either directly or by referral ...." CAL. WELF. & INST. CODE § 24005(c). The Family PACT program involves "family planning services" that includes abortifacients and intrauterine contraceptives. *What Does Family PACT Cover?*, Family PACT http://bit.ly/2lasupA (last updated Aug. 9, 2017); *see also* CAL. WELF. & INST. CODE § 24007(a)(2).[8]

Petitioners cannot in good conscience participate in the Family PACT program, because of their pro-life

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[8] *See also Birth Control: Medicines to Help You*, U.S. Department of Health and Human Services, http://bit.ly/2CP5slE (last updated Sept. 8, 2016).

religious, moral, and philosophical beliefs. By tying the Act's exemption from the compelled-speech requirements to an agreement to dispense all contraceptives, abortifacients, and IUDs, the State effectively precludes pro-life centers like Petitioners from avoiding the Act's mandates to speak.

5. *Penalties Under the Act.* Covered facilities that violate the Act by failing to make the compelled statements "are liable for a civil penalty of five hundred dollars ($500) for a first offense and one thousand dollars ($1,000) for each subsequent offense." Pet.App.82a. A facility found to be in violation will receive a notice that "it is subject to a civil penalty if it does not correct the violation within 30 days." *Id.* The Act's requirements are enforceable by the Attorney General, city attorney, or county counsel. *Id.*

B. Proceedings Below

1. *District Court Proceedings.* Governor Edmund G. "Jerry" Brown Jr. signed the Reproductive FACT Act into law on October 9, 2015. Petitioners filed their complaint four days later, in the United States District Court for the Southern District of California, alleging violations of the Free Speech and Free Exercise Clauses of the First Amendment, the Due Process Clause of the Fourteenth Amendment, and 42 U.S.C. § 238n (Coats–Snowe Amendment). Petitioners then filed their motion for preliminary injunction, asking that the Act be enjoined before its effective date of January 1, 2016.

The District Court denied the motion on February 9, 2016. Pet.App.44a–71a. The court held that the Act did not implicate speech but regulated only conduct,

and applied rational basis review. *Id.* at 61a–62a. Although the Act compels propagation of a government-crafted message, the District Court concluded that the Act was neither content based nor viewpoint discriminatory. *Id.* In the alternative, the District Court held that even if speech were implicated, the Act at most compelled professional speech and was subject to intermediate scrutiny. *Id.* at 63a–64a. The District Court then found that the Act, with respect to licensed centers, survived such scrutiny, in part because it did "not preclude Plaintiff from providing all manner of beneficial advice, including alternatives to abortion," and did "not preclude Plaintiffs from openly expressing disagreement with the required disclosure." *Id.* at 64a–65a. Concerning the unlicensed centers, the District Court found that the Act survived any level of scrutiny. *Id.* at 66a–67a.

2. *Ninth Circuit Proceedings.* The Ninth Circuit panel upheld the District Court's ruling denying Petitioners' motion for a preliminary injunction. *Id.* at 1a–43a. On appeal, Petitioners continued to argue that the Act is content based. The Ninth Circuit conceded as much, *id.* at 22a, but it declined to apply strict scrutiny, despite this Court's recent holding in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015). In its analysis, the panel cited Ninth Circuit precedent, explaining that "[s]ince *Reed*, we have recognized that not all content-based regulations merit strict scrutiny." Pet.App.23a. The Ninth Circuit also rejected Petitioners' argument that by targeting centers that "discourage and prevent women from seeking abortions," *id.* at 7a, the Act is viewpoint discriminatory. According to the Ninth Circuit, the

Act is viewpoint neutral, because "[i]t does not discriminate based on the particular opinion, point of view, or ideology of a certain speaker," *id.* at 20a, and because "the Act applies to all licensed and unlicensed facilities, regardless of what, if any, objections they may have to certain family-planning services," *id.* The Ninth Circuit additionally concluded that the Act's exemptions were "narrow exceptions that do not disfavor any particular speakers." *Id.*

When analyzing the Act's Compelled Abortion Referral for licensed centers, the panel applied intermediate scrutiny, because it deemed the speech professional in nature. The Ninth Circuit reached this conclusion even though this Court held in *In Re Primus*, 436 U.S. 412 (1978), that advocacy entwined with free professional services is fully protected, and Petitioners provide their services pro bono. Pet.App.32a–33a, 60a, 62a. The panel then found that the Act survived intermediate scrutiny, stating that "even if it were true that the state could disseminate this information through other means," California had met its burden because it "has a substantial interest in ... ensuring that its citizens have access to and adequate information about constitutionally-protected medical services like abortion." *Id.* at 34a–35a. Finally, the panel agreed with the District Court that the compelled speech imposed on unlicensed centers satisfies any level of scrutiny. *Id.* at 36a–39a.

On December 20, 2016, the Ninth Circuit denied rehearing en banc. *Id.* at 72a. On November 13, 2017, this Court granted certiorari as to Petitioners' free speech claims.

SUMMARY OF THE ARGUMENT

Petitioners engage in issue advocacy on an important matter of public concern. The very reason they exist is to encourage and support women in choosing to give birth to their unborn children, and to advocate a broader social message affirming the sanctity of human life. Petitioners' ideological speech is protected at the highest level by the First Amendment. But the Act undermines this advocacy and forces Petitioners to speak a message not only detrimental to their cause, but in direct conflict with their purpose and core convictions. The Act deserves strict scrutiny for three independent reasons, and this Court should reverse the Ninth Circuit's judgment upholding the Act under erroneous legal standards.

First, the Act unquestionably compels speech. This is not in dispute. And under this Court's precedent, laws compelling speech are generally subject to strict scrutiny. Although the Ninth Circuit invoked a "professional speech" exception to strict scrutiny, this Court has never created a category of "professional speech" that merits less rigorous First Amendment protection. The only category of protected speech this Court has deemed worthy of receiving lower scrutiny in certain instances is commercial speech—but the speech here is plainly not commercial, as the Ninth Circuit recognized. *See* Pet.App.18a n.5. By definition, nonprofit organizations offering services pro bono are not proposing commercial transactions. The State simply cannot compel Petitioners to speak on matters relating to their issue advocacy—just as they could

not be prohibited from speaking—unless the Act survives strict scrutiny.

Second, the Act is undeniably content based, as the Ninth Circuit acknowledged. Pet.App.18a. The State has prescribed precise words that Petitioners must say. Content-based speech regulations normally are invalid unless they survive strict scrutiny. The limited historical exceptions mentioned by the Ninth Circuit—for unprotected speech such as fraud, true threats, defamation, and the like—are irrelevant to Petitioners' fully protected speech. And the fact that Petitioners' speech pertains to the political, religious, and ideological issue of abortion does not, under this Court's case law, lessen its protections. Quite the opposite: speech on matters of fundamental public debate like abortion lies at the core of the First Amendment's protections against content-based regulations.

Third, the Act is viewpoint discriminatory in both its stated purpose and actual effect. It targets speakers with a particular viewpoint and forces them to advance the State's viewpoint-biased message. This the government cannot do. This Court has stated that laws regulating speech to disfavor a particular viewpoint are subject to the most rigorous scrutiny. In practice, this Court has approached such laws as though they are per se unconstitutional.

With three separate roads leading to at least strict scrutiny, the Act's fate is nearly sealed. The Act then falls far short of meeting the strict scrutiny test. The interest the State offers to justify the Compelled Abortion Referral—a general interest in providing women with information regarding healthcare—does

not rise to the level of compelling. The State itself does not contend that it does, arguing instead that it need only satisfy intermediate scrutiny. For the Compelled Disclaimer, the State asserts an interest in preventing a conjectural harm—women being misled—without objective evidence that the problem actually exists. This is woefully inadequate for the State to meet its heavy burden of proving a compelling interest.

Nor is the Act narrowly tailored. Rife with limitations and exemptions, the Act effectively compels only pro-life pregnancy centers to convey the State's supposedly all-important message. Such underinclusiveness is not narrow tailoring; it is the mark of an ill-fitted law. Moreover, the Act imposes burdensome requirements that are plainly excessive to the State's purported goal. For example, the Act mandates that the message be expressed in very large font, in multiple languages, and in numerous places. Worse yet, the State does not employ any of the obvious primary measures of advancing its purported interests—for example, enforcing fraud laws to combat actual deception, or publishing the messages itself. A speech regulation cannot be narrowly tailored when less restrictive means are readily available.

Because the Ninth Circuit failed to properly apply strict scrutiny—and the State cannot meet this test—this Court should reverse the judgment below.

ARGUMENT

I. Compelling pro-life pregnancy centers to speak government-created messages violates the Free Speech Clause.

In resolving free speech claims, this Court generally assesses the nature of speech as "the first question." *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 473 (1989). "[S]peech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Snyder v. Phelps*, 562 U.S. 443, 452 (2011) (citation omitted).

A. Speech discussing the issue of abortion from a pro-life viewpoint receives full First Amendment protection.

California's Reproductive FACT Act compels speech by private, nonprofit organizations. These organizations, like Petitioners, are mission-oriented, formed primarily to advocate and implement their core pro-life values as well as to express these views publicly and privately. As this Court has recognized, such nonprofits often engage in "dissemination of information, discussion, and advocacy of public issues, an activity clearly protected by the First Amendment." *Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 961 (1984). Indeed, the First Amendment protects an organization's ability to advocate for viewpoints in accordance with its mission, free from government interference with that expression. *See Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321, 2327 (2013).

The speech of these pregnancy centers about the issue of abortion rests at the core of the First Amendment. Advocacy related to abortion is fully protected expression. *See e.g.*, *McCullen v. Coakley*, 134 S. Ct. 2518, 2536 (2014) (abortion-related leafletting and advocacy are protected); *Rust v. Sullivan*, 500 U.S. 173, 196 (1991) (discussing the "constitutional right ... to engage in abortion advocacy and counseling"); *Members of City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 816 (1984) (listing "Abortion is Murder" and "Right to Choose" as examples of protected speech).[9]

Although the State argues that the Act regulates commercial speech, the Ninth Circuit rightly dispensed with that argument in a footnote. Pet.App.18a n.5 ("We find unpersuasive Appellees' argument that the Act regulates commercial speech"). This Court has made clear that commercial speech is "speech which does no more than propose a commercial transaction." *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976) (citation and quotation marks omitted). Petitioners charge nothing for their services and never propose commercial transactions. Even when there is a commercial aspect to speech, that speech does not "retain[ ] its commercial character when it is inextricably intertwined with otherwise fully protected speech," *Riley*, 487 U.S. at 796. When protected speech is part of the speaker's message, this

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[9] *Cf. Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (per curiam) (noting that discussion about political issues and matters of public debate is "an area of the most fundamental First Amendment" guarantees).

Court will "apply [its strict scrutiny] test for fully protected expression." *Id.* Thus, the Act's speech mandates intrude upon the purest sort of private, noncommercial, mission-oriented issue advocacy.

Nor can the State strip Petitioners' speech of protection by labeling it "professional speech," as the Ninth Circuit did. This Court has never treated "professional speech" as a separate category for First Amendment analysis. Certain forms of speech by professionals have been held to be "commercial speech," while other forms have been deemed noncommercial or political advocacy. *Compare Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995) (commercial speech by lawyers), *with NAACP v. Button*, 371 U.S. 415 (1963) (political advocacy by lawyers). As discussed above and *infra* section II, Petitioners' mission-oriented speech is in no way commercial and falls squarely within issue advocacy.

B. The Act compels Petitioners to speak the government's message.

Compelled speech is antithetical to the First Amendment. There is no dispute that the Act compels Petitioners to deliver a particular message crafted by the State. This government-mandated message is precisely the kind of compelled speech that the Constitution forbids. *See Knox v. Serv. Emps. Int'l Union, Local 1000*, 132 S. Ct. 2277, 2288 (2012) ("The government may not ... compel the endorsement of ideas that it approves"). Such "[l]aws that compel speakers to utter or distribute speech bearing a particular message are subject to ... rigorous scrutiny"—"the most exacting scrutiny." *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 642 (1994).

The First Amendment "presume[s] that speakers, not the government, know best both what they want to say and how to say it." *Riley*, 487 U.S. at 791. Its protections "include[] both the right to speak freely and the right to refrain from speaking at all." *Wooley*, 430 U.S. at 714. The First Amendment protects not only the right of a speaker to choose what to say, but also the right to decide "what not to say." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 573 (1995) (quotation marks and citation omitted). Compelled speech is no more tolerable than compelled silence. *Riley*, 487 U.S. at 796.

And compelled disclosure of "fact" is no more acceptable than compelled disclosure of opinion—"either form of compulsion burdens protected speech." *Id.* at 797–98. The "general rule[] that the speaker has the right to tailor the speech[] applies ... equally to statements of fact the speaker would rather avoid." *Hurley*, 515 U.S. at 573. Thus, even laws that compel expression of facts receive strict scrutiny. *See Riley*, 487 U.S. at 791–92 (citing cases and applying strict scrutiny to compelled factual disclosures).

Applying these principles, this Court has held that the government cannot force objectors to pledge allegiance to the flag, *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943), force drivers to display license plates with a state-scripted slogan, *Wooley*, 430 U.S. at 717, force newspapers to print political columns, *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974), or force companies to include third-party newsletters in their billing envelopes, *Pac. Gas & Elec. Co.*, 475 U.S. at 20–21 (plurality opinion). Nor may a state force professional

fundraisers to announce to potential donors the percentage of funds raised that have been given to charities. *Riley*, 487 U.S. at 799–800. Such compulsions of speech against the speaker's will are just as egregious as prohibiting speech based on disagreement with the speaker's message. *Cf. Sorrell*, 564 U.S. at 574 (rejecting as "impermissible" a speech regulation where "the State's goal [is] burdening disfavored speech by disfavored speakers").

Underlying the constitutional prohibition on compelled speech is the fundamental value of freedom of thought and mind. This includes both the "dissemination and propagation of views and ideas," *Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980), and private internal thought. "The right to think is the beginning of freedom." *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 253 (2002). Therefore, the "right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'" *Wooley*, 430 U.S. at 714 (citing *Barnette*, 319 U.S. at 637); *see also Schneiderman v. United States*, 320 U.S. 118, 137 (1943) (the First Amendment "guarantee[s] freedom of thought").

By compelling speech, the Act offends freedom of mind in more ways than one. First, it intrudes upon private thought by mandating that Petitioners mouth ideas that contradict their own convictions. The Compelled Abortion Referral requires Petitioners to facilitate the spread of pro-abortion information and, in the process, to encourage the very act they exist to help women avoid. As the Superior Court of California ruled in *Scharpen Foundation, Inc. v. Harris*, "[i]t

forces the [pro-life] clinic to point the way to the abortion clinic and can leave patients with the belief they were referred to an abortion provider by that clinic." Addendum at 13a–14a[10] (addressing a challenge to the Act's provisions for licensed facilities); *cf. Hurley*, 515 U.S. at 577 (impermissible compelled expression would be "perceived by spectators as part of the whole" message by the unwilling speaker). The State is "us[ing] the wall of the [center] as a billboard to advertise the availability of low cost abortions." Addendum at 14. This creates duplicity of thought and mental conflict for Petitioners—requiring them "to affirm in one breath that which they deny in the next"—that this Court has noted would make freedom of speech "empty." *Hurley*, 515 U.S. at 576 (citation omitted). Such an intrusion is forbidden, because "[t]he First Amendment protects the right of individuals to ... refuse to foster ... an idea they find morally objectionable." *Wooley*, 430 U.S. at 715.

Second, the Act presumes that certain private ideas about encouraging childbirth are wrong and should be overridden. But the First Amendment protects ideas and opinions, even when the government finds them distasteful. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974). It is not

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[10] As Petitioners advised the Court on November 2, 2017, the Superior Court of California, County of Riverside ruled that the Act violates the free speech protections of the California Constitution. *Scharpen Foundation, Inc. v. Harris*, No. RIC1514022 (Cal. Super. Ct. Oct. 30, 2017). A copy of the court's order permanently enjoining the Act, which has now been appealed by the State and is stayed, is attached here as an Addendum.

for California to assume its citizens cannot sort out ideas and information but must be assisted by state-ordered speech mandates. To the contrary, the spheres of political, social, and cultural life are to be places "where ideas and information flourish"—and where "the speaker and the audience, not the government, assess the value of the information presented." *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 503–04 (1996).[11] California's biased and paternalistic law interferes with this free exchange of ideas.

More specifically, the Compelled Abortion Referral presupposes that the idea of supporting women in continuing their pregnancies is misguided and should be undermined by a forced contrary message suggesting abortion. But this Court has made clear that the Constitution protects a pro-life viewpoint and all the associated liberties of living out one's pro-life conscience. *See, e.g., Stenberg v. Carhart*, 530 U.S. 914, 921 (2000) (recognizing "these virtually irreconcilable points of view [on abortion], aware that constitutional law must govern a society whose different members sincerely hold directly opposing views ... in light of the Constitution's guarantees of fundamental individual liberty"); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992) ("[W]here reasonable people disagree [over abortion,] the government can adopt one position or the other," but only when it "does not intrude upon a protected liberty").

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[11] If this is true in the commercial context, it has all the more force in the realm of fully protected noncommercial, ideological speech.

Similarly, the Compelled Disclaimer for unlicensed centers seeks to discredit certain pregnancy centers by forcing them to first announce (in large font) what they are *not*—even in public advertisements, before there is any relationship with an expectant mother. The Compelled Disclaimer is mandatory even when there is no basis to conclude that the disclosure is needed to clarify anything at all, because the centers are not purporting to provide medical services and do not operate for that purpose, and because women are already freely able to inquire about the centers' services and qualifications. This Court rejected such a law in *Riley*, holding that compelling charities' agents to speak prophylactic adverse disclosures is unconstitutional, where donors are already "free to inquire" about the details disclosed and "are also undoubtedly aware" of the underlying subject matter. 487 U.S. at 799.[12]

As in *Riley*, strict scrutiny is necessary because compelling these negative disclaimers up front—including in all advertisements seen by the public—"will almost certainly hamper the legitimate efforts" of the centers, in part because they "will not likely be given a chance to explain." *Id.* at 799–800. But precisely because the First Amendment protects ideas the government disapproves of, this Court has

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[12] To be sure, an unchallenged portion of the statute in *Riley* did require fundraisers to convey their "professional status" by disclosing their employer's name and address, and this Court suggested the provision would survive First Amendment scrutiny. 487 U.S. at 799 n.11. But a name and address is a far cry from the Act's Compelled Disclaimer requiring a message in large font, and in multiple languages, potentially amounting to hundreds of words, that effectively obscures any other message.

vigilantly confirmed that "governmental bodies may not prescribe the form or content of individual expression," which is precisely what the Act does. *Cohen v. California*, 403 U.S. 15, 24 (1971).

C. The Act impermissibly regulates speech based on content and therefore deserves strict scrutiny.

Besides compelling speech, the Act also regulates speech based on content. "Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech." *Riley*, 487 U.S. at 795. Such content-based speech regulations are presumptively unconstitutional. *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 799 (2011); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992). This Court has repeatedly held that "[a] law that is content based on its face," such as the Act, "is subject to strict scrutiny." *Reed*, 135 S. Ct. at 2228; *see also McCullen*, 134 S. Ct. at 2530; *Sorrell*, 564 U.S. at 565. This is true even when a law "singles out specific subject matter for differential treatment, [but] does not target viewpoints within that subject matter." *Reed*, 135 S. Ct. at 2230.

But despite this Court's clear pronouncement just two years ago in *Reed* that content-based speech laws must be subjected to strict scrutiny, *id.* at 2227, the Ninth Circuit declined to apply *Reed* or strict scrutiny, and announced a different standard:

> *Reed*, however, does not require us to apply strict scrutiny in this case. Since *Reed*, we have recognized that not all content-based regulations merit strict scrutiny. *See United*

States v. Swisher, 811 F.3d 299, 311–13 (9th Cir. 2016) (en banc).

Pet.App.23a.

A closer look at the Ninth Circuit's post-*Reed* case law reveals a misunderstanding of *Reed*—and a failure to apprehend this Court's distinctions between constitutionally proscribable expression and fully protected speech. When the Ninth Circuit in *Swisher* held that some content-based regulations did not trigger strict scrutiny, it cited only to *unprotected* speech: (i) this Court's reference in *R.A.V.*, 505 U.S. at 382–83, to obscenity, defamation, and fighting words; (ii) the plurality's reference in *United States v. Alvarez*, 567 U.S. 709, 717–18 (2012) (citations omitted), to "incite[ment] ..., obscenity, defamation, speech integral to criminal conduct, so-called 'fighting words,' child pornography, fraud, true threats, and speech presenting some grave and imminent threat the government has the power to prevent"; and (iii) Justice Breyer's concurrence in *Alvarez*, 567 U.S. at 734–35, noting that "certain kinds of false statements [are] unlawful," such as "false claims of terrorist attacks or other lies about the commission of crimes or catastrophes, impersonation of an officer, and trademark infringement." *Swisher*, 811 F.3d at 313–14.

But the existence of some categories of unprotected speech does not justify applying lower scrutiny to a content-based regulation on *fully protected speech*. This Court has already rejected attempts to justify content-based laws affecting fully protected speech when the government employs an "ad hoc balancing of relative social costs and benefits."

United States v. Stevens, 559 U.S. 460, 470 (2010). Here, the Act does not regulate any of the rare "historic and traditional categories" of expression recognized as criminal or dangerous, where content-based regulations may sometimes be permitted. *Alvarez*, 567 U.S. at 717. Rather, it seeks to interfere with speech on a deeply divisive ideological matter, which receives the utmost First Amendment protection.

In other words, the Ninth Circuit's primary reason for refusing to apply strict scrutiny here contradicts this Court's precedent. Indeed, *Reed* reiterated *R.A.V.*'s holding that content-based laws are presumptively unconstitutional. Likewise, *Alvarez* held that "the Constitution 'demands that content-based restrictions on speech be presumed invalid ... and that the Government bear the burden of showing their constitutionality." 567 U.S. at 716–17 (citing *Ashcroft v. ACLU*, 542 U.S. 656, 660 (2004)). In short, the "exceptions" the Ninth Circuit cites to spare the Act from strict scrutiny existed long before *Reed*, do not weaken *Reed*'s holding, and are irrelevant to analyzing the Act.[13] *Reed* states the "clear and firm rule" for content-based laws that regulate protected speech: when a law "imposes content-based restrictions on speech, those provisions

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[13] The Ninth Circuit also defined a new category of speech—"physicians' speech concerning abortion"—which it determined is regulated by the Act. Pet.App.23a–24a. The Ninth Circuit held that this new category of speech regulations demands lesser constitutional scrutiny, "[e]ven [t]hough the Act [e]ngages in [c]ontent-[b]ased [d]iscrimination." *Id.* at 23a. This reasoning is without any basis in this Court's precedent, and it is plainly incorrect. *See infra* § II.C.

can stand only if they survive strict scrutiny." 135 S. Ct. at 2231. Whatever the Ninth Circuit's view of its own precedent, this Court has not receded from that constitutional norm, and the Act therefore deserves strict scrutiny as a content-based regulation of speech.

D. The Act regulates speech based on viewpoint, the most egregious form of speech regulation.

Viewpoint discrimination is the most egregious form of speech regulation. "[T]he First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others." *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993) (citation omitted). While content-based regulations are presumptively unconstitutional, "[w]hen the government targets ... particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). This Court has recently reiterated that its cases "use the term 'viewpoint' discrimination in a broad sense" and that, outside the context of government speech, inapplicable here, "viewpoint discrimination is forbidden." *Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017) (plurality opinion).

1. The Act targets speakers with a viewpoint the State disfavors.

The Act's viewpoint-based purpose is both clear and constitutionally significant. It can be seen in two ways: (i) its operational effect and exemptions, and (ii) its stated purpose in the legislative record.

As to the former, the Compelled Abortion Referral is uniquely applicable to pro-life pregnancy centers, as the following examples illustrate:

Doctors in private practice. Because only *clinics* licensed under Section 1204 or operating pursuant to Section 1206(h) are subject to the Act, no doctor in private practice in California is subject to the Act.[14] This means the Act excludes, for example, all primary care physicians and obstetrician-gynecologists in private practice.

General practice clinics operating under Section 1204 or 1206(h). Any licensed clinic that provides a full range of medical services is not covered under the Act because its practice does not have pregnancy-related services as its "primary purpose." Pet.App.79a. This means the Act exempts, for example, all primary care clinics.

Clinics licensed under other provisions. Any clinic, whatever its primary purpose, is exempt if not licensed under Section 1204 or operating pursuant to Section 1206(h). This means the Act does not cover, for example, clinics exempted under Section 1206's other subsections—a long list of medical facilities, including student health centers, clinics operating as outpatient divisions of a hospital, clinics operated by an Indian tribe on tribal lands, community mental health centers, clinics affiliated with an institution of higher education that teaches any healing art, or clinics operated by employers for their employees.

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[14] An individual doctor could be subject to the Act, but only indirectly and only if he practices at a Section 1204 or 1206(h) clinic.

Abortion clinics. Planned Parenthood or other clinics that provide abortion-related services are eligible for an exemption, by participation in both Medi-Cal and Family PACT. As long as an abortion clinic enrolls in Medi-Cal and Family PACT and "provide[s] the full scope of family planning education, counseling, and medical services specified for the program, either directly or by referral ...," it is exempt from the Act. *See* CAL. WELF. & INST. CODE § 24005(c). The term "full scope" is a term of art meaning clinics that provide or refer patients for services including emergency contraception, abortifacients, and all FDA-approved forms of birth control.[15] There is no dispute that California's abortion clinics satisfy the Act's criteria for exemption.

In contrast to the above examples, nonprofit pro-life clinics, which are licensed under Section 1204, are subject to the requirements of the Act because:

- pregnancy-related services are their primary purpose,
- they perform two or more of the listed services, and
- they cannot qualify for the Medi-Cal / Family PACT exemption because, as a matter of conscience and religious belief, they will not offer or refer for abortion-causing drugs.

Thus, pro-life licensed nonprofit pregnancy centers are effectively the only type of medical facility

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[15] Clinics operated by the federal government are also expressly exempt. *See* CAL. HEALTH & SAFETY CODE § 123471(c)(1).

in California that must comply with the Act's Compelled Abortion Referral.

By applying the Compelled Abortion Referral only to licensed pregnancy centers that are pro-life, the Act singles out particular speakers with a particular viewpoint. The Compelled Disclaimer is also targeted at unlicensed facilities that are pro-life in their mission because it covers only facilities "whose primary purpose is providing pregnancy-related services." Pet.App.79a.

This speaker-based targeting alone triggers strict scrutiny because "laws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference." *Turner*, 512 U.S. at 658. "Speech restrictions based on the identity of the speaker are all too often simply a means to control content." *Citizens United v. FEC*, 558 U.S. 310, 340 (2010).

As in *Sorrell*, the Act also has the "express purpose" of burdening particular speakers. *See Sorrell*, 564 U.S. at 565 (considering the "statute's stated purposes" and noting that the regulation was aimed at certain speakers). The legislative hostility is clear.[16] The bill sponsor explained "that, unfortunately, there are nearly 200 licensed and unlicensed clinics known as crisis pregnancy centers (CPCs) in California." JA84. These pro-life centers, the sponsor complained, "pose as full-service women's

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[16] *Cf. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 540 (1993) (Kennedy, J., concurring) ("Relevant evidence [of legislative purpose] includes ... the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history ....").

health clinics but aim to discourage and prevent women from seeking abortions." JA85. The express legislative purpose criticizes Petitioners' goal of, as the bill sponsor viewed it, "interfer[ing] with a woman's ability to be fully informed and exercise their reproductive rights." JA84–85. The State thus openly sought to mandate speech that will undermine the centers' ability to further their pro-life mission and advocate their pro-life views. This sort of viewpoint targeting is "forbidden." *Matal*, 137 S. Ct. at 1763 (plurality opinion); *see also Rosenberger*, 515 U.S. at 829 (prohibiting viewpoint discrimination); *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 785–86 (1978) ("Especially where, as here, the legislature's suppression of speech suggests an attempt to give one side of a debatable public question an advantage in expressing its views to the people, the First Amendment is plainly offended").

The Ninth Circuit again excused the Act from the appropriate constitutional scrutiny by shrugging off this important factor after concluding that "*Sorrell* did not turn exclusively on the law's motivation or purpose" but also on the fact that the law was facially discriminatory. Pet.App.21a. The Ninth Circuit then proceeded as though the law's viewpoint-discriminatory purpose were irrelevant:

> [T]he law in *Sorrell* applied to the speakers that were the targets of the law, while it exempted others. In sharp contrast, as discussed, the Act applies to almost all licensed and unlicensed speakers. Other than the two narrow exceptions unrelated to viewpoint, the Act applies equally to clinics

> that offer abortion and contraception as it does to clinics that oppose those same services.

Id.

This analysis is wrong in at least three ways, and *Sorrell* is squarely on point. First, the Ninth Circuit read the statutory scheme incorrectly. As demonstrated above, the Act does *not* "appl[y] to almost all licensed and unlicensed speakers." *Id.* It facially excludes a vast array of licensed medical facilities where pregnant women may reasonably be expected to seek care. The Family PACT exemption further limits the Act's application so that hardly any speakers, aside from centers like Petitioners, are forced to speak the government's message.

Second, the exemptions in the Act are not "unrelated to viewpoint," as the Ninth Circuit concluded, *id.*, but plainly operate based on viewpoint. By requiring participation in Family PACT to avoid the speech mandates, the Act exempts all facilities willing to provide contraceptives and abortifacients, leaving only pro-life centers subject to the law. *See Sorrell*, 564 U.S. at 565 ("In its practical operation," the law "goes even beyond mere content discrimination, to actual viewpoint discrimination").

Finally, the viewpoint animus motivating the law *does* matter, as it did in *Sorrell*, and the Ninth Circuit should have considered it. "Any doubt that [the law] imposes an aimed, content-based burden on [certain speakers] is dispelled by the record and by formal legislative findings." *Id.* at 564. In *Sorrell*, the Vermont Legislature explained that certain speakers "convey messages that 'are often in conflict with the

goals of the state.'" *Id.* at 565 (citation omitted). It then "designed [the law] to target those speakers and their messages for disfavored treatment." *Id.* That sounds remarkably like the California Legislature's explanation that "unfortunately," JA84, centers like Petitioners "aim to discourage and prevent women from seeking abortions," JA85—something apparently in conflict with the State's goals. The State thus designed the Act to "impose[ ] a burden based on the content of speech and the identity of the speaker," which this Court found impermissible in *Sorrell*, 564 U.S. at 567.

Thus, in both express purpose and practical effect, the Act targets pro-life pregnancy centers to stifle their particular viewpoint. *See id.* at 565. At a minimum, such a law animated by the government's disagreement with a particular pro-life message "requires heightened scrutiny." *Id.* at 566.

2. The Act promotes the government's viewpoint while suppressing Petitioners' opposing viewpoint.

In addition to compelling Petitioners to promote messages that fundamentally contradict their beliefs and undermine their purpose, the Act chills their speech. Specifically, the Act's compelled speech provisions are so burdensome that they threaten to stifle Petitioners' pro-life viewpoint.

The Compelled Abortion Referral provision surely does that. Those walking into Petitioners' licensed facilities would see signs referring for free and low-cost abortions before even getting to the front desk or speaking with Petitioners' staff. Pet.App.80a–81a. The Act requires the signage *for* abortion to be in

several different languages—a dozen or more in some centers—and in large font, "conspicuous" and "easily read," attracting the attention of clients in the waiting room, who Petitioners hope to encourage in the very opposite way. *Id.* The Act's only alternative to posting the sign is for Petitioners to give each client a written or electronic notice with the same words. *Id.* Petitioners' effectiveness as advocates who encourage childbirth over abortion is undoubtedly undermined by a conspicuous sign informing expectant mothers how to obtain free or low-cost abortions.

The Compelled Disclaimer required in unlicensed facilities has a similar effect. It must be posted in large (48-point) font, "conspicuously in the entrance of the facility and at least one additional area where clients wait to receive services." Pet.App.81a. It must also appear in large font in multiple languages in all of Petitioners' print and digital advertisements. It crowds out or entirely eliminates space for Petitioners to speak their own messages *against* abortion or to communicate about the free services they offer. The Act's multiple-language and font requirements can add up to hundreds of words and many inches of text. With no space left for Petitioners' own messages, the only alternative left is for Petitioners to purchase additional space to speak their own words. But that is no alternative at all, given the cost.

As this Court noted in *Tornillo*, "it is not correct to say that, as an economic reality, a newspaper can proceed to infinite expansion of its column space to accommodate [the government's compelled speech]." 418 U.S. at 257. And if a government cannot force a for-profit newspaper to bear the cost of creating

additional space to counteract a government-mandated message, neither can it force a nonprofit, religious-based pregnancy center. That conclusion applies even more forcefully today, when many ads come through social media, where ads must be short to be effective and where any added words substantially increase the cost.

Burdensome costs aside, the Act requires Petitioners to speak unwanted messages instead of their desired views. That by itself renders the law unconstitutional. *See id.* at 258 ("Even if a newspaper would face no additional costs ..., the ... statute fails to clear the barriers of the First Amendment because of its intrusion into the function of [the speakers]").

And by forcing only pro-life clinics to use their speech to promote the government's message, the State has disfavored certain speakers with particular messages. But the First Amendment guarantees that "[t]he government may not prohibit the dissemination of ideas it disfavors, nor compel the endorsement of ideas that it approves." *Knox*, 132 S. Ct. at 2282. Thus, the State "must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger*, 515 U.S. at 829.

II. No Standard Less Than Strict Scrutiny Applies to This Content-Based and Viewpoint-Targeted Compelled Speech.

Rather than apply this Court's typical rules for analyzing compelled speech or content- and viewpoint-based regulations, the State below offered three arguments why strict scrutiny does not apply to the Act: (i) it regulates commercial speech, (ii) it

regulates professional speech, or (iii) it regulates speech in the abortion context. None of these arguments is grounded in principle or in this Court's precedents.

A. The Act does not regulate commercial speech.

The Ninth Circuit correctly rejected the State's argument that the Act regulates commercial speech. Pet.App.18a n.5. Petitioners are nonprofits and do not speak for any commercial purpose. They do not solicit any commercial transactions or sell any services, nor do they operate out of economic interest.

This Court "ha[s] always been careful to distinguish commercial speech from speech at the First Amendment's core." *Went For It, Inc.*, 515 U.S. at 623. The Act does not target commercial speech, which is "expression related solely to the economic interests of the speaker and its audience." *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 561 (1980). Commercial speech is "'linked inextricably' with the commercial arrangement that it proposes," *Edenfield v. Fane*, 507 U.S. 761, 767 (1993) (citation omitted), and "does no more than propose a commercial transaction," *Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 340 (1986) (quotation omitted). In contrast, Petitioners' ideological advocacy lies at the core of First Amendment protection, which guarantees "unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484 (1957). That, of course, is the essence of Petitioners' mission in operating centers

for compassionate, informative, and persuasive pro-life advocacy and assistance.

Petitioners' speech is akin to an ACLU-affiliated lawyer's offer of "free assistance by attorneys," which this Court did not analyze as commercial speech, since it was "not an offer predicated on entitlement to a share of any monetary recovery [or] ... to derive financial gain." *In re Primus*, 436 U.S. at 422; *see also Button*, 371 U.S. at 443 (declining to analyze lawyers' speech as commercial "because no monetary stakes [were] involved"). This Court has already held that the commercial speech doctrine does not apply to a speech regulation targeted at speakers who "do not solicit contributions or orders for the sale of merchandise or services." *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 153 (2002).

The intermediate scrutiny standard that governs restrictions on commercial speech does not apply for another reason. The Act regulates the pregnancy centers' speech for reasons unrelated to its alleged commercial character. By burdening speech out of ideological dislike and not for commercial concerns, the Act must be subjected to strict scrutiny. *Cf. R.A.V.*, 505 U.S. at 389 (noting that "the power to proscribe [speech] on the basis of one content element (e.g., obscenity) does not entail the power to proscribe it on the basis of other content elements"). Indeed, this Court's decision in *Sorrell* teaches that the First Amendment demands strict scrutiny "whenever the government creates 'a regulation of speech because of disagreement with the message it conveys.'" 564 U.S.

at 566 (citation omitted). To this rule, "[c]ommercial speech is no exception." *Id.*

The same logic applies to viewpoint-based regulations in the commercial context. As this Court has explained, viewpoint-based regulations of commercial speech receive strict scrutiny. *See, e.g.*, *R.A.V.*, 505 U.S. at 389 (holding that the government "may not prohibit only that commercial advertising that depicts men in a demeaning fashion"); *Matal*, 137 S. Ct. at 1767–69 (five justices concluding in two concurrences that the commercial speech doctrine does not justify viewpoint-based restrictions on speech, which always receive strict scrutiny).

B. The Act does not regulate "professional speech."

This Court has never recognized "professional speech" as a unique category for First Amendment analysis. While certain instances of speech by professionals have been deemed "commercial speech" when they met the narrow criteria described above, the default rule is that speech by professionals receives full First Amendment protections. *See, e.g.*, *Sorrell*, 564 U.S. at 563 (law restricting speech among professional pharmacists, physicians, and pharmaceutical representatives subject to heightened scrutiny); *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 548 (2001) (regulation of lawyers' professional advice to clients affects "private speech" that is "constitutionally protected expression"); *Riley*, 487 U.S. at 789–90 (speech by professional fundraisers to potential donors is fully protected); *Button*, 371 U.S. at 437 (lawyers' communications soliciting clients involved "advocacy" and "freedom[] of expression"

protected under the First Amendment). This Court has never inquired whether professionals have "positioned themselves in the marketplace" or "in a professional context," Pet.App.33a, in free speech cases. Nor does this Court need to create a new speech category now. *See* Rodney A. Smolla, *Professional Speech and the First Amendment*, 119 W. VA. L. REV. 67, 69 (2016) (concluding that "recognition of a new professional speech doctrine is unnecessary and inappropriate").

Nevertheless, the Ninth Circuit has manufactured a special category of "professional speech" that it characterizes as "a continuum," ranging from a professional's public advocacy on one end to professional conduct on the other. Pet.App.28a. The Ninth Circuit rejected, without explanation, the Fourth Circuit's conclusion that professional speech necessarily requires payment for services. *Id.* at 32a & n.8. Applying this dubious reasoning to the Act, the Ninth Circuit determined that the Compelled Abortion Referral "falls at the midpoint of the [speech–conduct] continuum" and—under the Ninth Circuit's new rule—is subject to "intermediate scrutiny." *Id.* at 29a. This is because, in the Ninth Circuit's view, "[w]hen professionals, by means of their state-issued licenses, form relationships with clients, the purpose of those relationships is to advance the welfare of the clients, rather than to contribute to public debate." *Id.* at 28a–29a (quoting *Pickup v. Brown*, 740 F.3d 1208, 1228 (9th Cir. 2014)); *but see Wollschlaeger v. Governor, Fla.*, 848 F.3d 1293, 1309 (11th Cir. 2017) (en banc) ("There are serious doubts about whether *Pickup* was correctly decided").

How the status of a professional-client relationship could transform speech into conduct is unclear. But even if professional speech as conduct were a constitutionally meaningful concept, it would not turn on the fact that the Act compels speech "within the clinics' walls," as the Ninth Circuit concluded. Pet.App.31a. In fact, the speech mandated by the Act occurs at the same point in the relationship as the communications from the lawyers for the NAACP in *Button*, 371 U.S. 415, and the lawyer for the ACLU in *In re Primus*, 436 U.S. 412, both cases where this Court applied strict scrutiny. Likewise, Petitioners here are seeking to provide pregnant women with free information, to offer them pro bono services, and to advocate pro-life causes. Yet the Compelled Abortion Referral requires licensed pregnancy centers to inform women entering the clinic of government-endorsed alternatives—before any professional relationship has begun. The Compelled Disclaimer is even further removed from a professional relationship of any sort, compelling speech not only to women first entering the centers but also to women anywhere who happen to see a print or digital advertisement. As a result, the Act does not ensure exchange of truthful information on a particular topic within an ongoing professional relationship; the Act deters women from ever seeking *any* information from pro-life pregnancy centers in the first place.

Even the few lower courts that have employed a separate "professional speech" analysis do not suggest that the doctrine applies at this early stage of a medical professional's interaction with a potential patient. *See, e.g., Wollschlaeger*, 848 F.3d at 1308

(reduced protection for professional speech only applies when speaking with a "particular client"); *King v. Governor of N.J.*, 767 F.3d 216, 232 (3d Cir. 2014) (professional speech protection limited only when providing "personalized services to a client based on the professional's expert knowledge and judgment"). Rather, this doctrine has been invoked only upon a showing that "the speaker is providing personalized advice in a private setting to a paying client." *Moore-King v. Cty. of Chesterfield, Va.*, 708 F.3d 560, 569 (4th Cir. 2013).

But the Act interferes with speech at the First Amendment's core: advocacy for a cause. As Petitioners seek to speak public messages about an ideological cause, their invitation "is characteristically intertwined with informative and ... persuasive speech." *Riley*, 487 U.S. at 796. Because the Act compels speech at the origin of this invitation, it interferes with the free exchange of ideas—for "without solicitation the flow of such information and advocacy would likely cease." *Id.* This, of course, is the State's goal in mandating messages in super-sized font to divert Petitioners' potential audience and inhibit Petitioners' opportunity to advocate for their pro-life perspective. The "professional" complexion of Petitioners' speech thus matters not; this Court's "lodestars in deciding what level of scrutiny to apply to a compelled statement must be the nature of the speech taken as a whole and the effect of the compelled statement." *Id.* Even if the speech of these nonprofit clinics were deemed to have some "professional" aspect, such speech "is inextricably intertwined with otherwise

fully protected speech," and the First Amendment permits nothing less than strict scrutiny. *Id.*

C. There is no "abortion exception" to the First Amendment.

There is neither a basis in case law nor a principled reason to apply lesser scrutiny simply because the government's content-based regulation of speech relates to abortion. This Court has never recognized an abortion exception to the First Amendment. To the contrary, Petitioners' pro-life messaging is just the sort of advocacy on matters of public concern that this Court has recognized lie "at the core of the First Amendment's protective ambit." *In re Primus*, 436 U.S. at 424.

When the Ninth Circuit said "courts have not applied strict scrutiny in abortion-related disclosure cases, even when the regulation is content-based," it overlooked a critical distinction: those cases all involved medical professionals obtaining informed consent to perform an abortion. Pet.App.23a–24a. Just because a physician performing an abortion, a medical procedure, must obtain a patient's informed consent does not mean that pro-life advocates must provide information related to abortion, a procedure they do not perform.

Obtaining informed consent for abortion, as with any medical procedure, requires a discussion of the risks, consequences, and alternatives of the procedure. *See Casey*, 505 U.S. at 881. In *Casey*, this Court reviewed a multifaceted law regulating abortion procedures. The law challenged there required a doctor performing an abortion to inform a patient, in the doctor's own words, of "the nature of

the procedure, the health risks of the abortion and of childbirth, and the 'probable gestational age of the unborn child.'" *Id.* In addition, the doctor was required to inform the patient about a variety of materials from the State offering alternatives to abortion, and to furnish those materials if a woman expressed interest. This Court dispatched the free speech claims in one paragraph, holding that the requirement was reasonable in the context of regulating the practice of medicine. *Id.* at 882–83. "As with any medical procedure," this Court explained, "the State may enact regulations to further the health or safety of a woman seeking an abortion." *Id.* at 878. It is implied but nonetheless clear that this Court viewed informed consent for abortion akin to informed consent for other medical procedures. *See id.* at 883 (analogizing to a kidney transplant operation). In contrast, the Act's compelled speech provisions have no connection to informed consent to any medical procedure performed by Petitioners.

This Court has elsewhere made plain that there is a significant difference between the government's ability to regulate a doctor's particular advice to a patient regarding a medical procedure and the government's inability to regulate speech by, for example, "mak[ing] it a crime publicly or privately to speak urging persons to follow or reject any school of medical thought." *Thomas v. Collins*, 323 U.S. 516, 544 (1945) (Jackson, J., concurring). Patients talking to their doctors about a particular medical procedure need and expect certain information before they can consent to undergoing that procedure. That is not true for persons receiving information from pro bono

advocacy groups that is unrelated to surgeries or any medical services those centers perform.

The Ninth Circuit relied on a case from the Fourth Circuit to buttress its claim that courts routinely employ a lesser standard for evaluating abortion-related disclosures. But while the Fourth Circuit invalidated on free speech grounds a law mandating that a physician asked to perform an abortion must first describe the unborn baby to the expectant mother during an ultrasound, the Fourth Circuit did not—contrary to the assertion of the Ninth Circuit, Pet.App.26a—decide which level of scrutiny applied. *See Stuart v. Camnitz*, 774 F.3d 238, 248 (4th Cir. 2014) ("Thus, we need not conclusively determine whether strict scrutiny ever applies in similar situations, because in this case the outcome is the same whether a special commercial speech inquiry or a stricter form of judicial scrutiny is applied" (citation and quotation marks omitted)).

The two other cases cited by the Ninth Circuit also involved informed consent laws. One case recognized that "such laws are part of the state's reasonable regulation of medical practice" and do not compel or otherwise interfere with "ideological speech." *Texas Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 576 (5th Cir. 2012). The other case held that "a physician is required to disclose truthful and non-misleading information as part of obtaining informed consent to a procedure." *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 737 (8th Cir. 2008).

Casey and these decisions from the Fifth and Eighth Circuits, each of which addresses informed

consent to medical procedures are worlds apart from the present case. None of those cases support the Ninth Circuit's view of the Act. It is simply not true that, outside of that context, there is a wide exception to First Amendment principles if the requirement has any remote connection to abortion. This Court's decision in *Bigelow v. Virginia*, 421 U.S. 809 (1975), clearly illustrates that general First Amendment principles apply when the State regulates advertising about abortions.

Moreover, the *Casey* plurality recognized that issue advocacy surrounding the persistent public debate over abortion is deeply ideological. 505 U.S. at 850 ("Men and women of good conscience can disagree, and we suppose some always shall disagree, about the profound moral and spiritual implications of terminating a pregnancy, even in its earliest stage"). Compulsory transmission of government-selected words in this issue-advocacy context cannot be defended by reference to informed-consent laws because the Act is unrelated to a medical procedure that is being offered by Petitioners and creating risk for the patient.

III. The Act Cannot Survive Constitutional Review.

The State cannot meet the exacting standard the First Amendment demands. As discussed above, "[b]ecause the Act imposes a restriction on the content of protected speech"—and, worse yet, targets a particular viewpoint—"it is invalid unless California can demonstrate that it passes strict scrutiny." *Brown*, 564 U.S. at 799. Given the heavy burden on the government to sustain such a law, "[i]t is rare that

a regulation [of] speech because of its content will ever be permissible." *United States v. Playboy Entm't Grp.*, 529 U.S. 803, 818 (2000). The Act is no exception to that general rule. Here, at a minimum, the State has not shown that the Act is the least restrictive means of advancing a compelling state interest—much less has it justified its discrimination against organizations holding a pro-life point of view.

Alternatively, instead of applying strict scrutiny, this Court could hold that a speech regulation is never permissible when the government targets an ideological viewpoint for disfavored treatment. *Rosenberger*, 515 U.S. at 829 ("The State may not ... discriminate against speech on the basis of its viewpoint"). Ultimately, though, it does not matter what level of scrutiny applies because the Act fails even under more deferential standards.

A. No compelling state interest justifies the Act.

Only interests of the "highest order" are sufficiently compelling to satisfy strict scrutiny. *City of Hialeah*, 508 U.S. at 546. Moreover, the State must show that a compelling governmental interest is actually furthered by burdening the particular party. *Brown*, 564 U.S. at 799; *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430–31 (2006).

Neither the Compelled Abortion Referral for licensed centers nor the Compelled Disclaimer for unlicensed centers can clear this high bar. In support of the Compelled Abortion Referral, the State asserts a general interest in ensuring that women are informed of their rights and the healthcare services

available to them. The State itself does not assert that this interest is compelling, and for good reason. This interest does not suffice for strict scrutiny because it is far too general to satisfy the particularity that strict scrutiny demands.

Moreover, the State's purported purpose of propagating information is called into question by the Act's striking underinclusiveness. The Compelled Abortion Referral is not required in all the ordinary places where expectant mothers may seek care during their pregnancy, such as physicians' offices or obstetrician-gynecologist practices. Such "[u]nderinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint." *Brown*, 564 U.S. at 802. "[A] law cannot be regarded as protecting an interest of the highest order ... when it leaves appreciable damage to that supposedly vital interest unprohibited." *Reed*, 135 S. Ct. at 2232 (citation omitted).

The State's claim that the Compelled Disclaimer for unlicensed centers furthers its interest in informing women that certain pro-life pregnancy centers are not licensed medical facilities fares no better. This could not possibly be a compelling interest because there is no evidence of any confusion about what these centers do and do not provide. When the government justifies a speech regulation as preventing anticipated harms, "[t]he State must specifically identify an 'actual problem' in need of solving, and the curtailment of free speech must be actually necessary to the solution." *Brown*, 564 U.S.

at 799 (citations omitted). "[A]mbiguous proof" or a mere "predictive judgment" "will not suffice"; the State must demonstrate a "direct causal link." *Id.* at 799–800. But here, California has put forth no specific, objective evidence supporting the existence or risk of fraud by pro-life centers—not in the legislative record or at any point during this litigation.[17] Mere assertion, in the absence of evidence, cannot establish a compelling interest. *See Bellotti*, 435 U.S. at 786 ("[T]he burden is on the Government to show the existence of such an interest" (citation omitted)).

Nor is a general interest in distinguishing medical from non-medical centers sufficient. "[I]t is no answer" to First Amendment claims "to say ... that

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[17] As stated in the Petition, Pet. at 34, the only "evidence" underlying the legislative purpose of combatting misinformation by pregnancy centers were summary descriptions of anecdotal "reports"—one by a partisan organization, NARAL Pro-Choice California, and one released by the University of California, Hastings College of Law, on strategies to restrict pro-life pregnancy centers. *See* JA40–41. Neither report was even included in the legislative record or the record in this case. There is no indication that the NARAL report relied on objective sources for its accusations—primarily accusations faulting the centers for not promoting abortion. *See id.* Neither is there any indication that the UC Hastings report pointed to any harms caused by pregnancy centers. In short, neither of these reports (i) has been demonstrated to be objective or reliable, (ii) proves any harm caused by pro-life pregnancy centers, or (iii) shows that the compelled speech would prevent any harm, real or imagined. The reports were driven by ideological advocacy and underscore the viewpoint hostility that drove the Act. The State's general reference to these reports is merely ambiguous "proof" that fails to show a direct causal link between the state-mandated compelled speech and a specific harm to be remedied.

the purpose of [the law] was merely to insure high professional standards and not to curtail free expression." *Button*, 371 U.S. at 438–39. "[A] state may not, under the guise of prohibiting professional misconduct, ignore constitutional rights." *Id.* at 439.

B. The Act is not narrowly tailored to achieve any asserted interest.

In addition, the Act is not narrowly tailored to achieve any interest that the State has identified. The First Amendment demands that the "government not dictate the content of speech absent compelling necessity, and then, only by means precisely tailored." *Riley*, 487 U.S. at 800. Even where a compelling interest has been shown—and the State has not done so here—"the 'danger of censorship' presented by a facially content-based statute ... requires that that weapon be employed only where it is '*necessary* to serve the asserted [compelling] interest.'" *R.A.V.*, 505 U.S. at 395 (citations omitted).

The State claims that the Compelled Disclaimer is a means to prevent fraud and deception. But a law addressing fraud—if it targets the content of private speech—must be narrowly tailored to regulate only what is necessary for fraud prevention. *See Watchtower*, 536 U.S. at 168 (an "interest in preventing fraud ... provides no support for [the law's] application to [ideological, political, and advocacy] causes"). This Court has made the "distinction ... between regulation aimed at fraud and regulation aimed at something else in the hope that it would sweep fraud in during the process." *Joseph H. Munson Co.*, 467 U.S. at 969–70. The latter, which is what the State has done here, fails because it does not

aim precisely—free speech rights may not be collateral damage in a preventive assault on fraud. *See id.* at 970.

To satisfy narrow tailoring, the State "must demonstrate that ... the regulation will in fact alleviate these harms in a direct and material way." *Turner*, 512 U.S. at 664. A speech regulation cannot stand if reason "suggest[s] the availability of less intrusive and more effective measures" for accomplishing the asserted goal. *Schaumburg*, 444 U.S. at 639; *see also Playboy Entm't Grp.*, 529 U.S. at 824 (instructing courts not to "assume a plausible, less restrictive alternative would be ineffective"). For example, "[f]rauds may be denounced as offenses and punished by law." *Schneider v. New Jersey*, 308 U.S. 147, 164 (1939). Even if that "is not the most efficient means of preventing fraud," this Court has already "emphatically" affirmed "that the First Amendment does not permit the State to sacrifice speech for efficiency." *Riley*, 487 U.S. at 795. This Court has therefore stricken speech laws justified by the asserted purpose of fraud prevention when the laws appeared intended to target certain speakers, *e.g.*, *Watchtower*, 536 U.S. at 158, or the means chosen unduly interfered with free speech, *e.g.*, *Riley*, 487 U.S. at 798.

Riley illustrates why the Act fails narrow tailoring. There, this Court held that the compelled disclosure imposed on professional fundraisers was not narrowly tailored to the asserted governmental interest because the challenged law "necessarily discriminate[d] against" certain small and underfunded nonprofits and tainted the fundraisers'

ability to communicate those groups' charitable messages. *Riley*, 487 U.S. at 799–800. The compelled preemptive "unfavorable disclosures [had] the predictable result that [the speaker's message] will prove unsuccessful." *Id.* at 799. Assessing this burden, this Court explained that "[i]n contrast to the prophylactic, imprecise, and unduly burdensome rule the State has adopted to reduce its alleged donor misperception, more benign and narrowly tailored options are available." *Id.* at 800. The State could, this Court observed, "publish the ... disclosure[s]" itself or "vigorously enforce its antifraud laws to prohibit [speakers from eliciting public trust based] on false pretenses or by making false statements." *Id.*; *see also Sorrell*, 564 U.S. at 573 (noting that the speech regulation could have been more precisely tailored had the State limited its application to "only a few narrow and well-justified circumstances").

The Compelled Abortion Referral, if designed to promote the spread of information on how to obtain an abortion, is not properly tailored by any measure. *See infra* § III.D. Most obviously, as in *Riley*, the State could itself publish information about where women may obtain free and low-cost abortions in California. The State could make the abortion-provider contact information publicly available—without forcing private citizens like Petitioners to be the messengers. It could "purchase television advertisements as it does to encourage [other state programs]" or "purchase billboard space" near pregnancy centers. Addendum at 19a (discussing ways in which the FACT Act could be more narrowly tailored). It could "require counties or other political entities to make ... significant efforts to inform women of the

availability of family planning services." *Id.* at 8a–9a. It could require county health departments to prominently post (in large font, perhaps) the referral information on their website home pages. *See id.* at 8a. It could require medical facilities receiving government funding for certain programs, such as Family PACT, to say certain things. *Cf. Rust*, 500 U.S. at 197–98. These would certainly be less restrictive means of disseminating the government's desired message, but the State employs none of them.

The de minimis advertising the State has done rarely mentions the word "abortion," instead describing services euphemistically as "family planning." Addendum at 8a; *see also id.* at 7a ("those few [state] entities making an effort to inform women of the availability of services appear nearly as loathe as [pro-life pregnancy centers] to specifically use or post the word 'abortion'"). Ironically, not talking about abortion is one of the primary criticisms the Act's sponsors launch against pro-life pregnancy centers like Petitioners. *See supra* note 17. If spreading information about abortion to women is the State's crucial objective, it could start by first speaking the word itself.

The Compelled Disclaimer, if intended to prevent deception, is likewise far more restrictive than necessary. As this Court has reiterated in free-speech cases, states must enforce their fraud laws rather than decide that it is a "less efficient and convenient" means and thus "abridge freedom of speech" instead. *Schneider*, 308 U.S. at 164. Beyond that, the State has not even attempted to explain why the Compelled Disclaimer could not be more narrowly tailored than

intruding upon all of the centers' advertisements in print or digital media. The State has made no effort to justify the necessity of the large font requirements or the numerous language requirements. The State could instead, for example, maintain a public registry of unlicensed pregnancy centers, noting that they are not medical facilities. This would serve to inform every person seeking the information, even before entering the center, without encroaching upon Petitioners' channels of mission-oriented private speech and issue advocacy.

Because in speech regulations, the government may act only through "narrowly drawn regulations ... without unnecessarily interfering with First Amendment freedoms," *Schaumburg*, 444 U.S. at 637, laws that gratuitously compel or stifle speech cannot stand. Where "[p]recision of [the] regulation must be the touchstone," *Button*, 371 U.S. at 438, the Act is too blunt an instrument to pass constitutional muster.

C. The Court should adopt a per se rule that viewpoint discrimination against private speech is unconstitutional.

The Act's egregious targeting of a particular viewpoint presents a prime vehicle for the Court to hold that the government can never mandate or suppress speech based on an ideological disagreement. A per se rule has been a long time coming.

No violation of the First Amendment is more clear than when the government regulates a private speaker because of his viewpoint. "[T]he First Amendment forbids the government to regulate

speech in ways that favor some viewpoints or ideas at the expense of others." *Matal*, 137 S. Ct. at 1757 (plurality opinion) (citation omitted). This Court long ago suggested the rigor of this constitutional principle when West Virginia compelled school children to speak words they did not believe:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

Barnette, 319 U.S. at 642.

No government has ever succeeded in an attempt to justify viewpoint discrimination. In *Barnette*, the state argued that the requirement to pledge allegiance to the flag was justified because "[n]ational unity is the basis of national security" and "the authorities have the right to select appropriate means for its attainment." *Id.* at 640. This Court did not weigh the importance of this claimed interest in any sort of a balancing test. Rather, it declared that the use of compelled speech to achieve this particular viewpoint was beyond the power of government. *Id.* at 641.

Then, in *Rosenberger*, the Court invalidated, as impermissible viewpoint discrimination, a state-university policy prohibiting religious student organizations from equal participation in a student funding program. 515 U.S. 819. There, this Court rejected the university's proffered justification not

because it was insufficiently weighty, but because viewpoint discrimination is never legitimate: "nothing in our [prior] decision indicated that scarcity would give the State the right to exercise viewpoint discrimination that is otherwise impermissible." *Id.* at 835.

Years later, this Court determined that a congressional restriction on using legal-services funding to challenge the constitutionality of welfare programs constituted unconstitutional viewpoint discrimination. *Legal Servs. Corp.*, 531 U.S. at 548–49. Although the Court did not employ the "viewpoint" terminology, its ruling was squarely rooted in the theory that "[w]here private speech is involved, even Congress' antecedent funding decision cannot be aimed at the suppression of ideas thought inimical to the Government's own interest." *Id.* Again, this Court did not weigh the importance of the government's claimed interests, but simply declared the restriction per se illegitimate, holding that "[t]he Constitution does not permit the Government to confine litigants and their attorneys in this manner." *Id.* at 548.

This Court has repeatedly treated a finding of viewpoint bias as determinative.[18] Though the level of

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[18] This Court also recently addressed viewpoint discrimination in *Matal*, 137 S. Ct. 1744. The plurality rejected the government's claim that its interest in preventing the issuance of trademarks disparaging any person or group could justify viewpoint discrimination. The Court held that the appropriate level of review "need not be resolved here because the disparagement clause cannot withstand even *Central Hudson* review." *Id.* at 1749. A four-justice concurrence advanced a more rigorous level of protection whenever viewpoint discrimination is found—even in the context of commercial speech: "It is telling

scrutiny has never been decided, it operates as the functional equivalent of a per se rule. Following this established practice, this Court should now declare that a per se violation of the First Amendment occurs when the government regulates speech based on a disagreement with the viewpoint of a private speaker.

D. The Act fails any level of scrutiny.

Even under the lesser scrutiny that the State urges, the Act fails because it is not narrowly drawn. *See Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 764 (1994) (intermediate scrutiny demands that the law be "narrowly tailored to serve a significant governmental interest"). The State's purported interest in ensuring that its citizens have access to health-related information can be advanced in any number of constitutionally sound ways. A content-based speech law compelling objectors to speak a particular viewpoint is not "narrowly drawn" to achieve such an interest. *See Cent. Hudson Gas & Elec.*, 447 U.S. at 565 ("[T]he First Amendment mandates that speech restrictions be 'narrowly drawn'" (citation omitted)).

As detailed in section III.B., *supra*, there are obvious means by which the State could transmit health-related information without compelling speech. *See also Riley*, 487 U.S. at 800 (law not narrowly drawn when, "[f]or example, as a general rule, the State may itself publish the detailed

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that the Court's precedents have recognized just one narrow situation in which viewpoint discrimination is permissible: where the government itself is speaking or recruiting others to communicate a message on its behalf." *Id.* at 1768 (Kennedy, J., concurring).

financial disclosure forms it requires professional fundraisers to file"); *Schaumburg*, 444 U.S. at 637 (because "[f]raudulent misrepresentations can be prohibited and the penal laws used to punish such conduct directly," the State need not regulate speech in violation of the First Amendment). Yet California has not even attempted to show, much less convincingly demonstrated, that any of these measures would be inadequate. *See* Addendum at 8a, 17a (discussing State's "completely passive" and "very modest efforts at delivering information" through alternative means). On that basis alone, the Act cannot be, as the Ninth Circuit wrongly concluded, "*closely drawn* to achieve California's interests in safeguarding public health and fully informing Californians of the existence of publicly-funded medical services." Pet.App.35a (emphasis supplied). Even under a lesser standard than the strict scrutiny that correctly applies, "[i]n the absence of a showing that more limited speech regulation would be ineffective," the Act fails a First Amendment analysis. *Cent. Hudson Gas & Elec.*, 447 U.S. at 571.

In addition, no matter the level of scrutiny, "[t]he State cannot regulate speech that poses no danger to the asserted state interest." *Id.* at 565. Here, there is no evidence that the Act's compelled speech solves any real problem at all; the State has shown no "danger." In this way, the Act is overinclusive. The Compelled Disclaimer applies regardless of whether the pregnancy centers have engaged in any "misleading" speech that would threaten a governmental interest. It applies to all centers focused on assisting with pregnancy and options counseling. The Compelled Abortion Referral also

applies despite the absence of any evidence that women in California are without access to information about abortion. Thus, the Act's requirements are not even reasonably or rationally related to the State's asserted interest in preventing citizens' confusion.

CONCLUSION

Abortion remains a deeply divisive moral issue in this country. Nothing prohibits California from taking a side in that debate, too. It can subsidize a pro-abortion view and use many tools at its disposal to disseminate that perspective. But the State cannot single out and commandeer the speech of those devoted to pro-life advocacy to transmit that view. The marketplace of ideas can sort out which view is most persuasive. California need not, and under the First Amendment cannot, use coercion of private speech to advance the outcome it prefers. This Court should reverse the Ninth Circuit's refusal to enjoin the Act.

Respectfully submitted.

JOHN C. EASTMAN
CENTER FOR CONSTITUTIONAL JURISPRUDENCE
c/o Chapman University Fowler School of Law
One University Drive
Orange, CA 92866
(877) 855-3330

ANNE O'CONNOR
NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES
5601 Southpoint Centre Blvd.
Fredericksburg, VA 22407
(540) 372-3930

DEAN R. BROYLES
THE NATIONAL CENTER FOR LAW AND POLICY
539 West Grand Avenue
Escondido, CA 92025
(760) 747-4529

MICHAEL P. FARRIS
KRISTEN K. WAGGONER
DAVID A. CORTMAN
Counsel of Record
KEVIN H. THERIOT
DENISE M. HARLE
ELISSA M. GRAVES
ALLIANCE DEFENDING FREEDOM
440 1st Street N.W.
Suite 600
Washington, D.C. 20001
(202) 393-8690
dcortman@ADFlegal.org

Counsel for Petitioners

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ADDENDUM

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The Scharpen Foundation, Inc. v. Harris, No. RIC1514022 (Cal. Super. Ct. Oct. 30, 2017) 1a

FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF RIVERSIDE
OCT 30 2017
J. Castillo

SUPERIOR COURT OF CALIFORNIA, COUNTY OF RIVERSIDE

TITLE:	DATE & DEPT:	CASE NO.:
THE SCHARPEN FOUNDATION INC. vs. KAMALA HARRIS, et al.	October 30, 2017 Department 1	RIC1514022
COUNSEL: None present	REPORTER: None	

STATEMENT OF DECISION

STATEMENT OF DECISION

This action seeks a judicial declaration that the Reproductive FACT Act, Health and Safety Code Sections 123470 et seq., is unconstitutional and a permanent injunction prohibiting its enforcement. Trial was held on October 18, 2017.

Based on the law and evidence presented at trial, the Court finds that the notice requirement of the FACT Act is compelled speech violating Article I, Section 2, of the Constitution of the State of California.

Judgment is for Plaintiff Scharpen Foundation. The Court grants injunctive and declaratory relief.

STATEMENT OF THE CASE AND PROCEDURAL BACKGROUND

The Reproductive FACT Act, Health and Safety Code Sections 123470 et seq. requires Scharpen's licensed clinic to either post or individually provide the following specifically worded notice to patients:

> California has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women. To determine whether you qualify, contact the county social services office at [insert the telephone number].

Failure to make the required notice is punishable by a civil penalty. The statute is enforced by the Attorney General, County Counsels, and City Attorneys.

For religious reasons Scharpen Foundation does not provide or make referrals for abortion services and refuses to post the required notice.

Scharpen Foundation filed this action alleging in its First Amended Complaint that the FACT Act violates the freedoms of speech, assembly, and free expression of religion guaranteed by Article I, Sections 2, 3 and 4 the Constitution of the State of

California. The Attorney General, County Counsel of Riverside County, and City Attorney of the City of Temecula all answered the First Amended Complaint. The County Counsel and City Attorney left the defense of the challenged legislation in the hands of the Attorney General and agreed to be bound by the results of this trial.

Plaintiff Scharpen Foundation moved for a preliminary injunction. That motion was denied on the grounds that Plaintiff was unlikely to succeed on the merits.

The Attorney General moved for Judgment on the Pleadings. That motion was denied on June 23, 2017. The Court granted the motion with respect to the Counts 2 and 3 of the First Amended Complaint related to freedom of assembly and free expression of religion. The resulting trial was thus limited solely to the issue of whether the Fact Act violates Plaintiff Scharpen Foundation's freedom of speech under Article I, Section 2. This Court's June 23, 2017, ruling on the Attorney General's motion for Judgment on the Pleadings is incorporated herein by reference.

THE EVIDENCE AND FACTUAL FINDINGS

There is little contradiction in the evidence presented by the parties. The dispute lies in the inferences the Court should draw from that evidence and what law governs the State's power to compel the speech at issue.

The parties stipulated to the admissibility of almost all exhibits, transcripts, declarations and of

matters subject to judicial notice. For reasons the Court will explain, the disputed evidence is of minimal relevance, and does not alter the outcome of the case. The Court overrules all objections and receives into evidence all exhibits, declarations, transcripts and matters to be judicially noticed offered by the parties.

The Court finds that Scharpen Foundation operates a clinic subject to the required notice provisions of the FACT Act. The clinic is mobile and operates out of a motor home in the County of Riverside and at times in the City of Temecula. For religious reasons, Scharpen Foundation does not comply with the posting and notice requirements of the statute.

The FACT Act compels speech, and regulates its content.

VIEWPOINT DISCRIMINATION

Sharpen Foundation asserts that the FACT Act discriminates based upon viewpoint. In support of that argument Scharpen produced a spreadsheet showing that only about 90 of the State's 1,200 or so clinics are subject to the FACT Act, and the vast majority of affected clinics are pro-life. This may be so. But for the reasons stated in the Court's ruling of June 23, 2017, finding no violation of Article I, Section 4 right to free expression, the Court finds no viewpoint discrimination. By its terms, FACT Act is a neutral statute of general applicability. It may affect mostly pro-life clinics, but laws requiring mandatory vaccinations burden persons who view vaccinations

as harmful more those that view them as beneficial. Such laws do not discriminate on viewpoint.

The Plaintiff Scharpen Foundation points to the legislative history suggesting that the statute was supported by pro-abortion groups and that a legislative author was concerned about pro-life Christian clinics misleading women who came to those clinics with false information regarding abortion. Some legislators may have had discriminatory intent. But the Legislature is a corporate body, and its intent is always a mix of the motives of its members, best understood by looking at the words they enact. This is especially true in a case such as this where there is no ambiguity in the statute and the Legislature has made specific legislative findings. Those findings state that thousands of California women are not knowledgeable regarding the availability of comprehensive family planning services, including abortion services. The statute was enacted to address that problem. The legislative findings make no mention of Christian pro-life clinics, or any misrepresentations by those clinics.

This Court is cognizant of the Legislature's role as the public policy making body of California government. Legislators are sworn to and have a duty to support the California Constitution no less ardently than members of the Judiciary. Constitutional protections for free speech serve to legitimize the Legislature's role in formulating public policy by ensuring the People, in whose name the Legislature acts, are informed on issues of public importance. Courts must be vigilant in protecting

constitutional free speech in order to preserve our republican democracy, but unless clearly acting outside its constitutional limitations, the Legislature's acts are entitled to great judicial deference.

Based upon the text of the legislation, the legislative findings, and the legislative history, the Court finds that there was no prohibited legislative discriminatory intent in the FACT Act's enactment. Similarly, even though the legislation may primarily affect Christian pro-life clinics, there is no prohibited discriminatory affect in its operation.

SCOTT SCHARPEN TESTIMONY

The deposition transcript of Scott Scharpen, the president and founder of the Scharpen Foundation, was also received into evidence. His testimony generally describes how the Scharpen organization is pro-life, that it does not advertise as pro-life, and that it attempts to have women who would otherwise obtain an abortion go to the clinic and subsequently choose to give birth. As a whole, the testimony establishes that Mr. Scharpen goes to great lengths to have women who may be contemplating abortion come to his clinic, and makes no effort to inform them beforehand of the clinic's pro-life position.

The legislative findings do not address potential abuses by Scharpen or any other pro-life clinic. The legislative findings could have targeted behaviors similar to those described in Mr. Scharpen's deposition testimony, but the legislative findings only discuss the need to provide women with information

regarding comprehensive family planning services without any mention of abuses by clinics of any description. The legislation is facially neutral and applies to all clinics that meet certain neutral criteria, regardless of whether they are religious or not, whether they are pro-life or not, and regardless of the content of their advertising, their motives, or their behavior.

Mr. Scharpen's activities are not relevant to the constitutionality of the statute.

THE STATE'S EFFORTS TO INFORM WOMEN OF THE AVAILABILITY OF SERVICES

The legislative findings state that many women remain uninformed of available services. That lack of information serves as the State's justification to compel clinics such as Scharpen Foundation's to "supplement" its own efforts to inform women of its reproductive health programs. The Attorney General offered a number of declarations and exhibits. They describe those steps the State has taken, and which Scharpen Foundation must now supplement, to educate women regarding the availability of low cost public contraceptive, prenatal, and abortion services.

While the educational steps taken by the State are described as "myriad' by the Attorney General, they are actually quite minimal. And while the evidence is voluminous, it describes very little. And even those few entities making an effort to inform women of the availability of services appear nearly as loathe as Scharpen Foundation to specifically use or post the word "abortion".

The evidence consists of declarations describing the contents of Health Department websites for 15 of the State's 58 counties, and a State website for the Office of Family Planning. After one navigates though each of these 16 websites to the Health Department and one can see the services offered. In most of these websites the services are merely described as "family planning" or by a similar euphemism. The word "abortion" appears on only 2 county websites.

These website based attempts at educating women are completely passive. A woman must decide, on her own initiative, to go to the website seeking services. Even if she can navigate through information concerning vaccinations, the importance of flossing, hazardous waste, and other topics, in all but 2 counties, she must then ascertain that "family planning" or "contraceptive" includes post-conception contraception and abortion.

The only evidence of an active effort to educate women was a 12-week project in Alameda County in 2015. Signs were posted on buses advertising a "Free Pregnancy Test" with a phone number. Wallet-sized cards with the same message were also distributed. The word "abortion" did not appear in the advertising, and no other services beyond free pregnancy testing were listed. If a woman knew she was pregnant and desired an abortion, or was not pregnant and only desired contraception, this advertising would not direct her to the desired services.

Based on the record at trial the Court finds the State does not require counties or other political entities to make any significant efforts to inform

women of the availability of family planning services. The Court finds that the State, which controls public education from K-12, community colleges, State Universities, the UC system, and which controls the funding of the services at issue, makes no other effort to inform women about the availability of those services.

FREEDOM OF SPEECH UNDER ARTICLE I, SECTION2

This action is brought under Article I, Section 2 of the California Constitution, a provision of California's Declaration of Rights. The civil liberties granted by the California Constitution are independent of rights guaranteed by the United States Constitution's Bill of Rights. See California Constitution Article I, Section 24. Absent cogent reasons, however, California courts do not depart from the construction placed by the United States Supreme Court on a similar provision of the federal constitution. *Gabrielli v. Knickerbocker*, (1938) 12 Cal.2d 85.

There is neither a California nor a federal case examining the Reproductive FACT Act under the California Constitution's provision protecting freedom of speech, Article I, Section 2. We look first to U.S. Supreme Court First Amendment precedent for guidance. In the abortion context, the seminal U.S. Supreme Court case addressing compelled speech is *Planned Parenthood of Southern Pennsylvania v. Casey* (1992) 505 U.S. 833. There, the Court's plurality found no First Amendment deficiency in a statute that compelled a physician to provide specific

information regarding abortion and childbirth to an abortion patient. *Id.*, 505 U.S. 833, 884.

The Court did not discuss whether strict scrutiny, intermediate scrutiny, or rational basis was the appropriate level of review.

STRICT SCRUTINY, INTERMEDIATE SCRUTINY, OR RATIONAL BASIS

There is no question that the FACT Act compels speech and the content of that speech. This Court must determine the appropriate level of scrutiny to apply, and whether the statute passes that level of scrutiny.

Five federal circuit courts have examined cases of state compelled speech by physicians in the abortion context. These federal circuit court cases are not binding precedent for this Court. They are secondary authorities this Court may consult for guidance. The cases are not in agreement on what level of scrutiny to apply.

California's Reproductive FACT Act was analyzed as a First Amendment case by the Ninth Circuit Court of Appeals in *National Institute of Family and Life Advocates (NIFLA) v. Harris* (2016) 839 F.3d 823. As this Court finds, the Ninth Circuit court held the FACT Act is content based, but does not discriminate based on viewpoint. The Ninth Circuit court found the statute passed intermediate scrutiny. *Id.*, 839 F.3d 823, 838. The Attorney General urges the Court to adopt the Ninth Circuit's opinion, except for the level of scrutiny it applied. The Attorney General urges

this Court to adopt the lowest level of scrutiny, rational basis.

The Fifth and the Eighth Circuits applied the lower rational basis standard urged by the Attorney General. Both cases involve statutes compelling physicians to describe fetal development to the patient. In one case the State compelled physicians to specifically inform the patient that abortion "... will terminate the life of a whole, unique, living human being." Using the rational basis analysis, both circuit courts found the statutes in question did not violate the First Amendment. *Texas Medical Providers v. Lakey* (5th Cir. 2012) 667 F.3d 570, 576; *Planned Parenthood of Minnesota v. Rounds*, (8th Cir. 2008) 530 F.3d 724, 734-735.

In *Stuart v. Camnitz* (4th Cir. 2014) 774 F.3d 238, 246-250 the Fourth Circuit used intermediate scrutiny to analyze a statute requiring physicians to perform ultrasounds and sonograms, and to then describe the fetus to patients. The statute was similar to the statutes found constitutional by the Fifth and Eighth Circuits. The Fourth Circuit found that the statute failed intermediate scrutiny. By necessary implication it failed strict scrutiny as well. The Court took a contextual approach, holding the statute regulated not professional conduct, but ideological speech. The burden on liberty was too great to justify interfering with the physician's "freedom of mind". The Court held the compelled speech unconstitutional.

In a case examining an ordinance similar to the California statute at issue, the Second Circuit held a

New York City ordinance compelling pregnancy centers to disclose whether they provided referrals for abortions was invalid. The Court held the ordinance failed both intermediate scrutiny and strict scrutiny. *Evergreen Association v. City of New York*, (2nd Cir. 2014) 740 F.3d 233. The court focused on the context of the speech in question to determine the appropriate level of scrutiny. See *Id.*, 740 F.3d 233, 249:

> When evaluating compelled speech, we consider the context in which the speech is made. [Citation.] Here, the context is a public debate over the morality and efficacy of contraception and abortion, for which many of the facilities regulated ... provide alternatives. 'Expression on public issues has always rested on the highest rung on the hierarchy of First Amendment values.' [Citation.] Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech. [Citation.] A requirement that pregnancy centers address abortion, emergency contraception, or prenatal care at the beginning of their contact with potential clients alters the centers' political speech by mandating the manner in which the discussion of these issues begins.

In summary, the federal circuit courts are in disagreement, but lean toward intermediate or strict scrutiny. The Second and Fourth Circuits are consistent in that both find that compelled political or

ideological speech leads to heightened scrutiny, possibly strict scrutiny. The contextual approach of the Second and Fourth Circuits is most compatible with the California Supreme Court's approach to Article I, Section 2.

California's protection of freedom of speech sometimes differs from that required by the First Amendment. In those cases the California Supreme Court has necessarily looked to the context of the speech, either in its forum, its nature as commercial or political, and whether it is restricted or compelled. In *Robins v. Pruneyard Shopping Center* (1979) 23 Cal. 3d 899, Article I, Section 2 was found to protect a level of free expression on the grounds of a privately owned shopping center not sanctioned by the First Amendment. In *Gerawan Farming Inc. v. Lyons* (2000) 24 Cal.4th 468, 495 and 517, Justice Mosk explained the independent analysis afforded compelled commercial speech under Article I, Section 2, and the historical reasons for the that difference.

The speech required by the FACT Act is unquestionably compelled and content based. The Attorney General describes its context as commercial in nature, thus justifying a rational basis review. It is true that Scharpen provides services, without cost, in the market for pre-natal care. But this compelled speech is not politically neutral. This speech is not merely the transmittal of neutral information, such as the calorie count of a food product, or the octane of gasoline purchased at a pump. Here, the State commands clinics to post specific directions for whom to contact to obtain an abortion. It forces the clinic to point the way to the abortion clinic and can leave

patients with the belief they were referred to an abortion provider by that clinic.

The Attorney General argues forcefully that the FACT Act only requires an affected clinic to post true, factual information. That argument is accurate, but only to a point. The required posting directs the reader to a telephone number. And if that number is called, one can undoubtedly be referred to an abortion provider if one so desires. But the specific language of the required signage is also misleading, in that it can leave the reader with the belief that the referral is being made by the clinic in which it is posted. In Scharpen's case that would be inaccurate, profoundly inaccurate.

The dispute over the issue of abortion is contentious and raises issues that are religious, cultural, political, and legal. It has been a matter of continuous legal and political controversy for more than four decades. The dispute is essentially over how we define when human life begins, a purely moral and philosophical question that cannot lend itself to scientific resolution. This conflict goes to the heart of our debates regarding individual liberty, judicial power, feminism, federalism, and now, free speech. It is a subject of paramount importance when evaluating nominees to the U.S. Supreme Court, a political process. Political candidates for all manner of public office find it necessary to declare their positions on the issue. The issue of abortion is undoubtedly political in nature.

There is no question that the State has a legitimate regulatory interest in the practice of the

healing arts. In the midst of this contentious political dispute the State commands that specific State authored words be mouthed by the clinic at the very beginning of its relationship with those who come to it for guidance. In at least some cases the compelled speech alters that relationship. *Evergreen* (supra), at 249. The statute distorts the clinic's speech, which can confuse the patient. The statute interferes both with the right of the clinician to speak and with the right of the patient to hear what the clinician would say in the absence of State censorship.

The State is requiring more than informed consent. The statute requires the clinic to give information to a woman at the start of her relationship with the clinic. Women who come to the clinic and are found not to be pregnant must be told of the availability of abortion. Women who find out they are pregnant and are thrilled to be so must be told about abortion. Women with unplanned, but not unwanted pregnancies must also be told. The State inserts itself into the private and sensitive relationship between a woman and her physician.

It is entirely proper for the State to take its position supporting access to abortion, a right protected by both state and federal constitutions. It may enact laws that support abortion access and tax its citizens to make abortions available. It can require informed consent for all medical procedures. But its ability to impress free citizens into State service in this political dispute cannot be absolute; it must be limited.

RATIONAL BASIS

Article I, Section 2 offers little protection if a rational basis test is used to evaluate compelled political speech. The rational basis test could be used to subject women and their physicians to compelled descriptions of fetal development. The majority of the federal circuit court cases previously cited suggest that no less than intermediate scrutiny is required, with the Court in *Evergreen, supra*, 740 F.3d 233, specifically noting that freedom of expression on public issues enjoys the highest level of protection, and the Court in *Camnitz, supra*, 774 F.3d 238-246 noting that the compelled statements required of physicians interfered with a physician's 'freedom of mind".

INTERMEDIATE SCRUTINY

This statute fails even intermediate scrutiny.

In *McCullen v. Coakley*, 573 U.S.__,134 S.Ct 2518 (2014), the United States Supreme Court examined a Massachusetts statute creating a 35 foot buffer area around reproductive health care facilities, that excluded all but patrons and employees of the facilities. There were problems with protesters blocking public sidewalks and preventing women from entering the clinic. The statute was enacted as a public safety measure after the State found less intrusive measures inadequate. The Court held the statute was subject to intermediate scrutiny.

Writing for the majority, Chief Justice Roberts found the while the Commonwealth provided

evidence of pro-life advocates obstructing access at only one clinic, the statute applied to every clinic in the State. The Court rejected the State's argument that other approaches to the problem were unworkable, holding that the evidence in the record was insufficient to support that position. The State had not tried other approaches to the problem that were effective in other states. The Chief Justice wrote that it is not enough that a restriction on free speech is easier for the State to administer, that the "prime objective of the First Amendment is not efficiency." *Id.*, at 134 S.Ct. 2540.

Here, the State's very modest efforts at delivering information to its target audience regarding the availability of services, including abortion services, do not establish the necessity of compelling private citizens to "supplement" those efforts. The legislative finding that the FACT Act is "necessary" to "supplement" the State's minimal efforts is not supported. The statute fails intermediate scrutiny.

STRICT SCRUTINY

This Court finds that Article I, Section 2 of the California Constitution is in accord with the standards suggested by *Evergreen*. The compelled speech is political in nature. This statute should to be analyzed using strict scrutiny. That standard for compelled statements for political speech is neutral on the political issue of abortion. The Legislature may not use the wall of the physician's office as a billboard to advertise the availability of low cost abortions, but neither may it compel physicians to describe a fetus as a "whole, unique, living human being" as was

approved using a First Amendment rational basis test in *Rounds, supra*, 530 F.3d 724, 734-735.

COMPELLED SPEECH

Compelled speech is that which forces a speaker to say that which he or she may not believe. Compelled speech is undoubtedly necessary in many circumstances. But compelled speech of a political or cultural nature is not the tool of a free government.

In *West Virginia State Board of Education v. Barnette* (1943) 319 U.S. 624, the U.S. Supreme Court examined a case where West Virginia compelled public school students to salute the national flag and recite the pledge of allegiance, which at that time had no reference to God. Students who were Jehovah's Witnesses believed that the salute was a form of idolatry. They refused to give the salute and pledge. Refusal to participate was punished as an act of disobedience resulting in expulsion. In 1943, the United States was in the midst of history's most destructive war against totalitarian governments at their most evil. West Virginia had sons who already had, and more who soon would perish or return maimed from that war. West Virginia's requirement of a modest patriotic affirmation could be viewed as a necessary measure at a time when the nation's future depended on national unity.

The Court found West Virginia's compelled salute and recitation violated the First Amendment because it invaded the speaker's "individual freedom of mind", (*Id.*, 319 U.S. 624, 637), and the "sphere of intellect and spirit", (*Id.*, 319 U.S. 624, 642. The Court relied

entirely upon the right of free expression, requiring no religious motive on the part of the refusing student. *Id.*, 319 U.S. 624, 636-637.

The FACT Act violates "individual freedom of mind". The State can deliver its message without infringing upon anyone's liberty. It may purchase television advertisements as it does to encourage Californians to sign up for Covered California or to conserve water. It may purchase billboard space and post its message directly in front of Scharpen Foundation's clinic. It can address the issue in its public schools as part of sex education.

Compelled speech must be subject to reasonable limitation. This statute compels the clinic to speak words with which it profoundly disagrees when the State has numerous alternative methods of publishing its message.

In this case, however virtuous the State's ends, they do not justify its means.

RULING

The Court finds that the FACT Act violates Article I, Section 2 of the California Constitution. Plaintiff Scharpen Foundation is entitled to a declaration that the FACT Act is unconstitutional and a permanent injunction prohibiting the Attorney General, the County Counsel of Riverside County, and the City Attorney of the City of Temecula from taking any action to enforce that statute against it, its officers, and its employees.

Dated: 10/30/17

Gloria C. Trask
Hon. Gloria C. Trask
Judge of the Superior Court

No. 16-1140

In the Supreme Court of the United States

NATIONAL INSTITUTE OF FAMILY & LIFE ADVOCATES, D/B/A NIFLA, ET AL.,

Petitioners,

v.

XAVIER BECERRA, ATTORNEY GENERAL OF CALIFORNIA, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE STATE RESPONDENTS

XAVIER BECERRA
Attorney General of California
EDWARD C. DUMONT
Solicitor General
JANILL L. RICHARDS
Principal Deputy Solicitor General
JOSHUA A. KLEIN*
Deputy Solicitor General
KATHLEEN VERMAZEN RADEZ
ANTHONY R. HAKL
JONATHAN M. EISENBERG
Deputy Attorneys General
STATE OF CALIFORNIA
DEPARTMENT OF JUSTICE
455 Golden Gate Ave., Suite 11000
San Francisco, CA 94102-7004
(415) 510-3919
Joshua.Klein@doj.ca.gov
**Counsel of Record*

February 20, 2018

QUESTION PRESENTED

Whether the disclosures required by the California Reproductive FACT Act violate the protections set forth in the Free Speech Clause of the First Amendment, applicable to the States through the Fourteenth Amendment.

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INTRODUCTION

"'[P]eople will perceive their own best interests if only they are well enough informed.'" *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 578 (2011). That principle is especially pertinent in matters of healthcare, where "'information is power,'" and increased knowledge leads to "'better decisions.'" *Id.* (quoting physician's statement). It applies with urgency when patients must make timely, important, and sometimes difficult decisions affecting matters of life, health, and intimate liberty, as women must when they are pregnant. And it is crucial when a low-income woman's unplanned pregnancy presents her with new and pressing medical needs that her finances do not enable her to fulfill on her own.

A woman who seeks advice and care during pregnancy needs certain basic information to make informed decisions and obtain appropriate, timely medical care. When she is offered assistance by a facility that provides pregnancy-related services of a type the public may associate with medical clinics, she needs to know whether the entity she is dealing with is in fact a state-licensed clinic staffed with regulated professionals. And when she visits a state-licensed clinic that caters to those not covered by private insurance or already enrolled in public programs and provides less than the full spectrum of relevant healthcare, she needs to know that there are state resources available to access additional care if she wishes to do so.

To address these needs, California requires unlicensed facilities that primarily serve pregnant women and have characteristics associated with licensed medical clinics to provide clients with a one-sentence disclosure of their unlicensed status. And the State requires licensed medical clinics that primarily offer

pregnancy or family-planning care to provide, in one of various ways, a two-sentence notice stating the existence of, and providing a phone number to obtain information about eligibility for, state-funded programs offering a full range of free and low-cost reproductive healthcare services to eligible women.

California enacted these requirements in light of an unquestioned medical consensus on the benefits of early medical care for those who are or seek to become pregnant; the reality that abortion, for those who choose it, is optimally conducted earlier rather than later; and evidence that many women are unable to pay for comprehensive care themselves, are unaware of available state-funded comprehensive options, and are being misled by the actions of limited-service pregnancy centers. The statute does not require anyone to provide information on, or refer any client for, abortion, contraception, or any other medical option. It simply imposes a carefully drawn, neutral disclosure requirement on entities that deal with a specific population likely to need particular information at a critical moment, ensuring that women will have the information they need to seek the care and services they deem appropriate.

STATEMENT

1. a. About 700,000 California women become pregnant each year. Pet. App. 76a-77a. California has long prioritized "comprehensive perinatal care," including "prenatal care, delivery service, postpartum care, and neonatal and infant care," as "necessary services that have been demonstrated effective in preventing or reducing maternal, perinatal, and infant mortality and morbidity." Cal. Health & Safety Code

§ 123475.[1] The legislative record of the Reproductive FACT Act, Cal. Health & Safety Code § 123470 et seq., reflects findings that medical care early in pregnancy is of the utmost importance, and that pregnancy requires decisions that are "time sensitive." Pet. App. 77a.

Petitioners do not appear to contest these basic legislative judgments, which are, in any event, supported by medical evidence. The majority of women carry their pregnancies to term.[2] For them, delayed or forgone medical care increases the risk of maternal death, preterm delivery, low birth weight, and congenital birth defects.[3] Indeed, optimal outcomes call for preconception care, which provides the circumstances in which an intended pregnancy can flourish and reduces the chance of unintended pregnancies.[4] For women who choose to terminate their pregnancies, early care is also important, because late abortions may be less safe, less desirable, and more burdensome to obtain than those that occur early in a pregnancy.[5] And for

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[1] Unless otherwise specified, statutory citations in this brief are to the California Health & Safety Code.

[2] *See* Guttmacher Institute, State Facts About Abortion: California (2018), https://www.guttmacher.org/sites/default/files/fact-sheet/sfaa-ca.pdf.

[3] *See* Smith & Bassett-Novoa, Late Presentation to Prenatal Care, 92 Am. Family Physician 395, 395 (2015).

[4] *See* Lu, Recommendations for Preconception Care, 76 Am. Family Physician 397, 398 (2007).

[5] *See* Zane, et al., Abortion-Related Mortality in the United States, 126 Obstetrics & Gynecology 258, 263-264 (2015) (noting that although later abortions involve low complication rates, the rates are noticeably higher than for earlier abortions); *Gonzales v. Carhart*, 550 U.S. 124, 134-140 (2007) (discussing abortion methods at various points in a pregnancy); Guzik, Even in Blue-State California, Abortions Can Be Hard To Find, Rewire (May

women who are still in the process of deciding whether to carry their pregnancy to term or whether to receive an abortion, early medical care can ensure that the decision they make is an informed one, and that whichever outcome they choose, they do not suffer unnecessary consequences due to misunderstandings or delay.

Almost half of California pregnancies are unintended. Pet. App. 76a. Those women are especially likely to experience delays in care, especially if they are poor.[6] California thus makes a variety of pregnancy care and family-planning services immediately available to women who cannot afford care on their own. Medi-Cal and the Medi-Cal Access program provide free or low-cost prenatal and delivery care for qualifying patients, and allow applicants to receive those services while their applications are pending review.[7] The Medi-Cal Family Planning, Access, Care and Treatment (F-PACT) program provides family

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24, 2017), https://rewire.news/article/2017/05/24/blue-state-california-abortions-hard-to-find/ (discussing unavailability of late pre-viability abortions in parts of California); Cal. Health & Safety Code § 123468(b) (prohibiting most post-viability abortions).

[6] *See* Cheng, et al, Unintended Pregnancy and Associated Maternal Preconception, Prenatal and Postpartum Behaviors, 79 Contraception 194, 196 (2009) (women with unwanted or mistimed pregnancies are more likely to delay prenatal care); Nothnagle, et al., Risk Factors for Late or No Prenatal Care Following Medicaid Expansions in California, 4 Maternal & Child Health J. 251, 254 (2000) (low-income women are more likely to receive late or no prenatal care).

[7] *See* Cal. Dep't of Health Care Svcs., Medi-Cal Access Program, Important Information for Pregnant Applicants (June 26, 2015), http://mcap.dhcs.ca.gov/My_MCAP/Important_Information_Applicants.aspx.

planning assistance (including medical methods and abstinence and fertility-awareness counseling), limited infertility services, sexually transmitted infection testing and treatment, cancer screening, and preconception counseling, with F-PACT providers able to determine eligibility and enroll patients on-site.[8] And for women who choose to terminate a pregnancy, Medi-Cal covers abortion care.[9]

Despite "statewide marketing campaigns, community mobilization, provider training, and targeted efforts to reach vulnerable populations who may be newly eligible for coverage," many eligible Californians do not know about their publicly funded healthcare options.[10] Of special pertinence to the Legislature's efforts to provide early care for pregnant women, each year thousands of women are unaware of

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[8] *See* Cal. Dep't of Health Care Svcs., What Does Family PACT Cover? (Aug. 9, 2017), http://www.familypact.org/Get%20Covered/what-does-family-pact-cover; Cal. Dep't of Health Care Svcs., Eligibility Criteria (May 2, 2016), http://www.familypact.org/Get%20Covered/client-eligibility-enrollment/eligibility-criteria; Cal. Dep't of Health Care Svcs., Family PACT Program Standards at 5-12 (Jan. 2018), http://files.medical.ca.gov/pubsdoco/publications/masters-mtp/fpact/progstand_f00.doc.

[9] *See Comm. to Defend Reproductive Rights v. Myers*, 29 Cal. 3d 252, 258 (1981).

[10] Kaiser Family Foundation, The California Health Care Landscape, at 6 (Aug. 26, 2015), http://files.kff.org/attachment/fact-sheet-the-california-health-care-landscape; Pet. App. 76a-77a; *see* Becker, Number of Uninsured in California Remained at Record Low in 2016, UCLA Ctr. for Health Policy Research, at 3 (Oct. 2017), http://healthpolicy.ucla.edu/publications/Documents/PDF/2017/uninsured-factsheet-oct2017.pdf (estimating that 11% of California's 2.8 million uninsured are income-eligible for Medi-Cal and another 22% are income-eligible for Covered California subsidies).

relevant public health programs when they learn that they are pregnant. J.A. 57. A woman's ability to learn about and obtain needed medical services in such circumstances may be especially limited if she is low-income, since such women are likely to have limited time and money for travel, may have difficulty attending multiple appointments, may be ill-equipped to research options, and will find it difficult to pay for services.[11]

b. Informational challenges for low-income women may be heightened by the activities of limited-service centers that actively seek out women with unplanned pregnancies but either do not provide medical care at all or provide only limited types of care and advice. Some women may go to such centers with full knowledge of what will be provided and find exactly the non-medical services, religious or ethical counseling, or limited types of medical care that they are looking for. Others, however, may arrive at such centers misunderstanding what they do and do not provide, or erroneously believing that they are the only option for those unable to afford comprehensive care on their own.

Such misunderstandings can be exacerbated by the attributes and actions of the centers themselves. Some centers that have no medical professionals and offer no medical services nevertheless outwardly resemble medical institutions—for instance, by using lab coats, forms, and office spaces resembling those at medical clinics, and by providing services such as ultrasounds and pregnancy testing.[12] Some facilities

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[11] *See, e.g.*, Braveman, et al., Barriers to Timely Prenatal Care Among Women with Insurance: The Importance of Prepregnancy Factors, 95 Obstetrics & Gynecology 874, 874 (2000).

[12] NARAL Pro-Choice America, Crisis Pregnancy Centers Lie

may be licensed medical clinics whose names and advertising imply that they will provide comprehensive reproductive healthcare, but which in fact provide only limited services and incomplete medical advice selected to "prevent women from accessing abortions." J.A. 39-40.[13] Staff and volunteers may achieve that goal by conveying information that is medically or legally false, or distracting women who ask questions that the center prefers not to answer.[14] As the Legislature heard, the result can be to delay or thwart women's ability to receive the medical care and truthful information they seek—as evidenced by physician testimony about patients whose serious health issues

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(2015), at 15 (NARAL Report), https://www.prochoiceamerica.org/wp-content/uploads/2017/04/cpc-report-2015.pdf; *id.* at 7 ("Volunteers who are not licensed medical providers may wear lab coats and require clients to complete paperwork prior to seeing a so-called counselor."); J.A. 40 (discussing NARAL Report); *see also* FDA, Consumer Update: Avoid Fetal 'Keepsake' Images, Heartbeat Monitors, https://www.fda.gov/ForConsumers/ConsumerUpdates/ucm095508.htm (last updated Dec. 16, 2014).

[13] *See also* Letter from the American Congress of Obstetricians & Gynecologists to Sen. Hernandez, Chair, Senate Health Committee, re A.B. 775 (June 15, 2015), located in A.B. 775 Bill File, Cal. Sen. Comm. on Health (stating that some centers "use false and misleading advertising to appeal to women who think they may be pregnant and are looking for comprehensive reproductive health care"). Bill files, which are maintained by the State Archives, are collections of legislative history that are frequently relied on by California courts to shed light on the legislative intent and concern behind a statute. *See, e.g., Beeman v. Anthem Prescription Mgt., LLC*, 58 Cal. 4th 329, 338 (2013).

[14] *See* J.A. 40; NARAL Report 12 (counselor's statement that abortion is legal "'up to nine months,'" in a state that actually bans abortion after 24 weeks); *id.* (inaccurate information about miscarriage rates).

were overlooked by limited-service facilities, or who received inaccurate information from such facilities.[15]

2. In response, California enacted the Reproductive FACT Act, which establishes two disclosure requirements.

The Unlicensed Facility Disclosure. The Legislature determined that it is important for pregnant women to know whether they are receiving services from a licensed institution and professional, or from somebody who is not subject to the qualification requirements, professionalism guarantees and quality controls that govern licensed healthcare providers. Pet. App. 77a.

The Act therefore defines an "unlicensed covered facility" as an entity which is not licensed by the State and which has no licensed medical provider who provides or supervises the facility's services. § 123471(b). Such a facility is covered if it has a "primary purpose" of "providing pregnancy-related services," and does two or more of the following:

> (1) ... offers obstetric ultrasounds, obstetric sonograms, or prenatal care to pregnant women[;]
>
> (2) ... offers pregnancy testing or pregnancy diagnosis[;]

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[15] Sen. Health Comm. Hrg. at 54:16 (June 24, 2015) (statement of Dr. Sally Greenwald, discussing pregnant woman whose diabetes was untreated by crisis pregnancy center, causing significant risk to baby and mother), http://archive-media.granicus.com:443/OnDemand/calchannel/calchannel_7f56b221-8674-4c2b-8eb6-a58a90239170.mp4; *id.* at 56:18 (statement of Dr. Juliana Melo, about patients deceived by non-licensed centers).

> (3) ... advertises or solicits patrons with offers to provide prenatal sonography, pregnancy tests, or pregnancy options counseling[; or]
>
> (4) ... has staff or volunteers who collect health information from clients.

§ 123471(b).

Unlicensed covered facilities must disclose, on site and in any print or digital advertising, that:

> "This facility is not licensed as a medical facility by the State of California and has no licensed medical provider who provides or directly supervises the provision of services."

§ 123472(b). The notice must be in English and "in the primary threshold languages for Medi-Cal beneficiaries as determined by the State Department of Health Care Services for the county in which the facility is located." *Id.* The on-site notice must measure at least 8.5 by 11 inches and appear in 48-point or larger type, and the advertising-material notice must be "clear and conspicuous." § 123472(b)(2), (3).

Violations are punishable by a civil fine of $500 for a first offense or $1,000 for subsequent offenses. § 123473(a). No enforcement proceeding may occur unless the enforcing authority has previously notified the facility of noncompliance and given it 30 days to correct the violation. *Id.*

The Licensed Facility Disclosure. The Legislature also determined that "[t]he most effective way to ensure that women quickly obtain the information and services they need" is to require licensed health care facilities that focus on pregnancy or family planning but are unable to immediately enroll patients into

state-funded full-service programs to advise each patient that such programs exist and to notify patients about how information about eligibility may be accessed. Pet. App. 77a.

A "licensed covered facility" is a clinic licensed under § 1204, which covers "primary care" clinics, "community" clinics, "free" clinics, and "specialty" clinics such as "surgical" clinics and "alternative birth center[s]." *See* §§ 123471(a), 1204. Such a facility is covered if its "primary purpose is providing family planning or pregnancy-related services," and it does two or more of the following:

> (1) ... offers obstetric ultrasounds, obstetric sonograms, or prenatal care...[;]
>
> (2) ... provides, or offers counseling about, contraception or contraceptive methods[;]
>
> (3) ... offers pregnancy testing or pregnancy diagnosis[;]
>
> (4) ... advertises or solicits patrons with offers to provide prenatal sonography, pregnancy tests, or pregnancy options counseling[;]
>
> (5) ... offers abortion services[; or]
>
> (6) ... has staff or volunteers who collect health information from clients.

§ 123471(a).

Clinics that are providers under both the Medi-Cal and F-PACT programs, and which are therefore able to "immediately enroll patients into" each program, J.A. 55, are excluded from the definition of licensed covered facilities. § 123471(c). Also exempted are

clinics that are operated by the federal government. *Id.*

The Act requires licensed covered facilities to provide clients with a two-sentence notice stating that:

> "California has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women. To determine whether you qualify, contact the county social services office at [insert the telephone number]."

§ 123472(a)(1).

Clinics may choose how to provide this notice: by including it with other digital notices at the time of check-in or arrival, by posting a sign in the waiting room, or by distributing a printed notice at any time during the visit. § 123472(a)(2). The notice may be given separately or "combined with other mandated disclosures." § 123472(a)(3). It must be provided in English and in the county's "primary threshold languages" for Medi-Cal beneficiaries, as "determined by the State Department of Health Care Services." § 123472(a). For clinics that choose to comply with the statute by distributing a printed notice, the notice must be in 14-point or larger type. § 123472(a)(2)(B). For those that choose to post the notice in the waiting room, the sign must be at least 8.5 inches by 11 inches and written in 22-point or larger font. § 123472(a)(2)(A). Violations are governed by the same penalty provisions that apply to unlicensed covered facilities.

3. Before the Act took effect, the three petitioners in this case challenged the law by suing California's

Governor and Attorney General, the County Counsel for San Diego County, and the City Attorney of El Cajon in the U.S. District Court for the Southern District of California. Pet. App. 84a-85a.

According to its Complaint, the National Institute of Family and Life Advocates is a non-profit organization comprised of both medical and non-medical centers that provide "pro-life information services" to women with unplanned pregnancies. Pet. App. 93a. Fallbrook Pregnancy Center is an unlicensed facility which provides pregnancy test kits, educational programs, and maternity clothes, and which provides ultrasound services through a licensed provider at another location. *Id.* at 92a. And Pregnancy Care Clinic is a state-licensed community clinic which provides "[m]edical" and "clinical" services such as ultrasound examinations, pregnancy testing, health provider consultation, information on natural family planning, and prenatal vitamins, as well as non-medical services such as peer counseling, maternity clothes, and support groups. *Id.* at 91a-92a.

Petitioners moved immediately for a preliminary injunction and did not request discovery. Their motion relied solely on the factual allegations in their verified complaint, Pet. App. 47a n.2, and argued that the Act's disclosure requirements violated petitioners' First Amendment rights to free speech and the free exercise of religion, *id.* at 49a.

4. The district court concluded that petitioners were unlikely to succeed on the merits of their claims. Pet. App. 56a-69a. The Act's unlicensed facility requirements, the court concluded, would withstand "any level of scrutiny," because disclosure of a facility's unlicensed status was narrowly tailored to achieve the compelling interest of ensuring that women know

whether or not they are receiving care from a licensed professional. *Id.* at 66a-67a.

With respect to the licensed facility provisions, the court noted that, while "the Act requires medical providers to advise their patients of various types of treatment available so patients are fully informed," Pet. App. 61a, the notice was "neutral as to any particular view or opinion," did not make any recommendation, and did not preclude clinics from expressing disagreement, *id.* at 64a-65a. The notice requirement applied only to licensed medical institutions that provide specific medical services, *id.* at 61a-62a, was no broader than necessary, and was constitutional under intermediate scrutiny, *id.* at 64a-65a.

The court further determined that public policy and the balance of hardships favored not granting a preliminary injunction. Pet. App. 69a-71a. And in rejecting petitioners' Free Exercise claim, the court found "no evidence to suggest the Act burdens only conduct motivated by religious belief." *Id.* at 68a.

5. The court of appeals affirmed. Pet. App. 1a-43a.

The court reasoned that the Unlicensed Facility Disclosure was "narrowly tailored" to serve the State's "compelling interest in informing pregnant women when they are using the medical services of a facility that has not satisfied licensing standards set by the state." Pet. App. 37a. Because the requirement would pass even strict scrutiny, the court did not determine whether a lower standard should apply. *Id.*

As to the Licensed Facility Disclosure, the court rejected petitioners' argument that the requirement discriminates based on viewpoint, reasoning that "the Act applies equally to clinics that offer abortion and contraception as it does to clinics that oppose those same services." Pet. App. 21a. It noted that this Court

upheld a state mandated message from physicians to patients in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), and that, consistent with *Casey*, it was appropriate to treat the Act's speech requirement like other regulations affecting speech in a professional context. Pet. App. 23a-28a; *see id.* at 30a (noting that "clients go to the clinic precisely because of the professional services it offers" and "reasonably rely upon the clinic for its knowledge and skill"); *id.* at 31a (observing that the notice contains information relating to the clinics' professional services and is provided as "part of the clinics' professional practice").

Because the Licensed Facility Disclosure was neither "treatment" itself (which would have been analyzed differently), nor part of a "public dialog" removed from particular patients' care (which would have been subject to strict scrutiny), the court reasoned that intermediate scrutiny applied. Pet. App. 31a-32a. The statute passed that test because it promoted public health while requiring from the clinics only what was necessary to alert women to the existence of the health-promoting services. *Id.* at 34a. Unlike laws that courts had struck down in other jurisdictions, the notice here did not "encourage, suggest, or imply that women should use" any service, *id.*, and did not suggest any governmental "preferences regarding prenatal care," *id.* at 36a. The court also rejected petitioners' claim that the Act discriminated against clinics that were motivated by religious belief. Pet. App. 40a-41a.

While the denial of preliminary relief was being considered on appeal, the case proceeded in the district court. On September 29, 2017, the district court dismissed Governor Brown as a defendant but otherwise denied the defendants' motions to dismiss. *See*

D.C. Doc. 62. Further district court proceedings have now been stayed at petitioners' request, pending this Court's decision. D.C. Doc. 67.

SUMMARY OF ARGUMENT

A woman seeking pregnancy-related advice and care should be able to know whether a facility that holds itself out as offering some such services is a licensed medical clinic capable of providing medical care, or a non-medical facility that can only provide something different and more limited. The First Amendment does not bar States from advancing that interest by requiring service providers to disclose a neutral statement of fact regarding the existence or not of a governmental license. Petitioners' further arguments about purported burdens posed by the statute's language and advertising requirements provide no basis for reversing the denial of a preliminary injunction, and were not in any event raised below.

The Licensed Facility Disclosure serves an equally compelling interest: It ensures that low-income women who are or may be pregnant have the information they need in order to seek, if they wish, the time-sensitive comprehensive medical care that is available through public programs. The statute is designed to reach an audience in need of such information at a critical moment. The carefully neutral, two-sentence notice is a permissible requirement in the relevant professional context, as confirmed by this Court's decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). This Court's compelled speech precedents do not bar the State from requiring such non-ideological statements of fact, delivered in a context featuring pervasive government-mandated notices that patients do not attribute to any clinic or physician, and in a manner which

will not interfere with or burden any clinic's own advocacy. The Act is not subject to strict scrutiny under this Court's precedents on content-based regulation, and it is not viewpoint discriminatory. In any event, although this Court's precedents do not require the application of strict scrutiny here, the Act's compelling purposes and close tailoring would satisfy even that standard.

ARGUMENT

I. THE UNLICENSED FACILITY DISCLOSURE IS CONSTITUTIONAL

A. The Disclosure Enables Women To Secure the Services They Deem Appropriate

"[T]o assure the protection of the public," California "requires that a person's competency [to provide healthcare] be determined by the state and evidenced by a license." *Magit v. Bd. of Med. Exam'rs*, 57 Cal. 2d 74, 85 (1961). Only physicians may practice medicine, and they must meet the Medical Board's strict qualifications and practice under that body's oversight. Cal. Bus. & Prof. Code §§ 2052, 2080-2433; *see generally Barsky v. Bd. of Regents of Univ. of State of N.Y.*, 347 U.S. 442, 451 (1954) (noting a State's "concern for maintaining high standards of professional conduct" with respect to physicians' "initial licensing" and "continuing supervision"). Although California permits various other healthcare professionals to provide certain services subject to the rules of their respective state licensing bodies, medical care is always provided by a physician or under a physician's close supervision.[16]

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[16] *See* Cal. Bus. & Prof. Code § 3502 and Cal. Code Regs., tit. 16,

Close regulation is necessary because physicians provide services and advice that are indispensable for the public but whose correctness and competence a layperson is usually unable to evaluate on his or her own. *Cf. Rosenberg v. Cahill*, 99 N.J. 318, 325 (1985) (discussing jurors' need for expert testimony to evaluate the appropriateness of medical care); *Kimmelman v. Morrison*, 477 U.S. 365, 378 (1986) ("A layman will ordinarily be unable to recognize counsel's errors and to evaluate counsel's professional performance."). Careful regulation allows and encourages individuals to "trust [the professional's advice] with confidence." *Dent v. West Virginia*, 129 U.S. 114, 128 (1889).

The State takes similar care in regulating entities through which medical care is provided. Medical clinics, for instance, are licensed under various sections of the Health and Safety Code, with the Department of Public Health prescribing rules regarding safety, sanitation, staff qualifications, and "standards for providing the services offered." § 1226(a). Although many interactions with patients occur through unlicensed personnel, medical or nursing care must occur with a licensed professional present, and under the supervision of a physician or registered nurse. Cal. Code Regs., tit. 22, §§ 75027, 75028. And clinics must designate a licensed physician as the "professional director," who has the responsibility to "[a]ssur[e] the quality" of medical services, *id.* § 75027, "[r]eview[] and approv[e] all protocols used by the clinic," *id.*, and

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§ 1399.541 (physician's assistants must provide care under physician's supervision); 66 Ops. Cal. Atty. Gen 427, 1983 WL 144830, at *8 (registered nurses may provide nursing services independent of a physician's supervision, but must provide other care under "supervision by [the] physician who ... bear[s] responsibility for treating [the] patient").

ensure that employees do not act outside of their qualifications, *id.* § 75029(b).

These requirements, imposed on the entities and people who provide healthcare, are a powerful guarantee of the quality of aid that those seeking services will receive. They justify patients' reliance on the advice and services provided. And they allow the State to entrust licensed clinics with the power to provide services for "the care and treatment of patients for whom the clinic accepts responsibility." Cal. Code Regs., tit. 22, § 75026.

Members of the public may assume that a facility whose name, advertising, appearance, and services resemble corresponding aspects of licensed medical providers is regulated under these provisions. *See* pp. 6-8 & nn.12-15. But the distinction is critical: Whatever their outward appearance, unlicensed institutions and individuals are not subject to the comprehensive regulation that governs physicians and licensed clinics. Disclosure of such an entity's unlicensed status ensures that women who seek state-licensed, professional medical care are not unwittingly diverted to facilities unable to provide it, and thus helps "women to seek the care they wish to obtain." J.A. 43. That, in turn, has important health implications. Misdirection is concerning in any context, but it can be especially dangerous for pregnant women of limited means. Work schedules, child-care needs, limited funds, and transportation difficulties can significantly constrain such a woman's ability to visit multiple facilities. A woman who wants a licensed professional but uses her limited available time to mistakenly go to an unlicensed facility may then be unable to schedule an actual medical visit until much later. The effect may be to subject her to significantly increased medical

risks and potentially even a complete inability to access some services, such as safe and lawful abortion.

B. The Disclosure Facially Satisfies *Zauderer* or Any Other Standard of Review

1. In *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985), this Court held that Ohio could not prohibit lawyers from including legal advice in their advertisements, *id.* at 644-647, but could require lawyers advertising contingency arrangements to disclose that clients might be liable for litigation costs if their cases were unsuccessful, *id.* at 650-653. The Court reasoned that there are "material differences between disclosure requirements and outright prohibitions on speech." *Id.* at 650. An advertisement that promised, "'if there is no recovery, no legal fees are owed by our clients,'" had a "self-evident" capacity to mislead a layperson unaware of the distinction between legal fees and litigation costs. *Id.* at 652. Although "unjustified or unduly burdensome disclosure requirements might offend the First Amendment," there is only a "minimal" constitutionally protected interest in not providing "factual and uncontroversial information" about "the terms under which [one's] services will be available." *Id.* at 651. *Zauderer* therefore held that "an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers." *Id.*

Consistent with *Zauderer*, this Court's opinions make clear the government's power to require disclosures that will eliminate potential confusion about the legal or professional status of one who offers services to the public. For instance, *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781 (1988), struck down various disclosures that would

have burdened the speech of paid charitable fundraisers (*see* p. 41, *infra*), but made clear that that a requirement for the fundraisers to "disclose unambiguously [their] professional" (meaning paid) status would "withstand First Amendment scrutiny." *Id.* at 799 n.11. And *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229 (2010), upheld a federal statute that required qualifying professionals to state in their advertisements that "'[w]e are a debt relief agency.'" *Id.* at 233; *see id.* at 250 (reasoning that the disclosure "entail[ed] only an accurate statement identifying the advertiser's legal status and the character of the assistance provided, and [did] not prevent debt relief agencies ... from conveying any additional information"). *See also Meese v. Keene*, 481 U.S. 465, 480 (1987) (stating that statutorily mandated disclosure of a film's connection to a federally registered agent of a foreign government would "better enable the public to evaluate the [film's] import"); *In re R.M.J.*, 455 U.S. 191, 201, 203, 205, 207 (1982) (distinguishing between warnings or disclaimers that "might be appropriately required ... in order to dissipate the possibility of consumer confusion or deception," and the State's impermissible effort to ban lawyers from advertising membership in "the Bar of the Supreme Court of the United States").

2. The Unlicensed Facility Disclosure consists of "purely factual and uncontroversial information about the terms under which [the facility's] services will be available." *Zauderer*, 471 U.S. at 651. It "entail[s] only an accurate statement identifying the advertiser's legal status and the character of the assistance provided, and [does] not prevent [the facility] from conveying any additional information." *Milavetz*, 559 U.S. at 250. It helps to "better enable [a woman] to evaluate" the services that she receives. *Keene*, 481 U.S. at 480; *see* J.A. 43 (disclosure "provid[es] context

for counseling given at these unlicensed facilities"). And it allows women to judge for themselves whether "'their own best interests,'" *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 578 (2011), would be served by supplementing the facility's non-medical services with medical care and advice from a licensed provider.

In these respects, the requirement advances interests similar to those served by a host of laws under which States require disclosure of a service-provider's non-professional status to prevent confusion. For instance, statutes and court rules require paralegals, notaries, and those providing immigration assistance to disclose to clients and the public that they are not lawyers.[17] Lawyers licensed in one jurisdiction may be required to disclose that they are not licensed to practice in another jurisdiction where they have an office.[18] And an alternative health practitioner may be required to disclose that he or she is "not a licensed physician" and that "the services to be provided are not licensed by the state."[19]

Reflecting the statute's focus on the heightened informational needs of pregnant women, the Unlicensed Facility Disclosure applies only to facilities that primarily serve those seeking pregnancy-related services. § 123471(b). In line with the Legislature's concern that women not mistake an unlicensed facility for a licensed medical provider, the disclosure requirement applies only to a facility that is unlicensed and does not provide care supervised by licensed providers,

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[17] *See, e.g.*, Ariz. Rev. Stat. § 41-329; Cal. Gov't Code § 8219.5(a); N.Y. Gen. Bus. Law § 460-c(1)(a); Tex. Gov't Code § 406.017(b); Ky. Sup. Ct. R. 3.700, sub-rule 7; N.H. Sup. Ct. R. 35-8; N.M. R. Ct. 20-104.

[18] *See, e.g.*, D.C. Rule of Prof. Conduct 7.5(b).

[19] Cal. Bus. & Prof. Code § 2053.6.

but whose activities—such as "obstetric ultrasounds," "prenatal care," "pregnancy testing or diagnosis," and "collect[ing] health information from clients"—could mislead or confuse women about whether the facility is licensed to provide medical care. § 123471(b). Unlicensed entities that provide services such as counseling, diapers and maternity clothes (Pet. Br. 4-5), but not additional services suggesting professional medical care, are not required by the Act to disclose anything.

The disclosure itself is limited and neutral, and contains no advice about what the woman should do. The woman alone decides whether the unlicensed status of an entity is pertinent to her needs. The disclosure neither states nor implies any opinion about the relative value of licensed and unlicensed facilities and any non-medical services they provide.[20] To the extent that the absence of a license implies a particular facility's inability to offer *medical* services, that is inherent in the system of licensing to begin with, and an unlicensed facility would be in violation of California law if it did provide such care.

Petitioners suggest that the State should address its concerns through various other approaches rather than the disclosure enacted here. Such an analysis generally is not required under *Zauderer*. *See Zauderer*, 471 U.S. at 651 n.14; *Bd. of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 476-477 (1989). In any event, a state-maintained registry of unlicensed pregnancy centers (Pet. Br. 57) would not necessarily

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[20] *Cf. Evergreen Ass'n, Inc. v. City of New York*, 740 F.3d 233, 250 (2d Cir. 2014) (striking down portion of ordinance requiring unlicensed facilities to state that the city health department "'encourages women who are or who may be pregnant to consult with a licensed provider'"); *Centro Tepeyac v. Montgomery Cty.*, 722 F.3d 184, 191 (4th Cir. 2013) (en banc) (similar).

be accessible or helpful to the women most likely to avail themselves of free pregnancy facilities and most likely to be confused or deceived by such centers' quasi-"medical" appearance and services. *Cf. Midland Funding, LLC v. Johnson*, 137 S. Ct. 1407, 1413 (2017) (misleading nature of a statement can depend on the audience's level of sophistication). Nor would such a registry inform women at the moment of service that a particular facility is not licensed. And the creation and maintenance of such a registry might require intrusions of a different sort—registration or monitoring of non-medical providers—that the Legislature could reasonably prefer to avoid.

Petitioners are similarly wrong to suggest (Pet. Br. 56) that it would necessarily be preferable, from a First Amendment standpoint, to prohibit the kinds of speech that could mislead women rather than require this simple one-sentence disclosure. A one-sentence disclosure that leaves unlicensed facilities otherwise free "to express whatever views they may have," *Rumsfeld v. Forum for Acad. & Inst'l Rights, Inc.*, 547 U.S. 47, 60 (2006), may well impinge on speech interests less than the monitoring and evaluation of the content of speech that petitioners' alternative would presumably entail. *See* p. 54, *infra*.

Hypothetical other approaches are especially irrelevant here because the record discloses no evidence that the disclosure will in fact burden petitioners' legitimate advocacy. Petitioners have every right to advocate their positions on family planning and abortion, both publicly and to individual women. But they do not have a right to attract women into their facilities based on confusion or deception about their ability to provide professional medical care—particularly when the consequences of such misdirection could so significantly affect those women's health and lives.

The only women whom the notice will dissuade from going to such a facility are those who would only have gone there because they were misled or confused.

3. The district court did not abuse its discretion by declining to preliminarily enjoin the Act based on allegations and arguments about the statute's language and advertising requirements that were not presented to that court or substantiated in the record.

Section 123472 provides that the Unlicensed and Licensed Disclosures must be provided "in English and in the primary threshold languages for Medi-Cal beneficiaries as determined by the State Department of Health Care Services for the county in which the facility is located." The statute also requires that the Unlicensed Disclosure must be "disseminate[d] to clients" both on-site and "in any print and digital advertising materials including Internet Web sites." § 123472(b).

These provisions serve important purposes. California contains substantial populations of low-income non-English speakers, for whom disclosures in English alone would be ineffective.[21] And given the socioeconomic circumstances of the women who are most in need of free services, a disclosure of unlicensed status that does not come until a woman has already mistakenly arrived at an unlicensed facility may be too late—she will already have used her limited time and money to travel to a non-medical provider, leaving her little ability, in the timeframe needed, to go to the licensed

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[21] *See* Cal. Dep't of Health Care Svcs., Frequency of Threshold Language Speakers in the Medi-Cal Population by County for January 2015, at 1 (Sept. 2016), http://www.dhcs.ca.gov/dataandstats/statistics/Documents/Threshold_Language_Brief_Sept2016_ADA.pdf (38% of the Medi-Cal population reports a primary language other than English).

provider she really sought. *See* p. 6, *supra*. The district court did not abuse its discretion in denying preliminary relief against these provisions, because neither the face of the Act nor any evidence in the record shows that these benefits are outweighed by burdens the provisions impose.

Petitioners' current contention that the language requirement is unduly burdensome because it will require notices in multiple languages—13 in Los Angeles County, and six in San Diego County (Pet. Br. 2, 11-12, 38)—was never put before the district court and is not supported by any evidence in the current record. *See* D. Ct. Doc. 3 (Motion); D. Ct. Doc. 17 (Reply); Pet. App. 85a-122a (Complaint). The district court record likewise contains no specific allegation resembling petitioners' contention (Pet. Br. 39) that the advertising requirement will make advertising impossible or unaffordable.[22] That court thus had no reason to explore whether any burdens were disproportionate to the purposes of these provisions, and the State had no opportunity to produce relevant evidence of its own. Under these circumstances, this Court has no basis to reverse. *See Taylor v. Illinois*, 484 U.S. 400, 410–411 (1988) ("The adversary process [cannot] function effectively without adherence to rules of procedure that govern the orderly presentation of facts and arguments to provide each party with a fair opportunity to

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[22] *See* Pet. App. 100a (alleging generally that web advertisements on services such as Google "have limits on their size, such as in the number of characters that can be used," but providing no information about what those limits are or how petitioners' advertisements would be affected, or what newspaper advertising costs might be); D. Ct. Doc. 51, at 20 (Jan. 28, 2016, Tr.) (court's observation about the absence of information in the record regarding "what [the plaintiffs'] advertisements say and how they might be impacted by the disclosure required by the statute").

assemble and submit evidence to contradict or explain the opponent's case.").

As the district court case proceeds to final judgment, petitioners will have ample opportunity to properly raise these issues for judicial decision. And the district court, in turn, will have an opportunity to determine issues of jurisdiction and statutory meaning preliminary to any decision on the merits.[23] If petitioners substantiate their allegations of burden, then the district court would be well-positioned to consider an appropriate remedy that would alleviate the burden and give effect to the statute's severability clause. Pet. App. 82a-83a. But the district court did not abuse

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[23] Petitioners would need to submit evidence establishing their standing to raise challenges based on requirements imposed in Los Angeles County. *Compare Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (noting plaintiff's burden to establish standing at each stage of the case), *with* Pet. App. 89a (specific geographic allegations regarding only San Diego County plaintiffs); *see also Virginia v. Hicks*, 539 U.S. 113, 119-120 (2003) (plaintiff seeking relief under overbreadth doctrine must show that a law's unconstitutional applications are "'substantial'" in comparison to its constitutional applications). If there is standing, the district court would need to consider whether, under California law, a clinic could satisfy the statute's informational purposes and achieve full or "substantial" compliance by, for example, including the disclaimer on the website to which a search-engine advertisement links, rather than as part of the search-engine advertisement itself. *See, e.g., City of Santa Monica v. Gonzalez*, 43 Cal. 4th 905, 925 (2008). And the district court would similarly need to determine whether full or substantial compliance with the language requirement requires printed statements in *every* Medi-Cal threshold language, as petitioners maintain, or only in the few most important languages, as § 123472's use and placement of the modifier "primary"—which is atypical of California statutes and regulations referencing Medi-Cal threshold languages—could imply. *Cf., e.g.*, §§ 128552, 128565; Ins. Code § 10112.8(c)(5); Bus. & Prof. Code § 1971(f); Cal. Code Regs., tit. 9, § 1810.410(a)(3).

its discretion by failing to enter a preliminary injunction on the basis of arguments that were never made, let alone substantiated, before it, and there is no reason for this Court to consider those arguments in the first instance. *See generally, e.g., Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144, 1151 (2017) ("'We are a court of review, not of first view.'").

II. THE LICENSED FACILITY DISCLOSURE IS CONSTITUTIONAL

Petitioners also challenge Section 123472(a)'s requirement that licensed medical clinics must provide patients with a notice disclosing the existence of publicly funded full-service healthcare programs. The two-sentence Licensed Facility Disclosure provides neutral information of great importance, in a manner consistent with the State's ability to regulate in the professional context. It is just one of a number of non-ideological notices required in the healthcare field, which will not be misattributed to petitioners and will not interfere with their own message. And although this Court's precedents on content-based regulation and viewpoint discrimination do not require the application of strict scrutiny here, the Act would satisfy even that standard, in light of the interests the law advances and the narrow tailoring it reflects.

A. The Disclosure Provides Vital Factual Information to a Specific Population at a Critical Point

In healthcare, information can "save lives," *Sorrell*, 564 U.S. at 566, permit "alleviation of physical pain," *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 763-764 (1976), and enable people to act in "'their own best interest,'" *Sorrell*, 564 U.S. at 578. Information about how to receive prenatal care lessens the risk of illness, mortality, miscarriage, and birth defects. *See* p. 3, *supra*. And

information about contraception and abortion allows women to decide whether and when to obtain legal medical treatments concerning "intimate and personal choices ... central to personal dignity and autonomy." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992) (plurality opinion of O'Connor, Kennedy, and Souter, JJ.).

The Act is crafted to address the needs of a narrow class of women in great need of information. Information concerning state-funded prenatal care, family planning, and abortion is appropriately targeted to clinics whose "primary purpose" is the provision of "family planning or pregnancy-related services," including clinics that provide abortions. § 123471(a) & (a)(5). Because the disclosures are especially relevant to low-income women unable to pay for care on their own, they are targeted to "free clinic[s]" that do not charge patients for services or drugs, and to "community clinic[s]" that accept payment on a sliding scale based on ability to pay. § 1204(a)(1)(A), (B). In short, the statute gets information to women who are most likely to need it at the time when it will most likely be noticed and useful.[24]

For a woman whose informational needs are being met by the counseling she receives at a clinic bearing the notice, the disclosure will have little effect. She will not call the phone number on the notice, and the notice certainly will not dissuade her from continuing to work with the clinic. But for a woman who is dissatisfied, who has been misled, or who did not previously understand the availability of other low-cost sources of advice or care, the notice may be of great

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[24] *Cf. Sorrell*, 564 U.S. at 578 (listeners considered "targeted" promotional activities "'very helpful'").

importance. For her, the notice's brief acknowledgment of free and low-cost programs offering a comprehensive range of care ensures her ability to "access ... a multiplicity of information sources"—"a governmental purpose of the highest order." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 663 (1994). Indeed, some women who greatly value the clinic's services and counseling may still benefit from the notice's information about ways to supplement those services with additional sources of care.

At the same time, the Legislature crafted the disclosure requirement in a manner that fully respects a clinic's ability to limit what services it will provide or endorse. The Act does not require any clinic to provide, discuss, or refer for any service. Clinics must provide only the barest notice of how the *patient* may access information about eligibility for public programs providing comprehensive reproductive healthcare should *she* choose to do so. And the Act's flexibility allows clinics to provide that notice in a manner that will not limit their ability to engage in their own advocacy.

California respects petitioners' desire not to associate themselves with, or express any moral approval of, contraception or abortion. The Licensed Disclosure does not urge women to seek any particular type of care or imply anything about the care that would be appropriate for any particular woman. The mere statement that patients may have a method by which to access comprehensive care, including family planning and abortion, through a public program does not suggest that they should seek or obtain any particular form of care. And it does not put the licensed facility in the position of associating itself with any services it does not wish to provide.

The Act strikes a balance between women's interest in not being deprived of vital healthcare information by the licensed practitioners whom they entrust with their care, and practitioners' interest in avoiding activities that conflict with their personal beliefs. California, like many States, works hard to devise solutions that reduce the severity of any conflict between a professional's interest in adhering to her personal beliefs and a patient's need for complete care and accurate information. *See, e.g.*, § 123420 (prohibiting healthcare employers and schools from disciplining those who refuse to perform or assist with abortions, and allowing religiously affiliated hospitals to refuse to provide abortions if they inform consumers of their policy). This statute fits within that pattern and is, in fact, less onerous than ethical standards recognized by the relevant professional community.[25] As demonstrated below, nothing in this Court's precedent precludes this modest effort to provide needed information at minimal burden to licensed facilities that choose to limit the services that they themselves will provide.

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[25] *See, e.g.*, Comm. on Adolescence, Am. Acad. of Pediatrics, Counseling the Adolescent About Pregnancy Options, 101 Pediatrics 938, 939 (1998) ("[t]he pediatrician should discuss ... all three options"—"[c]arrying her pregnancy to delivery and raising the baby"; "[c]arrying her pregnancy to delivery and placing the baby for adoption"; and "[t]erminating her pregnancy"—or should "refer the adolescent to a health care professional who will discuss all three options"); *cf.* Comm. on Ethics, American College of Obstetricians & Gynecologists, The Limits of Conscientious Refusal in Reproductive Medicine (2007, reaffirmed 2016), https://www.acog.org/-/media/Committee-Opinions/Committee-on-Ethics/co385.pdf.

B. The FACT Act's Limited, Neutral Disclosure Requirement Is Permissible in Its Professional Context

1. The court of appeals upheld the Licensed Disclosure as a permissible regulation of professional speech. Pet. App. 25a-36a. Applying the First Amendment in this context requires sensitivity to how speech functions in a professional's practice. *See Lowe v. SEC*, 472 U.S. 181, 207-208 (1985); *id.* at 227-233 (White, J., concurring); *Thomas v. Collins*, 323 U.S. 516, 544-548 (1945) (Jackson, J., concurring). Much of what some professionals do—such as a physician's treatment recommendations, or an attorney's advice and advocacy—occurs through speech. In such contexts, the First Amendment must be applied so as to ensure that "the power of government to regulate the professions is not lost" simply because "the practice of a profession entails speech." *Lowe*, 472 U.S. at 228 (White, J., concurring).

This Court has never directly articulated the test that should apply to speech requirements in such cases. In *Casey*, however, this Court considered the constitutionality of a Pennsylvania statute that, among other things, required medical professionals to deliver certain state-specified information to patients seeking an abortion. Some of the information pertained to the "'nature of the proposed procedure'" and material "'risks and alternatives.'" 505 U.S. at 902 (plurality opinion) (quoting 18 Pa. Cons. Stat. § 3205(a)(1)). But the statute also required that each woman seeking an abortion be informed that:

> "(i) The [Pennsylvania Department of Health] publishes printed materials which describe the unborn child and list agencies which offer alternatives to abortion and that she has a right to review

> the printed materials and that a copy will be provided to her free of charge if she chooses to review it.
>
> "(ii) Medical assistance benefits may be available for prenatal care, childbirth and neonatal care, and that more detailed information on the availability of such assistance is contained in the printed materials published by the department.
>
> "(iii) The father of the unborn child is liable to assist in the support of her child, even in instances where he has offered to pay for the abortion.* * * *"

Id. at 903 (quoting Pa. Cons. Stat. § 3205(a)(2)).

Beyond simply informing women of the availability of state-provided printed materials, the law required the clinic to itself provide a copy of those state publications to any woman who asked. 505 U.S. at 903 (quoting Pa. Cons. Stat. § 3205(a)(3)).

This Court upheld those requirements. *See* 505 U.S. at 884-885 (plurality opinion); *id.* at 968-969 (Rehnquist, C.J., concurring in the judgment and dissenting in part). As the United States observes, *Casey* did not establish a special First Amendment test for speech concerning abortion. U.S. Br. 18-19. Instead, the plurality opinion considered the constitutionality of the disclosure requirement in light of its professional character and context. The medical providers objected that the State was requiring them to disclose information "beyond the expertise of medical professionals" and that the requirements could not withstand First Amendment scrutiny.[26] The plurality

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[26] Br. for Petitioners, *Casey*, 1992 WL 12006398, at *9, *53-55.

opinion concluded, however, that there was "no constitutional infirmity." 505 U.S. at 884. Although the physician's "First Amendment rights not to speak [were] implicated" by the statute, they were affected only "as part of the practice of medicine, subject to reasonable licensing and regulation by the State." *Id.* The requirement was constitutional because ensuring knowledge about "the availability of information relating to ... the assistance available should [the woman] decide to carry the pregnancy to full term" was "reasonable ... to ensure [her] informed choice." *Id.* at 883.

The Licensed Facility Disclosure here is, if anything, less burdensome and problematic than the disclosures that *Casey* upheld. The law in *Casey* required physicians or clinics themselves to give patients, upon request, state-prepared publications containing extensive state messages. California's statute requires only a two-sentence notice that services are available to eligible women through public programs and that a county office can provide more information if it is desired. The law upheld in *Casey* required that detailed information be personally given by the physician or her designee. California's law offers clinics multiple ways to deliver the relevant notice. The mandatory disclosure in *Casey* addressed only alternatives to abortion, and signaled that abortion was a disfavored choice. The California disclosure neutrally notes the availability of state-funded programs providing a full range of care—prenatal care, family planning, and abortion. Finally, California's law contains nothing similar to the *Casey* statute's requirement that disclosures be delivered at a time (at least 24 hours before an abortion, 505 U.S. at 844) that increased the burdens on speakers and listeners alike and required additional appointments and travel.

2. The factors justifying special treatment of speech claims in the professional context are present in this case.

A central factor distinguishing the professional context from others is that a professional "takes the affairs of [a client] personally in hand and purports to exercise judgment on [the client's behalf] in the light of his individual needs or circumstances." *Lowe*, 472 U.S. at 232 (White, J., concurring). This applies to Licensed Covered Facilities—which by definition are licensed to provide services "for the care and treatment of patients for whom the clinic accepts responsibility." Cal. Code Regs., tit. 22, § 75026 (governing clinics licensed under Health & Safety Code § 1204).

A disclosure does not lose its professional nature in this respect simply because it is made by a non-physician or can take place in writing. *See, e.g., Casey*, 505 U.S. 902-903. The State's ability to regulate healthcare providers extends beyond physicians, "to the regulation of all professions concerned with health." *Barsky*, 347 U.S. at 449. California law, in any event, ensures that disclosures made by others at the clinic, like all interactions between patients and clinic employees, are ultimately under the supervision and authority of the "licensed physician" who has been designated as the clinic's "professional director," and who has the responsibility to "[a]ssur[e] the quality" of medical services provided to all patients, and "[r]eview[] and approv[e] all protocols used by the clinic." Cal. Code Regs., tit. 22, § 75027. The Licensed Disclosure's effect on First Amendment rights therefore occurs as part of the overall "regulation" of physicians in "the practice of medicine." *Casey*, 505 U.S. at 884. California law permits the disclosure to be made by a physician. Allowing it to be made as well by another employee—or by a posted sign—simply permits

the clinic (at the physician director's discretion) to deliver the disclosure in whatever manner it considers least burdensome.

The duty to obtain informed consent (Pet. Br. 46-48) is not the only informational duty medical professionals owe to their patients. Patients may depend upon medical professionals for assistance in understanding a variety of issues—such as whether the patient is eligible for clinical trials.[27] Physicians must also tell patients or others about financial conflicts of interest and about potential consequences that a medical condition could have on third parties.[28] If physicians may not be required to disclose information about financial aspects of healthcare decisions, then it is hard to understand *Casey*'s determination that Pennsylvania could require physicians to distribute state-printed pamphlets on adoption and child support as part of its "regulation" of "the practice of medicine." 505 U.S. at 884.

3. There is no merit to petitioners' argument (Pet. Br. 16, 47-48) that speech claims in the professional context are subject to a stricter standard of review if the professional does not charge for the services rendered. The question of whether providers charged for abortions was not discussed in *Casey*, although it appears that some of the abortions at issue may have

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[27] *See* Bruce, et al., Clinical Case: Is There a Duty To Inform Patients of Phase I Trials, 11 Virtual Mentor: Am. Med. Assoc. J. Ethics 207, 209 (2009).

[28] *E.g.*, Cal. Bus. & Prof. Code §§ 654.2, 650.02 (conflict of interest disclosures); *Tarasoff v. Regents of the Univ. of Cal.*, 17 Cal. 3d 425 (1976) (duty to disclose information that will protect someone whom a patient may harm).

been performed without charge.[29] Although petitioners claim that a special rule for noncharging professionals is appropriate under *In re Primus*, 436 U.S. 412 (1978), and *NAACP v. Button*, 371 U.S. 415 (1963), neither case supports that view. *See* U.S. Br. 20-24.

Button held that Virginia could not punish the NAACP for soliciting potential plaintiffs to file civil rights lawsuits with the NAACP as counsel. 371 U.S. at 428-444. *Primus* held that a State could not discipline an attorney for informing a forced-sterilization victim that the ACLU might represent her for free. 436 U.S. at 416-421. In each case, the "solicitation of prospective litigants ... for the purpose of furthering [the organization's and its members'] objectives" fell squarely "within the right 'to engage in association for the advancement of beliefs and ideas.'" *Id.* at 423-424 (quoting *Button*, 371 U.S. at 430); *see Button*, 371 U.S. at 430 (discussing "constitutional protection for ... cooperative, organizational activity").

Thus, under *Primus* and *Button*, interference with an organization's associational right to attract members and allies for collective action through litigation receives "'exacting scrutiny'" in order to avoid "'unnecessary abridgment of associational freedoms.'" *Primus*, 436 U.S. at 432; *see United Transp. Union v. State Bar of Mich.*, 401 U.S. 576, 585 (1971) (*Button* concerned the "right to group legal action"). The cases did not turn on whether the professionals involved charged for their services. They rested instead on concern about government preventing people from banding together with the aid of professionals to undertake

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[29] *See Planned Parenthood of Se. Penn. v. Casey*, 744 F. Supp. 1323, 1338 (E.D. Pa. 1990) (noting that one plaintiff-clinic never turned away patients because of their inability to pay).

public advocacy in pursuit of common goals. That principle has no apparent application to this case.

Petitioners' proposed rule would be inappropriate, because a client's need for competent, objective, and confidential legal advice, or a patient's need for competent and complete medical advice, does not change based on payment of a fee. *See* U.S. Br. 20-21. To the extent that the presence or absence of a profit motivation may affect the need for a particular regulation, that possibility may be better accounted for under general standards rather than through any categorical rule regarding non-profit professional practice. Here, women who have sought free medical care from licensed clinics that choose to provide a limited range of services are not less likely than their paying counterparts to benefit from a notice about the potential availability of comprehensive, publicly funded services. To the contrary, they are more likely to need that information.

C. The Disclosure Requirement Is Consistent with This Court's Compelled-Speech Precedents

Petitioners argue primarily that the Act is invalid as compelled speech under this Court's precedents. Pet. Br. 22-28. But the Licensed Facility Disclosure is a brief, non-ideological notice that readers will quickly identify as simply one of many government-mandated notices in the healthcare context. The flexibility built into the Act also allows clinics to present the disclosure in a manner that poses no significant burden to the clinic's own message. This limited notice requirement is consistent with this Court's precedents on compelled speech.

1. The Act Does Not Require a Statement or Endorsement of Belief

The "'heart of the First Amendment'" is the principle that "'each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence.'" *Agency for Int'l Dev. v. Alliance for Open Soc'y*, 570 U.S. 205, 213 (2013) (quoting *Turner*, 512 U.S. at 641). This Court is thus especially wary when the government attempts to "compel the endorsement of ideas that it approves." *Knox v. Svc. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 309 (2012). The notice at issue here is nothing like the types of compelled statements that this Court has disapproved on that ground.

West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943) (discussed in Pet. Br. 23-24, 58), considered whether the First Amendment permitted a State to require public school students to salute the flag while reciting in unison a pledge of "allegiance" to the flag and the United States. *Id.* at 626 n.2. West Virginia's policy effectively compelled students to "declare a belief," affirm a "slogan," and "communicate ... acceptance of the political idea[]" of "adherence to government as presently organized." *Id.* at 631, 633. *Barnette* held that participation in a "ceremony so touching matters of opinion and political attitude" could not be constitutionally imposed. *Id.* at 636. The decision is "inapposite" to cases that, like this one, do not "involve[] the compelled recitation of a message containing an affirmation of belief." *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 88 (1980).

Wooley v. Maynard, 430 U.S. 705 (1977) (discussed in Pet. Br. 1, 23-25), held that it was unconstitutional for New Hampshire to require drivers to display, on their license plates, the state motto "'Live Free or Die.'"

Id. at 707. The State was compelling its residents to display an "ideological message." *Id.* at 713, 715. As in *Barnette*, the constitutional error was in requiring an individual to serve as "an instrument for fostering public adherence to an ideological point of view." *Id.* at 715; *see id.* at 717 (describing state motto as "an official view as to proper appreciation of history, state pride, and individualism").

Most recently, in *Agency for International Development*, the Court considered a statute which made federal funding available only to organizations with "'a policy explicitly opposing prostitution and sex trafficking.'" 570 U.S. at 208. The statute, which forced grantees to "profess" and officially "adopt" a "belief," *id.* at 218, was unconstitutional for the same reason as the pledge-of-allegiance requirement in *Barnette*, *id.* at 220-221.

Unlike the regulations at issue in *Barnette*, *Wooley*, and *Agency for International Development*, California's law requires no affirmation, express or implied, of private agreement with a government-favored viewpoint or position. Nor does it burden the clinics' speech by requiring the retaliatory distribution of private, ideologically-opposed speech. *Cf. Pac. Gas & Elec. Co. v. Public Utils. Comm'n of Cal.*, 475 U.S. 1, 12 (1986) (plurality opinion).[30] Instead, it requires only notification of purely factual information stated in a way that is "truthful and not misleading." *Casey*, 505 U.S. at 882 (plurality opinion). California's requirement does not implicate the concerns raised

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[30] In *Pacific Gas*, this Court disapproved of a regulator's decision to respond to a utility's distribution of a publication containing "political editorials" by forcing it to replace that publication with one from an organization that opposed the utility in ratemaking proceedings. *Id.* at 5.

where the government requires physicians to tell patients inaccurate or disputed "facts" designed to steer the patient's decision one way or another, or requires disclosures whose content and context are calculated to inspire emotional distress or revulsion.[31] To be sure, contraception and abortion are the subject of vigorous debates encompassing disputes on a variety of moral, religious, and factual issues. But the phone number and factual existence of the public programs noted in the Licensed Facility Disclosure are not subject to dispute. Nor do they imply the desirability or undesirability of abortion or any form of contraception, either in general or in any particular case. The only way that such a limited disclosure could be "opposite" (Pet. Br. 38) to a factual assertion by a clinic would be if the clinic were deceiving women about the existence of such programs.

In *Rumsfeld*, for instance, universities opposed to federal military policies on gay and lesbian personnel challenged a law that required them to send messages such as "'[t]he U.S. Army recruiter will meet interested students in Room 123 at 11 a.m.'" 547 U.S. at 62. Notwithstanding vigorous debate about military

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[31] *Cf. Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 726 (8th Cir. 2008) (en banc) (discussing required disclosure that abortion subjects a woman to a risk of suicide and "'will terminate the life of a whole, separate, unique, living human being,'" with whom the woman "'has an existing relationship ... enjoy[ing] protection under the [federal] Constitution and [state law]'"); *Stuart v. Camnitz*, 774 F.3d 238, 255 (4th Cir. 2014) (disclosure delivered during invasive procedure and intended to express "moral condemnation"); *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1216 (D.C. Cir. 2012) (disclosure featuring graphic medical images "intended to evoke an emotional response"), *overruled by Am. Meat Inst. v. USDA*, 760 F.3d 18 (D.C. Cir. 2014) (en banc). *See generally Casey*, 505 U.S. at 936 n.7 (Blackmun, J., concurring and dissenting).

policies, the facts stated in such messages were not a subject of dispute. And compelling a law school to send such messages was "simply not the same as forcing a student to pledge allegiance, or forcing a Jehovah's Witness to display the motto 'Live Free or Die.'" *Id.* The compelled statement of fact was "subject to First Amendment scrutiny," *id.*, which consisted of careful consideration of the burdens involved. Those burdens were revealed to be insubstantial, and the law was upheld. *See* pp. 40, 43-45, *infra*.[32]

Similarly, in *Riley*, this Court considered several disclosures that North Carolina required hired charitable fundraisers to make as part of their solicitations. 487 U.S. at 786. The Court held unconstitutional a requirement for fundraisers to disclose their historical compensation—in part because such a disclosure tended to imply certain charities' inferiority and hamper their solicitation efforts. *Id.* at 799-800 (noting that "small or unpopular charities" would be more likely to rely on professional fundraisers whose costs would have to be disclosed and would discourage donors, whereas larger and more popular charities could rely on employees and volunteers). In contrast, *Riley* explained, a requirement for charitable solicitors to "disclose unambiguously [their] professional status" would "withstand First Amendment scrutiny." *Riley*, 487 U.S. at 799 n.11. The latter requirement (like the statute's requirement that paid fundraisers divulge their names and addresses, *see id.*) did not tend to imply the superiority or inferiority of any particular speaker. It thus did not burden anyone's speech, much like the Licensed Disclosure Requirement here.

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[32] Although the challenged policy was implemented as a funding condition, *Rumsfeld* did not rely on any extra deference that might have resulted from analyzing it as a funding restriction. *Id.* at 59-60.

2. The Delivery of Governmental Notices in Healthcare Does Not Hamper Clinics' Ability To Present Their Own Messages

1. The disclosure required by the FACT Act is simply one among many government-mandated notices in the healthcare context. The notice's content—which states only that programs covering certain services are provided by the State of California—will be understood as coming from the State. There is little or no risk that it will be misunderstood as undercutting, or implying anything about, the clinic's own views.

Patients visiting medical or dental facilities see many government-prescribed notices and disclosures. Some disclose information about the medical professionals who provide and supervise the facility's services.[33] Others inform patients of the provider's legal duties and of patients' rights.[34] Additional notices

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[33] *E.g.*, Cal. Code Regs., tit. 16, § 1355.4 (requiring physicians to post a notice informing patients that "Medical doctors are licensed and regulated by the Medical Board of California" and providing the Board's phone number and web address); *id.* § 1611.3 (similar requirement for dentists); *id.* § 1399.547 (similar requirement for physician's assistants).

[34] *E.g.*, 45 C.F.R. § 164.520(b)(1) (notice regarding privacy); 42 U.S.C. § 1395cc(a)(1)(N)(iii) (notice about emergency room duty to provide care); Cal. Code Regs., tit. 16, § 1707.6 (required pharmacy postings).

warn about dangerous substances used in treatments.[35] And others are included with pharmaceuticals that the clinic dispenses.[36] Indeed, government-mandated disclosures are particularly prevalent in the pregnancy context, where there is a special need to familiarize patients with information that prior experience may not have exposed them to.[37]

Patients understand that a clinic's role in serving as a conduit for such notices is not self-expression. *See Rumsfeld*, 547 U.S. at 64 ("A law school's recruiting services lack the expressive quality of a parade, a newsletter, or the editorial page of a newspaper...."). [38] Thus, although California's law leaves clinics entirely free to expressly disavow the notice, *see PruneYard*, 447 U.S. at 87-88 (distinguishing *Barnette* from cases

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[35] *E.g.*, Cal. Office of Environ. Health Hazard Assessment, Dental Warnings, https://www.p65warnings.ca.gov/places/dental-office (last visited Feb. 19, 2018).

[36] *See* 21 C.F.R. pt. 201 (prescription drug label requirements).

[37] *See, e.g.*, Tex. Health & Safety Code § 161.501(a) (requiring healthcare workers to provide to pregnant women, during gestation or at delivery, a pamphlet concerning postpartum depression, safe baby care, and childhood diseases and vaccinations); 410 Ill. Comp. Stat. 253/4 (requiring hospitals to distribute to all new parents a pamphlet about immunization); Cal. Health & Safety Code § 1204.3(a)(5) (requiring birthing centers to deliver summary of child-car-seat laws, list of car-seat installation programs, and information about the risks of not using a car seat).

[38] Private law schools deliver highly opinionated speech on a variety of social and political issues—including (for some) speech directly at odds with the military recruiting policies giving rise to the dispute in *Rumsfeld*. What mattered, in this Court's analysis, was not the expressive context of the law schools' overall activity, but rather the particular activity (hosting recruiters) in which the school was required to host the government's message. *Id.*

where objectors are "free to publicly dissociate themselves" from the objected-to message), no "disavowal" should be necessary, because the required notice does not suggest any "avowal" in the first place. Just as "[n]othing about recruiting suggests that law schools agree with any speech by recruiters," *Rumsfeld*, 547 U.S. at 65, nothing about medical practice implies that any particular disclosure represents a physician's or clinic's personal choice. *See id.* at 61-62 (rejecting challenge to federal law that effectively required schools to "send e-mails or post notices on bulletin boards" providing information on the federal recruiters' behalf, based in part on the low risk of any compelled message being misattributed to the schools themselves); *Pruneyard*, 447 U.S. at 87 (upholding requirement that shopping centers be open for protest, based in part on the judgment that, in the shopping-center context, views expressed by protestors would "not likely be identified with those of the owner").

Indeed, a medical provider's transmission of such messages is not necessarily expression at all. The act of delivering what is clearly a government notice transmitted in response to legal requirements—particularly where that notice is non-ideological and does not amount to "a Government-mandated pledge or motto"—can be properly recognized as expressive conduct, subject at most to the intermediate scrutiny test of *United States v. O'Brien*, 391 U.S. 367 (1968). *Rumsfeld*, 547 U.S. at 62, 65-66; *cf. Turner*, 512 U.S. at 661-662 (applying *O'Brien* test to statute requiring cable systems to transmit signals of local broadcasters).

2. Like the recruiting assistance required in *Rumsfeld*—and the myriad disclosure requirements to which licensed medical providers are already subject—compliance with the Licensed Clinic Disclosure

requirement is a "minimal" accommodation that requires little effort and no significant monetary expenditure. *Rumsfeld*, 547 U.S. at 61 n.4. Petitioners do not claim that compliance will divert resources or staff time that would otherwise be spent on the clinic's own speech. Nor, especially given the flexible options for delivery, is there any chance that the required notice might crowd out clinics' own message from a limited space. *Cf. Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256-257 (1974).

Petitioners argue that the Licensed Disclosure undercuts the effectiveness of their messages. Pet. Br. 37-38. But when seeking a preliminary injunction, petitioners did not support that speculation with any concrete evidence of harm. *Cf. Turner*, 512 U.S. at 668 (opinion of Kennedy, J.) ("unless we know the extent to which the must-carry provisions in fact interfere with protected speech, we cannot say whether they suppress 'substantially more speech than ... necessary' to ensure the [government goal]"). Without such evidence, there is no basis for finding any actual suppression of speech. *Compare McCullen v. Coakley*, 134 S. Ct. 2518, 2528 (2014) (bench trial that developed record of suppressed speech), *and Sorrell*, 564 U.S. at 561, 564-565 (similar), *with Zauderer*, 471 U.S. at 653 n.15 (rejecting challenge where there was no "factual basis for finding that Ohio's disclosure requirements are unduly burdensome").[39]

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[39] This case is unlike *Arizona Free Enterprise Club's Freedom PAC v. Bennett*, 564 U.S. 721 (2011), in which a campaign-donation-matching statute mathematically ensured that speech by one person would result in equal opposing speech, *id.* at 737-738, and in which there was direct evidence that the state law was causing people to forgo speech, *id.* at 744. Petitioners do not allege that the disclosure requirement will cause them to desist from their anti-abortion advocacy. Nor would such a claim be

Petitioners' challenge therefore rests mainly on two claims. First, they assert that the Licensed Disclosure applies "*at the very beginning* of a pregnancy center's interaction with expectant mothers." Pet. Br. 1 (emphasis added); *see id.* at 37 (alleging that clients will "see signs referring for free and low-cost abortions before even getting to the front desk or speaking with Petitioners' staff"); *id.* at 38. But that rests on a misconception. As petitioners admit (Pet. Br. 38), the Act does not require anything in the waiting room or at the outset of a patient visit. Petitioners may choose to give the notice in that manner. But they may alternatively choose to include the notice among other electronic disclosures or to hand the patient a printed notice whenever the clinic deems best. § 123472(a)(2). And many pregnancy centers' first interactions will have occurred long before patients are at the clinic—during phone calls or online interactions in which the disclosure need not be provided at all.

Second, petitioners repeatedly maintain that the law in effect requires them to refer patients for abortion. Pet. Br. 8-11. But the Licensed Facility Disclosure does not recommend abortion as an appropriate option for any patient. Nor does it recommend any provider of abortions. Indeed, it does not even state that the phone number given will lead to information on abortion providers—only information on an individual's eligibility for state-funding of a spectrum of services that includes abortion. Like the host of other

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plausible. The statute simply requires disclosure of the fact that public programs exist which fund prenatal care, family planning, and abortion for eligible women. Clinics could not reasonably contend that such a statement would make their own much more extensive and pointed communications ineffectual or counterproductive.

notice requirements governing medical clinics, the Licensed Facility Disclosure imposes no more than the minimally-necessary burden on petitioners to ensure that their patients have a chance to obtain further information about access to additional services if they wish to do so.

3. *Reed* Does Not Change the Analysis

Petitioners argue that the Licensed Disclosure is subject to strict scrutiny under *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015). Pet. Br. 28-31. As the United States correctly shows (U.S. Br. 19-20), it is not.

Reed considered a challenge to a law which "identifie[d] various categories of signs based on the type of information they convey[ed], then subject[ed] each category to different restrictions" concerning size and the times that the sign could appear. *Reed*, 135 S. Ct. at 2224. As relevant here, *Reed* explained that "[g]overnment regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Id.* at 2227.

That analysis pertains to a law that "'on its face' draws distinctions based on the message a speaker conveys," or, more subtly, "defin[es] regulated speech by its function or purpose." *Reed*, 135 S. Ct. at 2227.[40]

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[40] *Reed* also explained that a law that is content-neutral on its face may be "considered content-based" if it "cannot be justified without reference to the content of the regulated speech" or was "adopted by the government because of disagreement with the message ... convey[ed]." *Id.* (internal quotation marks omitted). The disclosure requirement at issue here is justified by the need to inform women of the potential availability of comprehensive, free or low-cost reproductive healthcare—which relates to the status of women visiting facilities that focus on providing family

The sign ordinance in *Reed* was content based under that definition because the legal duties of someone posting a sign could be determined only by examining the message on the sign. *See id.* at 2231 ("come election time, [the ordinance] requires Town officials to determine whether a sign is 'designed to influence the outcome of an election' ... or merely 'communicating a message or ideas for noncommercial purposes'"). Here, a clinic's legal duties depend on its status and actions: the license it holds and the services it provides.

Petitioners argue that the disclosure requirement is content based because "[t]he State has prescribed precise words that Petitioners must say." Pet. Br. 18. That theory would require courts to apply strict scrutiny to all disclosure requirements, regardless of the disclosure's purpose or context. It would require overruling this Court's many precedents applying lower levels of scrutiny to required disclosures. *See* pp. 19-21, *supra* (discussing *Zauderer*); U.S. Br. 20. And it would call into question countless federal, state, and local laws.[41] *Reed* contains no indication that it was intended to sweep aside so many of this Court's precedents or cast doubt on commonplace and familiar laws, and this Court has not interpreted *Reed* as doing any such thing. *See Expressions Hair Design*, 137 S. Ct. at

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planning or pregnancy-related services, not to the content of any clinic's speech. *See also* pp. 49-52, *infra* (discussing viewpoint discrimination).

[41] *See, e.g.*, 12 C.F.R. § 1026.1 et seq. (requirements for credit-solicitation disclosures); 49 U.S.C. § 32908(b) (required automobile fuel economy labels); 21 C.F.R. pt. 101 (food labeling requirements); 21 C.F.R. §§ 201.56, 201.57 (prescription drug labeling requirements); Cal. Health & Safety Code § 13220 (requiring building owners to post emergency procedures); pp. 42-33 & nn.33-37, *supra* (required healthcare disclosures).

1151 (remanding for consideration of whether a statute governing price-disclosures should be reviewed under *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980), or under *Zauderer*); U.S. Brief 20.

D. The Act Does Not Discriminate Based on Viewpoint

Petitioners argue that strict scrutiny is necessary because the disclosure requirement applies "only to licensed pregnancy centers that are pro-life," Pet. Br. 34, and is therefore viewpoint discriminatory in "its operational effect," *id.* at 31. That is certainly not true on the law's face; in fact, providing abortion services is an activity that can subject a clinic to the law. § 123471(a)(5). Nor would any possible disparate impact establish viewpoint discrimination. *See McCullen*, 134 S. Ct. at 2531 (a law that "'serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others'"); *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 763 (1994); U.S. Br. 31.

In any event, the record includes no evidence that the law applies only to facilities that oppose abortion. *Cf.* U.S. Br. 32-33. Nor do the Act's coverage criteria give reason to believe that the Act singles out anti-abortion providers. Petitioners note that the Licensed Facility Disclosure applies to clinics and not independent doctor's offices. Pet. Br. 32. But private physicians may support abortion, oppose abortion, or be indifferent. Coverage of free clinics rather than private physicians does not target anyone by viewpoint; instead it serves a narrow-tailoring purpose, because private physicians are less likely than free clinics to

serve patients who are uninsured and not yet enrolled in public programs.[42]

Nor is discrimination shown by the statute's application to clinics with a "primary purpose" of providing pregnancy care or its exemption for clinics that are Medi-Cal and F-PACT providers. Pet. Br. 33. "'States adopt laws to address the problems that confront them,'" and "'[t]he First Amendment does not require States to regulate for problems that do not exist.'" *McCullen*, 134 S. Ct. at 2532. The disclosure would serve little purpose at clinics that are Medi-Cal and F-PACT providers, because those clinics already are able to enroll women in full-service publicly funded programs on the spot. *See* J.A. 54-55 ("[t]he most effective way to ensure that women quickly obtain the information and services they need" is to require disclosures by facilities "that are unable to immediately enroll patients into the Family PACT and Medi-Cal programs"). The Act does apply to clinics with a "primary purpose" of providing "family planning services," § 123471(a), that are not capable of instantly enrolling patients in the public programs at issue, *see* pp. 9-10, *supra*. The coverage criteria reflect that the people

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[42] Petitioners also observe that the disclosure requirement will not apply to clinics operated by the federal government, or to clinics licensed under sections of the Health and Safety Code applicable to hospital-affiliated clinics, tribal clinics, community mental health centers, student health centers, clinics affiliated with medical schools, or clinics operated by employers for their employees. Pet. Br. 32. But this does not operate to carve-out clinics likely to have a pro-choice view. To the contrary, the exemption for hospital-affiliated clinics will include many operated by religious institutions whose beliefs lead them to exercise statutory rights not to provide abortions. *See* § 123420(c). In any event, clinics in the excluded categories are not comparable to covered clinics with respect to the law's targeted population of uninsured women seeking reproductive healthcare.

most likely to benefit from the disclosures concerning the availability of comprehensive, low-cost services related to family planning, pregnancy, or abortion are those who have sought family-planning or pregnancy-related services at clinics that will not themselves enroll women in the public programs.

Petitioners also suggest that this Court should find the Act viewpoint-discriminatory based on the bill sponsor's stated concern about some crisis pregnancy centers' activities. Pet. Br. 34. But what that legislator viewed as "unfortunate[]" was not that such clinics exist or advocate against abortion, but that they "pose as full-service women's health clinics" and use "intentionally deceptive advertising and counseling practices [that] confuse, misinform, and even intimidate women from making fully-informed, time-sensitive decisions about critical health care." J.A. 39. Concern about deception is not the same as antipathy toward advocacy.

Petitioners' reliance (Pet. Br. 34-37) on *Sorrell v. IMS Health Inc.* is misplaced. In *Sorrell*, the legislative record evidenced an express intention to shield doctors from particular speakers delivering particular kinds of speech. 564 U.S. at 576-577. Here, the Act has neither the intent nor the effect of shielding women from any message or preventing petitioners' speech. Instead it ensures that, regardless of what petitioners choose to say, pregnant women will receive, from the State, certain minimal information that allows them to acquire more information if they wish.

In rejecting the conclusion that California's law was motivated by antipathy towards religious, anti-abortion viewpoints, the district court here reached

the same conclusion as every other court that has considered the issue.[43] That conclusion would be correct in any procedural posture, and is all the more correct given the more stringent standard that this Court has indicated applies to proof of discriminatory purpose in the context of requests for preliminary relief. *See Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997).

E. The District Court Properly Denied Preliminary Injunctive Relief Under Any Level of Scrutiny

Regardless of the First Amendment level of scrutiny that applies, the Licensed Facility Disclosure is constitutional, given its narrow tailoring (pp. 28-30, *supra*) and minimal burdens (pp. 39-40, 42-47, *supra*), and the State's compelling interest in ensuring that a particularly vulnerable population can make prompt, fully informed decisions. Under these circumstances, the district court did not abuse its discretion, *see Ashcroft v. ACLU*, 542 U.S. 656, 664 (2004), in denying petitioners' motion for preliminary relief.

Petitioners summarily suggest alternative approaches that would excuse licensed facilities from

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[43] *See* Pet. App. 64a-65a, 68a (district court); *id.* at 20a-22a (court of appeals); *A Woman's Friend Pregnancy Res. Clinic v. Harris*, 153 F. Supp. 3d 1168, 1195 n.11 (E.D. Cal.) ("the record does not suggest the State's rationale for the Act was to discriminate against a certain viewpoint"), aff'd 669 Fed. App'x 495 (9th Cir. 2016), pet. for cert. pending No. 16-1146; Pet. Br. 4a (opinion in *Scharpen Found. Inc. v. Harris*, No. RIC1514022 (Riverside Super. Ct. Oct. 30, 2017)); *see also LivingWell Med. Clinic, Inc. v. Harris*, 2015 WL 13187682, at *11 (N.D. Cal.) (recounting the legislative concerns underlying the Act), aff'd, 669 Fed. App'x. 493 (9th Cir. 2016), pet. for cert. pending, No. 16-1153; *Mt. Right To Life v. Harris*, 2016 WL 3883923, at *5 (C.D. Cal.) (finding no evidence of improper purpose), aff'd 692 Fed. App'x 807 (9th Cir. 2017), pet. for cert. pending, No. 17-211.

any role in helping low-income women learn about full-service government-funded options. Pet. Br. 55-57. Petitioners' present record, which consists only of their verified complaint, does not support their contentions about less burdensome ways to achieve the statute's purposes.[44]

Promotional messages posted at government-funded full-service providers or on government health program websites (Pet. Br. 56) would not advance the State's interest in reaching women who do not know about the existence of, or the aid available from, government health programs. Neither would general advertising campaigns (Pet. Br. 55-56) suffice, as evidenced by the high number of people who are eligible for publicly funded healthcare but remain unenrolled despite extensive marketing and outreach efforts. *See* pp. 5-6 & n.10, *supra*. As *Riley* illustrates, the government must sometimes undertake its own publicity campaign rather than enlist private parties to disclose facts. 487 U.S. at 799-800. But in *Riley* any decreased effectiveness of the alternative means of communication would result only in people donating to a charity that they would otherwise have skipped. The consequences of a less effective message here would be far more severe, *see* pp. 2-4 & nn.3-6, *supra*, and the First Amendment does not require reliance only on less effective alternatives when urgent matters of life and health are at stake.

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[44] When reviewing a lower court's decision on preliminary injunctive relief where "the underlying constitutional question is close," it is appropriate to affirm and "remand for trial on the merits." *Ashcroft*, 542 U.S. at 664-665. Proceedings on the merits would "permit the parties to develop a more thorough factual record," and "allow the District Court to resolve any factual disputes," *Turner*, 512 U.S. at 668 (opinion of Kennedy, J.), as is proper before this Court passes definitively upon the constitutional validity of a law.

Petitioners argue (Pet. Br. 54-55) that the State could achieve its purposes by simply enforcing laws against fraud, without requiring the clinics to make the required disclosures. But the State has vital interests in helping a woman to avoid health risks and missed opportunities to control her life, whether resulting from affirmative deception or from mere confusion and lack of information. Petitioners' proposal for aggressive policing of the advertising and messaging of licensed, limited-service clinics could also insert the State into the content of the clinics' speech far more extensively than the approach taken here.[45] "When selecting among various options for combating a particular problem, legislatures should be encouraged to choose the one that restricts less speech, not more." *McCullen*, 134 S. Ct. at 2532.

A truly minimal disclosure—two sentences and a phone number—satisfies women's vital informational needs in a way that neither interferes with nor intrudes upon any clinic's speech. Indeed, the disclosure serves a purpose that petitioners acknowledge as valuable: allowing women to "know the facts and be fully informed."[46] If a woman visiting a limited-service

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[45] When San Francisco passed an ordinance targeting "'untrue or misleading'" statements concerning pregnancy-related services, one of Petitioners' amici sued. The amicus argued that the law was subject to and failed strict scrutiny, *see First Resort, Inc. v. Herrera*, 860 F.3d 1263, 1270, 1273 (9th Cir. 2017), pet. for cert. pending, No. 17-1087, in part because it imposed a "substantial burden" on speech, *see* Reply Br. of Appellant, *First Resort*, 2015 WL 9267259, at *19.

[46] Fallbrook Pregnancy Resource Center, Abortion, http://www.fallbrookprc.com/Your-Options/Test-1 (last visited Feb. 19, 2018); *see id.* ("When faced with an unintended pregnancy everyone wants to give their opinion about what you should do. But it is YOUR decision, and no one should decide for

clinic determines that the advice and services she is provided there fully suit her needs, the required disclosure will be just another government notice, perhaps seen, but not acted on. But if she determines that she needs additional, neutral information to make decisions, that she wishes to consider services that the private center does not provide, or that she would simply feel better served by a publicly-funded, full-service clinic, the disclosure gives her notice of those options. In that circumstance, the notice allows a woman, in her judgment and discretion, to supplement the information and services she receives from the private, limited-service clinic should she wish. The First Amendment does not bar the State from making sure she knows she may do so.

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you."); Pregnancy Care Clinic Home Page, http://www.unplannedparenthood.org (last visited Feb. 19, 2018) ("[W]omen have a right to make their own decisions about the outcome of their pregnancy and their sexual health.").

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

XAVIER BECERRA
Attorney General of California
EDWARD C. DUMONT
Solicitor General
JANILL L. RICHARDS
Principal Deputy Solicitor General
JOSHUA A. KLEIN
Deputy Solicitor General
KATHLEEN VERMAZEN RADEZ
ANTHONY R. HAKL
JONATHAN M. EISENBERG
Deputy Attorneys General

February 20, 2018

No. 16-1140

In The
Supreme Court of the United States

NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES, d/b/a NIFLA, et al.,

Petitioners,

v.

XAVIER BECERRA, ATTORNEY GENERAL, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR RESPONDENT

THOMAS E. MONTGOMERY, County Counsel
COUNTY OF SAN DIEGO
THOMAS D. BUNTON, Chief Deputy
Counsel of Record
DARIN L. WESSEL, Senior Deputy
1600 Pacific Highway, Room 355
San Diego, CA 92101
(619) 531-6456
Thomas.Bunton@sdcounty.ca.gov

Counsel for Respondent
Thomas E. Montgomery in his official capacity
as County Counsel for the County of San Diego

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

This Court granted certiorari limited to the issue of:

Whether the disclosures required by the California FACT Act violate the protections set forth in the Free Speech Clause of the First Amendment, applicable to the States through the Fourteenth Amendment.

Thomas E. Montgomery, County Counsel for the County of San Diego, requests the Court to also address whether the claims against him are ripe for review under Article III of the United States Constitution. Specifically:

Is the passage of California's Reproductive FACT Act sufficient in and of itself to make the plaintiffs' First Amendment – government compelled speech – claims ripe when the plaintiffs assert they will not comply with the law and Montgomery took no steps and made no threats to enforce the law against the plaintiffs?

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INTRODUCTION

Appellants filed this lawsuit challenging the constitutionality of California's Reproductive FACT Act (Cal. Health & Saf. Code §§ 123470-123473) (FACT Act) nearly three months before the law took effect. Appellants named Thomas E. Montgomery, in his official capacity as County Counsel for the County of San Diego (Montgomery), as a defendant because the FACT Act identifies "county counsel" as among those authorized to enforce the FACT Act, and Appellant Fallbrook Pregnancy Resource Center (Fallbrook) is located within Montgomery's jurisdiction – the unincorporated area of San Diego County.

The lawsuit against Montgomery is not ripe for review under Article III of the United States Constitution because there has never been an imminent threat that Montgomery will enforce the FACT Act against Fallbrook, the only facility potentially covered by the Act in the unincorporated County of San Diego.[1] Specifically, the case is before this Court on the denial of a preliminary injunction motion which, under this Court's ripeness jurisprudence, required Fallbrook to go beyond the allegations in its complaint and offer

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[1] The FACT Act is a state law passed by the California legislature and signed into law by the Governor of California. Pet. App. 75a. Montgomery takes no position regarding the merits of lawsuit against the State challenging the FACT Act.

While Montgomery's arguments on ripeness may apply to the Attorney General and the El Cajon City Attorney, Montgomery focuses his argument on Fallbrook, the only plaintiff located within his jurisdiction.

evidence showing that its claims are ripe. Fallbrook did not meet its burden because it presented no evidence that Montgomery threatened to enforce the FACT Act against Fallbrook or took any steps to do so. Indeed, it is undisputed that Montgomery never served Fallbrook with a notice of noncompliance, which the FACT Act requires before any civil enforcement action may be filed.

The writ of certiorari should be dismissed for lack of federal jurisdiction with respect to Appellant Fallbrook and NIFLA's claims against Respondent Montgomery.

JURISDICTION

Montgomery agrees that petitioners timely requested certiorari and that 28 U.S.C. § 1254(1) authorizes this Court's review of the Ninth Circuit's decision. However, Montgomery contends that the claims against him are not ripe and therefore this Court does not have jurisdiction under Article III for the reasons addressed in the Argument.

Montgomery raised ripeness below.[2] Pet. App. 50a-55a; J.A. 114; *Nat'l Inst. of Family & Life Advocates v. Harris*, 839 F.3d 823, 823-833 (9th Cir. 2016). Without

[2] In any event, ripeness may be raised at any time, even for the first time at the Supreme Court. *Renne v. Geary*, 501 U.S. 312, 315, 111 S. Ct. 2331, 2336 (1991) (cert. granted to determine whether provision in Cal. Const. violated First Amendment; doubts about justiciability raised at oral argument).

making any distinction between the three plaintiffs or the three defendants, the lower courts concluded that the case was ripe, even though the litigation was commenced prior to the January 1, 2016 effective date of the FACT Act and even though plaintiffs submitted no evidence that any defendant took steps or made threats to enforce the law after it went into effect. *Ibid.*; and see Cal. Stats. 2015, ch. 700, § 3 (Assem. Bill No. 775) (2015-2016 Reg. Sess.); Cal. Const. art. IV, § 8(c)(1).

STATEMENT OF THE CASE

A. Factual background.

The FACT Act was signed by California Governor Jerry Brown on October 9, 2015. Pet. App. 75a; Cal. Stats. 2015, ch. 700, § 3 (2015-2016 Reg. Sess.) (Assem. Bill No. 775).[3] Under California law, the FACT Act did not take effect until January 1, 2016. Cal. Const. art. IV, § 8(c)(1).

Beginning on January 1, 2016, the FACT Act required licensed medical pregnancy centers, such as plaintiff Pregnancy Care Clinic, to post or distribute a notice stating that "California has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal

[3] Accessible at http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160AB775.

care, and abortion for eligible women. To determine whether you qualify, contact the county social services office at [insert the telephone number]." Pet. App. 80a, at new Cal. Health & Saf. Code § 123472(a)(1). Three options were available for dissemination of the notice. Pet. App. 80a-81a, new Cal. Health & Saf. Code § 123472(a)(2)(A)-(C). The notice could also be combined with any other mandated disclosures. *Id.*, new Cal. Health & Saf. Code § 123472(a)(3).

Starting on January 1, 2016, the FACT Act required unlicensed non-medical pregnancy centers, referred to as an "unlicensed covered facility," to post a notice stating that "[t]his facility is not licensed as a medical facility by the State of California and has no licensed medical provider who provides or directly supervises the provision of services." Pet. App. 79a and 81a, new Cal. Health & Saf. Code § 123471(b) [definition and factors for "unlicensed covered facility"] and § 123472(b)(1) [required notice]. The FACT Act required inclusion of this notice in any advertising material distributed by unlicensed covered facilities. *Id.* at § 123472(b)(3). Appellant Fallbrook, alleged it "is not licensed by the State of California" and "may qualify as an 'unlicensed covered facility'" under the FACT Act. Pet. App. 100a, 103a (Complaint, ¶¶ 83, 107).

The FACT Act solely authorized civil penalties – not criminal sanctions. Pet. App. 82a, new Cal. Health & Saf. Code § 123473(a)(1)-(2). Even then, there is no immediate threat that civil penalties will be imposed for violating the FACT Act because it provides a safe harbor provision requiring notice and an opportunity

to comply before any civil action may be filed. Specifically, the FACT Act requires the Attorney General, city attorney or county counsel to first "[p]rovide [ ] the covered facility with reasonable notice of noncompliance, which informs the facility that it is subject to a civil penalty if it does not correct the violation within 30 days from the date the notice is sent to the facility" and a civil action cannot be commenced until after the noticing authority verifies "that the violation was not corrected within the 30-day period described" above. Pet. App. 82a, new Cal. Health & Saf. Code § 123473(a)(1)-(2).

The FACT Act gives the California Attorney General authority to enforce the FACT Act throughout California. Pet. App. 82a, new Cal. Health & Saf. Code § 123473(a). It also authorizes a city attorney or county counsel to enforce the FACT Act within their respective jurisdictions. The FACT Act, however, does not mandate that a county counsel enforce the FACT Act. *Ibid.*

On October 13, 2015 – nearly three months before the FACT Act took effect – National Institute of Family and Life Advocates, d.b.a. NIFLA (NIFLA), Pregnancy Care Center, d/b/a. Pregnancy Care Clinic, and Fallbrook filed their Complaint against Montgomery, the Attorney General and the El Cajon City Attorney under 42 U.S.C. § 1983. J.A. 1 (Doc. 1), Pet. App. 84a-85a.

NIFLA is a "national non-profit pro-life membership organization with 111 affiliates in California."

Pet. App. 85a-86a (Complaint, ¶ 2). Although NIFLA generally alleged two of its affiliate members are located in San Diego County (Pet. App. 85a-86a [Complaint, ¶ 2]), the specific fact allegations establish only one affiliate, Appellant Fallbrook, is located in the unincorporated County of San Diego, and thus within Montgomery's jurisdiction.

Fallbrook alleges it "may" qualify as an "unlicensed" facility within the meaning of the FACT Act and is located in the unincorporated Fallbrook area of the County of San Diego. *Id.*, at 89a-90a, 103a (Complaint, ¶¶ 22, 107).

The third plaintiff, Pregnancy Care Center, alleges it is a "licensed" facility within the meaning of the FACT Act and is located in the incorporated City of El Cajon. *Id.*, at 89a-91a (Complaint, ¶¶ 20, 25, 30). Pregnancy Care Center is therefore located within the jurisdiction of the El Cajon City Attorney. *Ibid.*

B. Pertinent procedural history.

The Complaint sought to have the court declare the FACT Act unconstitutional and to enjoin the defendants from enforcing it. Pet. App. 120a (Complaint, Prayer ¶¶ A and B). The three plaintiffs alleged as pertinent to the issue on certiorari:

- The required disclosure statements constitute compelled speech in violation of the free speech clause of the First Amendment. Pet. App. 109a-110a, 117a-118a (Complaint, ¶¶ 150-153, 199-204).

On October 21, 2015, NIFLA, Fallbrook and Pregnancy Care Center filed a motion for preliminary injunction. J.A. 2 (Doc. 3). As noted by the district court, no declarations were submitted in support of the motion. Pet. App. 47a at n. 2. Instead, the plaintiffs relied on the allegations in the verified complaint. *Ibid.*

The Attorney General, Montgomery and the El Cajon City Attorney opposed the preliminary injunction motion on jurisdictional grounds, namely ripeness. J.A. 3-4 (Docs. 21-23); Pet. App. 50a-55a. The Attorney General's opposition also opposed the motion on the merits. *Ibid.*

The district court heard oral argument on the motion for preliminary injunction in January of 2016, *after* the FACT Act took effect. *Id.*, at 8 (Doc. 45); Pet. App. 44a-45a. Fallbrook presented no evidence that Montgomery commenced a civil enforcement action against it or even threatened to do so. See J.A. 5 (Doc. 30). Indeed, there was no evidence that Montgomery issued a notice of noncompliance against Fallbrook. Neither was there any evidence that either the California Attorney General or the El Cajon City Attorney issued notices of noncompliance against any of the other plaintiffs.

In its subsequent Order denying the preliminary injunction motion, the district court rejected the ripeness arguments. Pet. App. 50a-55a. It applied the factors used by the Ninth Circuit in *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1138 (9th Cir. 2000) (en banc) (*Thomas*), as well as the Ninth

Circuit's requirement that the plaintiff "articulate a concrete plan to engage in conduct subject to the law" announced in *Lopez v. Candaele*, 630 F.3d 775, 787 (9th Cir. 2010), but recognized Ninth Circuit authority holding that a plaintiff need not risk prosecution where protected speech may be at risk. Pet. App. 51a-52a. The district court concluded "the Plaintiffs present a concrete plan to violate the [A]ct" based on the complaint allegations that they desire to not "utter the disclosures required by the FACT Act." Pet. App. 55a.

The district court acknowledged "no one has threatened to institute enforcement proceedings against Plaintiffs for their failure to comply with the [FACT] Act." Pet. App. 55a. Nevertheless it inferred that there was a "credible threat of prosecution" since none of the defendants affirmatively stated the FACT Act would not be enforced. *Ibid.*

At the Ninth Circuit, Montgomery again argued that the claims against him were not ripe for review. Pet. App. 13a. The Ninth Circuit found the claims were constitutionally ripe and prudentially ripe without addressing ripeness in relation to any specific plaintiff or defendant. *Id.*, at 13a-17a.

The Ninth Circuit applied its en banc *Thomas* decision which quoted from this Court's decision in *Railway Mail Ass'n v. Corsi*, 326 U.S. 88, 93, 65 S. Ct. 1483, 1487 (1945) in arriving at three factors the Ninth Circuit assesses in deciding whether a case is constitutionally ripe – "(1) whether plaintiffs have articulated a concrete plan to violate the statute in question;

(2) whether the prosecuting authorities have communicated a specific warning or threat to initiate proceedings; and (3) the history of past prosecution or enforcement of the challenged statute." Pet. App. 14a. The Ninth Circuit recognized that where these factors are satisfied, a pre-enforcement challenge to a law claimed as infringing on fundamental rights is ripe for review. *Ibid.*, citing to *Thomas, supra*, 220 F.3d at 1137, n. 1 and *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 393 (1988) (holding booksellers had pre-enforcement standing to challenge Virginia law making it a crime "to knowingly display for commercial purpose in a manner whereby juveniles may examine and peruse" obscene materials, and which required booksellers implement substantial changes to avoid violating the law).

The Ninth Circuit concluded that the plaintiffs' allegation that they intended to not comply with the FACT Act was sufficient to satisfy the first prong of the test requiring a concrete plan to violate the statute. Pet. App. 14a. The Ninth Circuit reasoned, in the negative, that the second prong was satisfied because the Attorney General "has not stated that she will not enforce the FACT Act." *Id.*, at 14a-15a. As to the third prong, the Ninth Circuit held that the absence of a history of prosecution or enforcement was not compelling because the FACT Act did not go in effect until approximately one month before the district court denied the motion. *Id.*, at 15a, citing to *Wolfson v. Brammer*, 616 F.3d 1045, 1060 (9th Cir. 2010) and *LSO Ltd. v. Stroh*, 205 F.3d 1146, 1155 (9th Cir. 2000). On the third prong,

the panel indicated in a footnote that it received NIFLA's Fed. R. Civ. P. 28(j) letter informing the panel that the Los Angeles City Attorney purportedly sent an August 16, 2016 notice of noncompliance to a NIFLA affiliate located outside San Diego County. Pet. App. 15a, n. 4. Fallbrook did not submit a letter or other proof indicating that Montgomery issued any notice of noncompliance or otherwise threatened to enforce the FACT Act against Fallbrook. *Ibid.*

The Ninth Circuit then evaluated prudential ripeness. It utilized the considerations formulated in *Thomas, supra* – "(1) the fitness of the issues for judicial decision and; (2) hardship to the parties if we were to withhold jurisdiction." Pet. App. 16a.

On the first prong, the panel concluded the "action turns on a question of law" which required no further factual development. Pet. App. 16a. On the hardship prong, the panel acknowledged that under Ninth Circuit precedent the court considers "whether the 'regulation requires an immediate and significant change in plaintiffs' conduct of their affairs with serious penalties attached to noncompliance." *Ibid.* The panel concluded the choice of compliance with the FACT Act versus the plaintiffs' expressed desire to do nothing and thus violate the law was a sufficient hardship. *Id.*, at 17a. The court also concluded that all parties would suffer hardship in relation to potential future enforcement actions without the benefit of a ruling on constitutionality of the FACT Act. *Ibid.*

The Ninth Circuit proceeded to affirm denial of the preliminary injunction motion, upholding the validity of the FACT Act. Pet. App. 17a-42a.

The petition for certiorari to this Court followed. This Court granted certiorari, limiting the issue on review to whether the disclosures required by the FACT Act violate the protections set forth in the Free Speech Clause of the First Amendment, applicable to the States through the Fourteenth Amendment.

SUMMARY OF ARGUMENT

This "pre-enforcement" challenge is premature and not ripe for review. This lawsuit was filed prior to the FACT Act taking effect, and thus before enforcement of the law was even possible. Moreover, Montgomery did not threaten to enforce the FACT Act against Fallbrook once the law took effect or take any steps toward that end.

At no time did Fallbrook present any evidence showing that Montgomery gave the required notice of noncompliance or otherwise threatened to enforce the FACT Act against Fallbrook. It is undisputed that to this day, Montgomery has not issued a notice of noncompliance to Fallbrook or otherwise threatened to enforce the FACT Act against it.

Since Fallbrook is the only NIFLA affiliate within Montgomery's jurisdiction, NIFLA's claims against Montgomery are likewise not ripe. NIFLA has no

independent basis to assert any claims or establish jurisdiction, other than through its affiliate, Fallbrook.

The claims against Montgomery are simply not ripe for review. Thus, certiorari should be dismissed as to Fallbrook's and NIFLA's claims against Montgomery.

ARGUMENT

I. THE CLAIMS ARE NOT RIPE AGAINST MONTGOMERY.

Fallbrook's claims against Montgomery are not ripe for review because there is no imminent threat that Montgomery will enforce the FACT Act against Fallbrook. Montgomery has not issued a notice of noncompliance, a prerequisite to filing an action seeking civil penalties under the law. Montgomery has made no statements or taken any action indicating that he plans to enforce the FACT Act against Fallbrook.

"A claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Texas v. United States*, 523 U.S. 296, 300, 118 S. Ct. 1257, 1259 (1998), quoting from *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 581, 87 L.Ed.2d 409, 105 S. Ct. 3325 (1985) (quoting 13A C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3532, p. 112 (1984)).

This Court recently observed that in pre-enforcement situations, "[o]ne recurring issue in our cases is determining when the threatened enforcement of a law creates an Article III injury." *Susan B. Anthony List v. Driehaus*, ___ U.S. ___, 134 S. Ct. 2334, 2342, 189 L.Ed.2d 246, 255 (2014). Where a statute has not taken effect when the lawsuit is filed, there is no history of enforcement, no pending enforcement and no actual threat of enforcement against a specific plaintiff, this Court should find that the case is unripe as to that particular plaintiff.

A. This Court's jurisprudence on ripeness in pre-enforcement cases.

In *Younger v. Harris*, 401 U.S. 37, 42, 91 S. Ct. 746, 748 (1971) (*Younger*), this Court conducted a plaintiff-specific assessment and found that claims by three of the named plaintiffs were not ripe where there was no threatened prosecution as to those plaintiffs. The Court reasoned as follows:

> If these three had alleged that they would be prosecuted for the conduct they planned to engage in, and if the District Court had found this allegation to be true – either on the admission of the State's district attorney or on any other evidence – then a genuine controversy might be said to exist. But here appellees Dan, Hirsch, and Broslawsky do not claim that they have ever been threatened with prosecution, that a prosecution is likely, or even that a prosecution is remotely possible.

> They claim the right to bring this suit solely because, in the language of their complaint, they "feel inhibited."

Younger, 401 U.S. at 42.

The result in *Younger* was distinguished in *Steffel v. Thompson*, 415 U.S. 452, 459, 94 S. Ct. 1209, 1215 (1974) (questioned on other grounds in *MTM, Inc. v. Baxley*, 420 U.S. 799, 807 n. 2, 95 S. Ct. 1278, 1283 (1975) (White, J., concurring)). The difference – the plaintiff in *Steffel* was twice warned to stop handbilling and the police told him he would be arrested if he handbilled at the shopping center again in disobedience of a warning to stop. *Steffel*, 415 U.S. at 459. The conclusion it was likely he would be prosecuted was further supported by the arrest of his companion for the same offense. *Ibid.* "In these circumstances, it is not necessary that petitioner first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights." *Ibid.* Thus *Steffel* involved "alleged threats of prosecution that [could not] be characterized as 'imaginary or speculative' " but the case was still remanded for a determination of whether there remained a continuing controversy. *Ibid.*

In 2014, this Court confirmed in *Susan B. Anthony List v. Driehaus*, that "we have permitted pre-enforcement review under circumstances that render the threatened enforcement sufficiently imminent." *Susan B. Anthony List, supra*, 134 S. Ct. at 2342. "Specifically, we have held that a plaintiff satisfies the

injury-in-fact requirement where he alleges 'an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder.'" *Ibid.*, quoting *Babbitt v. Farm Workers*, 442 U.S. 289, 298, 99 S. Ct. 2301, 60 L.Ed.2d 895 (1979) (finding challenge to law proscribing dishonest, untruthful and deceptive publicity by plaintiffs who actively engaged in and alleged an intent to continue consumer publicity campaigns in the future to be ripe).

The *Susan B. Anthony List* case involved SBA's challenge to an Ohio statute prohibiting false statements during the course of a campaign where a candidate lodged a complaint with the Ohio Elections Commission which found probable cause and setthe matter for full hearing. *Susan B. Anthony List*, *supra*, 134 S. Ct. at 2339. SBA filed suit in federal court prior to the full hearing. *Ibid.* SBA sought declaratory and injunctive relief and challenged the statute on First and Fourteenth Amendment grounds. The plaintiff's federal complaint was later amended to allege a continuing threat of prosecution in relation to future campaigns after the Ohio Election Commission proceedings were terminated due to the candidate's withdrawal of his complaint against SBA. *Id.*, at 2340. With the existence of a prior state proceeding against SBA, evidence showing 20-80 complaints to the state elections commission each year, and SBA's stated intent to continue its activities, this Court had no difficulty concluding there existed a continued threat of a future

complaint against SBA, making the claims ripe. *Id.*, at 2343-2346.

In *Harris v. Quinn*, 134 S. Ct. 2618, 2644 n. 30, 189 L.Ed.2d 620, 659 (2014), this Court addressed First Amendment associational freedom claims of personal assistants working under Illinois's Rehabilitation Program which required payment of union dues from non-union members. In footnote 30, the majority concluded similar workers in the related "Disabilities Program" were not ripe even though potentially subject to the Illinois law because those personal assistants had not yet unionized. *Ibid.* As with *Younger*, the Court concluded that ripeness must be separately evaluated as to each plaintiff.

B. This case has not been ripe at any stage of the proceedings.

The plaintiffs admit that they filed the Complaint approximately three months before the FACT Act took effect. Pet. App. 88a (Complaint, ¶ 13). The case was not ripe when the Complaint was filed because none of the defendants could enforce a law that was not yet in effect. As to Fallbrook, the one plaintiff within Montgomery's jurisdiction, the Complaint contained no allegations that Montgomery threatened to enforce the FACT Act upon its effective date or made any public statements indicating such an intent. *Id.*, at 100a-103a (Complaint, ¶¶ 82-112). Nor were there any allegations Montgomery took a position on whether

Fallbrook was an "unlicensed covered facility" within the meaning of the FACT Act.

The FACT Act's provision requiring a notice of noncompliance and opportunity to comply before any civil action could be brought against Fallbrook takes this case out of the rare instance where this Court found a pre-effective date, pre-enforcement lawsuit to be ripe. In *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 536, 45 S. Ct. 571, 574 (1925), this Court found a challenge to an Oregon law ripe where, upon taking effect, the law required all children, except those expressly exempted, attend public school upon pain of criminal liability. In addition to impending criminal liability, the statute would have immediately impacted constitutional rights over parental choice of child education and would cause imminent harm to the plaintiffs – private schools – who would lose business as soon as the law took effect. *Pierce v. Soc'y of Sisters*, 268 U.S. at 536. This Court reasoned the "injury to appellees was present and very real, not a mere possibility in the remote future. If no relief had been possible prior to the effective date of the Act, the injury would have become irreparable."

That is not the situation here. The plaintiffs stated their intent not to comply with the FACT Act once it took effect. *Id.*, at 105a (Complaint, ¶ 123). They then made the conclusory allegation of "a credible threat of adverse state action due to the FACT Act." *Id.*, at 106a (Complaint, ¶ 130). Those bare allegations could not establish a credible threat of prosecution at the time the Complaint was filed. The FACT Act was not yet

effective and therefore the plaintiffs were not required to comply with the law. Neither could they show that they would incur any expense once the FACT Act took effect because they made it clear they were not going to give any notices required by the law. Further, unlike the prospect of immediate criminal liability in *Pierce v. Soc'y of Sisters*, the FACT Act requires Montgomery to issue a notice of noncompliance and give Fallbrook an opportunity to correct the violation before he could bring a civil action against Fallbrook.

For these reasons, Fallbrook's claims against Montgomery were not ripe at the time the Complaint was filed. Neither were Fallbrook's claims ripe at the time the district court heard oral argument on the motion for preliminary injunction, which took place after the effective date of the FACT Act.

We presume that federal courts lack jurisdiction "unless 'the contrary appears affirmatively from the record.'" *Renne v. Geary*, 501 U.S. 312, 316, 111 S. Ct. 2331, 2336 (1991). Thus, each element supporting federal jurisdiction, including ripeness, must exist at each stage of the case and must "be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation." *Susan B. Anthony List*, 134 S. Ct. at 2342, quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561, 112 S. Ct. 2130, 2137 (1992).

Under this Court's decisions in *Susan B. Anthony List*, 134 S. Ct. at 2342 and *Lujan*, 504 U.S. at 561,

Fallbrook was required to submit evidence establishing that the court has subject matter jurisdiction under Article III. Fallbrook submitted no evidence in support of its motion for a preliminary injunction showing that it received a notice of noncompliance from Montgomery. See Pet. App. 47a at n. 2 (district court confirmation that plaintiffs submitted no declarations in support of preliminary injunction motion). Likewise, Fallbrook submitted no evidence that Montgomery had ever stated that he planned to issue a notice of noncompliance or otherwise take any steps to enforce the FACT Act in the future. *Ibid.*

The only "fact" Fallbrook relied on was the mere existence of the statute itself and the provision identifying county counsel as one of the officials who had authority to bring a civil action after the issuance of a notice of noncompliance and after the failure to take corrective action. That is not sufficient to establish an imminent threat of harm necessary to make Fallbrook's claims ripe.

This case is governed by the holding in *Renne v. Geary*, 501 U.S. 312, 322, 111 S. Ct. 2331, 2339 (1991), where this Court concluded that ripeness did not exist in the absence of any past enforcement of the statute or indication of intent to enforce. The *Renne* Court dismissed on standing and ripeness grounds political parties' challenge to a California statute prohibiting candidate endorsements in ballot pamphlet statements, reasoning in part that the statute carried no criminal penalties and could only be enforced through injunction, and nothing "in the record suggests that

petitioners have threatened to seek an injunction against county committees or their members if they violate § 6(b)." *Renne v. Geary*, 501 U.S. at 322.

The absence of ripeness is also supported by the holding in *Younger* where this Court found three of the plaintiffs' claims were not ripe where there was no threatened prosecution against the specific plaintiff. *Younger*, 401 U.S. at 42. Likewise, Fallbrook offered no evidence showing that Montgomery took any action or made any threats to enforce the FACT Act at any time. Fallbrook's belated attempt to overcome that failing through its Fed. R. App. 28(j) letter informing the Ninth Circuit panel that the Los Angeles City Attorney purportedly sent a noncompliance notice to a different NIFLA affiliate located outside San Diego County is unavailing. See J.A. 18 (Docs. 49-51); Pet. App. 15a at n. 4. As in *Younger*, the fact that one person showed threatened enforcement sufficient to demonstrate ripeness did not mean the claims of others who were never threatened with enforcement became ripe. *Younger*, 401 U.S. at 42.

Now, Fallbrook will likely counter that the customary ripeness analysis is relaxed when facial challenges implicating First Amendment protections are brought. See *Babbitt*, *supra*, 442 U.S. at 298-299, 301-303 (applying ripeness determination on a claim by claim basis and finding three of five claims ripe where evidence of past prosecution under related acts was presented and criminal penalties applied). While the standard may be relaxed, this Court ultimately requires a showing of (1) explicit criminal penalties that the plaintiff

faces upon violation, (2) the loss of a vested license, or (3) a specific chilling effect on demonstrably intended future speech, combined with evidence showing past enforcement or evidence showing the state took steps to enforce the statute. See also *Doe v. Bolton*, 410 U.S. 179, 188-189, 93 S. Ct. 739, 746 (1973) (ripeness found where evidence presented showing criminal enforcement of predecessor Georgia abortion act as indicative of imminent threat of future prosecution). Ultimately, however, these cases are inapplicable here because Fallbrook never offered any evidence that Montgomery threatened to enforce the FACT Act or took any steps to do so.

Also, unlike traditional pre-enforcement "chilled speech" cases where the plaintiff established the challenged statute caused the plaintiff to self-censor by not engaging in free speech activities because of a threat of potential enforcement, there is no such "chilling effect" present in this case. Fallbrook avowed it would not comply with the FACT Act's unlicensed facility notice and NIFLA made a similar statement related to its non-licensed members. *Id.*, at 98a-100a, 105a (Complaint, ¶¶ 72-82, 119-125). That is enough to show Fallbrook's claims and any claims by NIFLA are unripe as against Montgomery.

An order dismissing this case for lack of jurisdiction under Article III would not impose any burden on Fallbrook's speech. Unlike a criminal statute which exposes a plaintiff to a real threat of immediate criminal liability, only civil penalties can be imposed for violating the FACT Act and the law requires a notice of

noncompliance and an opportunity to comply before any civil enforcement action can be brought. See Pet. App. 82a, Cal. Health & Saf. Code § 123473(a)(1)-(2). Should Fallbrook ever receive a notice of noncompliance, it would have ample time to seek injunctive relief well before any civil penalty could be imposed against it.

Nor does this case fall within the class of cases finding pre-enforcement ripeness where the law would inevitably cause economic harm. See, e.g., *Pennsylvania v. West Virginia*, 262 U.S. 553, 592-593, 43 S. Ct. 658, 663 (1923) (suit to enjoin West Virginia act found ripe even though implementing agency had not yet acted where implementation would cause immediate injury to plaintiff states and their consumers in the range of hundreds of millions of dollars); *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. at 393 (booksellers exposed to imminent criminal liability and booksellers would incur extensive costs and business disruption implementing substantial changes to avoid violating the law).

Fallbrook faced no additional costs as a result of the FACT Act since it asserted in the Complaint that it would not provide the notices required by the law. Nor did Fallbrook identify how the FACT Act prevented, interfered with, or otherwise chilled its pregnancy counseling activities and related messages, especially since it had no intent to comply with the FACT Act.

This Court should dismiss Fallbrook's claims because they are not constitutionally ripe for review.

II. FALLBROOK'S CLAIMS ARE ALSO NOT PRUDENTIALLY RIPE.

Alternatively, the Court should exercise its discretion to find the case not prudentially ripe for review. Fallbrook's claims would substantially benefit from further factual development and Fallbrook will suffer no harm should the Court decline to exercise jurisdiction over this case.

Under the prudential ripeness doctrine, federal courts consider both "the fitness of the issues for judicial decision" and "the hardship to the parties of withholding court consideration" in determining whether review of the issue should be declined for prudential reasons in favor of awaiting a more fact specific, concrete dispute. *National Park Hospitality Ass'n v. Department of Interior*, 538 U.S. 803, 808, 123 S. Ct. 2026, 155 L.Ed.2d 1017 (2003), accord, *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 670 n. 2, 130 S. Ct. 1758, 1767 (2010).

A. Fallbrook's claims would be substantially aided by further factual development.

Further factual development was and is necessary to facilitate court review of Fallbrook's legal claims against Montgomery. Thus, the Court should decline to

exercise jurisdiction over Fallbrook's claims at this time.

To be fit for judicial consideration, the Court takes into account whether further factual development would "significantly advance our ability to deal with the legal issues presented." *Nat'l Park Hosp. Ass'n v. DOI*, 538 U.S. 803, 812, 123 S. Ct. 2026, 2032 (2003). Or, as the Ninth Circuit described the factors in *Thomas*, "'[a] concrete factual situation is necessary to delineate the boundaries of what conduct the government may or may not regulate'" and that constitutional issues should not be decided in a vacuum. *Thomas*, 220 F.3d at 1141 (citation omitted).

Fallbrook's own allegations questioned whether it would even fall under the FACT Act's "unlicensed covered facility" provisions. See Pet. App. 100a, 103a (Complaint, ¶ 82 ["Fallbrook, and NIFLA's non-medical pregnancy center members in California, *appear* to qualify as unlicensed covered facilities for purposes of the FACT Act" [emphasis added]], ¶ 109 [questioning whether Fallbrook might qualify as an unlicensed covered facility due to asserted vagueness]. Fallbrook also identified various forms of pregnancy related information it provides for services rendered by others and questioned whether such information might fall under the FACT Act. See Pet. App. 102a-103a (Complaint, ¶¶ 96-106). Waiting for a notice of noncompliance under the FACT Act, if any ever came, would provide a court with specific alleged facts showing how (1) Fallbrook fell within the FACT Act's requirements, and (2) violated the FACT Act.

Requiring further factual development is particularly important here because Fallbrook raises an as-applied, not facial challenge, to the FACT Act. "An as-applied challenge goes to the nature of the application rather than the nature of the law itself." *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 803, 104 S. Ct. 2118, 2127 (1984); *Desert Outdoor Advertising, Inc. v. City of Oakland*, 506 F.3d 798, 805 (9th Cir. 2007).

Fallbrook's preliminary injunction papers aptly demonstrate the large number of factual issues raised in Fallbrook's challenge to the FACT Act, making plain it raises an as-applied challenge even though the FACT Act has not been applied to it. According to Fallbrook, "[t]he Act requires unlicensed non-medical pregnancy centers, such as Plaintiff Fallbrook and similar NIFLA members, to place in all 'digital' advertisements and post within their facilities disclosures telling women they have no medical licenses, even though those centers need no medical licenses since they are not offering medical services (and don't pretend to)." Addendum at 3a (Doc. 3 at 9). The factual issues raised by Fallbrook include whether Fallbrook: (1) engages in "digital" advertising covered by the FACT Act, (2) offers medical services to the public even though it claims not to, and (3) implies to others that it offers medical services. *Ibid.*; and see Pet. App. 100a-103a (Complaint, ¶¶ 83-106).

Fallbrook also asserted in the preliminary injunction motion that "[u]nlicensed centers, in turn, must clutter or preclude their advertising altogether due to

posting the long and prominent disclaimers." Addendum at 3a (Doc. 3 at 9). This raises the obvious factual question of whether the required statement ["This facility is not licensed as a medical facility by the State of California and has no licensed medical provider who provides or directly supervises the provision of services"], will preclude Fallbrook from advertising its services or will require it to unnecessarily "clutter" its advertisements. See Pet. App. 81a, Cal. Health & Saf. Code § 123472(b)(1).

Fallbrook asserts that the required disclosure "strongly suggests that Plaintiffs are unqualified to provide their information because they are not licensed physicians. . . . They are fully competent to share their viewpoint and personal help to women to aid them in choosing better options than abortion." Addendum at 4a (Doc. 3 at 10). This assertion raises the factual question of whether women who receive the required statement believe that the employees of Fallbrook are unqualified to provide information about reproductive health issues. Moreover, how would the notice purportedly result in an adverse impact to Fallbrook's desired message rising to the level of a constitutional violation? As this Court previously observed, "to say the ordinance presents a First Amendment *issue* is not necessarily to say that it constitutes a First Amendment *violation.*" *Members of City Council v. Taxpayers for Vincent*, 466 U.S. at 803-804 (internal citation omitted). Absent factual development in the form of specific allegations that Fallbrook is covered under the unlicensed covered facility provisions

of the FACT Act and the specific purported violations, Fallbrook's claims are not ripe.

B. The notice provisions of the FACT Act mean that Fallbrook will not be harmed if its claims are found unripe.

Fallbrook will not be harmed if the Court declines to exercise jurisdiction over the claims because Fallbrook admits that it is not complying with the FACT Act and it will have ample time to file a lawsuit and seek injunctive relief if it ever receives a notice of noncompliance outlining the basis of any asserted noncompliance.

Fallbrook's expressed uncertainty regarding whether the FACT Act applies to its activities makes this case akin to *Renne v. Geary*, 501 U.S. at 323. In *Renne*, this Court found no harm in declining to exercise jurisdiction because it was not clear from the statute whether it would apply to the plaintiff. *Ibid.* This Court also noted the potential that the challenged provisions could be interpreted, and possibly invalidated, by the state courts which supported declining federal jurisdiction. *Ibid.*

This Court's past decisions finding hardship are inapplicable here, especially in light of the FACT Act's noncompliance notice requirement. *Nat'l Park Hosp. Ass'n v. DOI*, 538 U.S. 803, 809-810, 123 S. Ct. 2026, 2031 (2003) found hardship existed in advance of actual enforcement where the statute or regulation threatened the plaintiff's licensed status if it failed to

perform acts or refrain from acts. Fallbrook faces no such license revocation threat. *Abbott Labs. v. Gardner* found hardship where drug manufacturers *who desired to comply with new labeling regulations* faced potential criminal misbranding charges even if they undertook the enormous expense of destroying existing labeling and retooled to change their labels, advertisements, and promotional materials in the event the FDA determined their new labels did not comply. *Abbott Labs. v. Gardner*, 387 U.S. 136, 152-153, 87 S. Ct. 1507, 1517-1518 (1967) (superseded by statute on other grounds). Nor is this case akin to the First Amendment challenge in *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. at 391-393 where this Court found that the evidence presented showed hardship because the booksellers faced significant costs to comply with the statute, an imminent threat of criminal prosecution if they did not adequately comply, and a demonstrated potential of self-censorship in seeking to comply with the new law.

Here, Fallbrook would suffer no hardship if the Court declined to exercise jurisdiction over this case. Fallbrook expressly asserted that it would proceed with business as usual and not give the unlicensed covered facility notice. Pet. App. 105a (Complaint, ¶¶ 122-124). It said, "Plaintiff Facilities desire to continue engaging in their speech and expressive services while refusing to post, distribute, or otherwise communicate the required compelled statements." *Ibid.* (Complaint, ¶ 124).

Fallbrook faces no imminent consequences (financial or otherwise) because of the FACT Act. This is true because Montgomery has never issued a notice of noncompliance to Fallbrook. Any possible threat of a civil action and potential civil penalties remain contingent on issuance of the requisite notice. Much like the conclusion reached in *Toilet Goods Ass'n v. Gardner*, 387 U.S. 158, 164-165, 87 S. Ct. 1520, 1525 (1967), there is no harm in awaiting issuance of a noncompliance notice which would give Fallbrook plenty of time to seek judicial review before any civil action or civil penalty could ever be imposed against it.

Hardship is also eliminated by the grace period provided by the FACT Act following a noncompliance notice. The FACT Act expressly provides that a "notice of noncompliance" must be given and that a minimum of 30 days must pass before verification of continued noncompliance. Pet. App. 82a at Cal. Health & Saf. Code § 123473(a)(1) and (2). Only if noncompliance continues 30 days after the notice may a civil action be pursued. *Ibid.* So, none of the named defendants, including Montgomery, could bring a civil action *until 31 days after the issuance of the notice of noncompliance, at the earliest. Ibid.*

Accordingly, Fallbrook would not have to wait for a civil proceeding to be filed against it before its claim became ripe. Rather, the claims would ripen as soon as notice of noncompliance outlining the alleged basis of the violation was given as required by the FACT Act. The 31 day safe harbor provision in turn, gives Fallbrook and any entity served with a notice of

noncompliance sufficient time to file a lawsuit and seek a temporary restraining order or preliminary injunction enjoining the FACT Act as applied.

Any potential hardship is further mitigated by the fact that only civil penalties may be imposed for violating the FACT Act. This "possible financial loss" does not meet the hardship requirement.[4] *California, Dep't of Education v. Bennett*, 833 F.2d 827, 834 (9th Cir. 1987) (financial expense alone was insufficient hardship to justify pre-enforcement judicial review); and see *Toilet Goods Ass'n v. Gardner*, 387 U.S. 158, 164-165, 87 S. Ct. 1520, 1525 (1967) (no hardship – regulation did not impact primary conduct; no immediate consequence for failure to comply and adequate opportunity for judicial review).

Indeed, any potential of a future enforcement action against Fallbrook remains speculative because the FACT Act does not mandate county counsel enforce the law. It merely identifies county counsel as one of the persons who *may* serve a noncompliance notice and thereafter enforce the FACT Act following expiration of the safe harbor period. See Pet. App. 82a, Cal. Health & Saf. Code § 123473(a).

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[4] At the district court, plaintiffs argued that they run the risk of "prosecution" if this pre-enforcement challenge is not decided. This is untrue on two grounds. First, a defendant cannot be criminally prosecuted for violating the FACT Act – only civil penalties may be imposed. Second, plaintiffs can seek injunctive relief after a notice of noncompliance and well before any potential civil penalty might be awarded.

For these reasons, Fallbrook will not suffer any hardship if the Court declines to exercise jurisdiction over this case under the prudential ripeness doctrine.

CONCLUSION

Montgomery requests this Court find Fallbrook and NIFLA's claims against him not ripe and therefore this Court lacks subject matter jurisdiction under Article III of the United States Constitution. Alternatively, the Court should find that Fallbrook's claims are not ripe for review under the prudential ripeness doctrine.[6]

Respectfully submitted,

THOMAS E. MONTGOMERY,
County Counsel,
COUNTY OF SAN DIEGO
THOMAS D. BUNTON, Chief Deputy
Counsel of Record
DARIN L. WESSEL, Senior Deputy
1600 Pacific Highway, Room 355
San Diego, CA 92101
(619) 531-6456
Thomas.Bunton@sdcounty.ca.gov

Counsel for Respondent
Thomas E. Montgomery
in his official capacity
as County Counsel for
the County of San Diego

[6] NIFLA's claims are derivative of Fallbrook's claims against Montgomery and fail for the same reasons. Pregnancy Care Center is located in the City of El Cajon and its claims are against the City Attorney, not Montgomery.

No. 16-1140

IN THE
Supreme Court of the United States

NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES, D/B/A NIFLA, ET AL.,
Petitioners,

v.

XAVIER BECERRA, ATTORNEY GENERAL, ET AL.,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

JOHN C. EASTMAN
CENTER FOR CONSTITUTIONAL JURISPRUDENCE
c/o Chapman University
Fowler School of Law
One University Drive
Orange, CA 92866
(877) 855-3330

ANNE O'CONNOR
NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES
5601 Southpoint Centre Blvd.
Fredericksburg, VA 22407
(540) 372-3930

MICHAEL P. FARRIS
KRISTEN K. WAGGONER
DAVID A. CORTMAN
Counsel of Record
KEVIN H. THERIOT
JAMES A. CAMPBELL
DENISE M. HARLE
ELISSA M. GRAVES
ALLIANCE DEFENDING FREEDOM
440 1st Street N.W.
Suite 600
Washington, D.C. 20001
(202) 393-8690
dcortman@ADFlegal.org

Counsel for Petitioners
[ADDITIONAL COUNSEL LISTED ON INSIDE COVER]

DEAN R. BROYLES
THE NATIONAL CENTER FOR LAW
AND POLICY
539 West Grand Avenue
Escondido, CA 92025
(760) 747-4529

CORPORATE DISCLOSURE STATEMENT

The Corporate Disclosure Statement in the Brief of Petitioners remains unchanged.

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INTRODUCTION

The State of California targets a group of speakers—pro-life pregnancy centers—for disfavored treatment. It does so by gerrymandering a statute that commandeers those centers' speech while letting alone countless others that would further the State's asserted interests.

California forces pro-life licensed centers to point the way to free or low-cost abortions, making those centers complicit in facilitating an act they believe hurts women and destroys innocent lives. Even though these centers hold their pro-life views as a matter of deep religious beliefs, California insists they say what their conscience cannot allow.

California does not stop there. As part of this targeted scheme, it places facially onerous advertising burdens on the pro-life unlicensed centers—unlike anything required elsewhere under California law. Their advertisements must contain an intrusive disclaimer, in multiple languages and conspicuous font, that wrongly implies that the centers should be licensed—even though they provide no services that require a license. This is obviously designed to hamper the centers' efforts to reach their audience.

California's arguments about preventing confusion sound in paternalism and exude a low view of women navigating unplanned pregnancies. The State assumes these women are unable to make phone calls, search the Internet, or ask basic questions of prospective service providers. *But see Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 799 (1988) (recognizing that the public is "free to

inquire" about a nonprofit's services). But these women, whom Petitioners serve every day, care deeply about the decisions they are facing and will do more to equip themselves than California gives them credit.

The Act's gerrymandered scope, compulsion to facilitate abortion, burdensome advertising demands, and overbearing paternalism demonstrate California's unconstitutional attempt to disadvantage "one side of a debatable public question" in its efforts to "express[ ] its views to the people." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2238 (2015) (Kagan, J., concurring) (quoting *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 785 (1978)). The First Amendment does not permit California to manipulate the marketplace of ideas in this way.

Despite California's contrary claims, Petitioners do not argue that all laws compelling speech receive strict scrutiny. Rather, strict scrutiny applies here because California has inserted its message into Petitioners' fully protected speech. *See, e.g.*, Pet. Br. 17 (distinguishing fully protected expression subject to strict scrutiny from commercial speech subject to lesser scrutiny). This is why the vast majority of existing disclosure laws would not be affected by Petitioners' argument. This Court vigorously protects against attempts to compel fully protected speech, whether the form of compelled speech is a license plate, a flag salute, or a written disclosure. And because the Act targets Petitioners and is not narrowly drawn, it cannot satisfy even lesser scrutiny.

ARGUMENT

I. The Act Compels Pro-life Pregnancy Centers' Speech.

California inserts its message into fully protected speech. This case does not involve commercial speech, informed consent, or any form of less protected speech. *See* Pet. Br. 39–48; *infra* Part II. By compelling the speech of those engaged in fully protected discussions about pregnancy, motherhood, and human life, the Act infringes on the "individual freedom of mind." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943). Worse yet, the Act singles out a disfavored group of speakers for disfavored treatment. It cannot survive intermediate, let alone strict, scrutiny.[1]

A. The Act targets Petitioners as disfavored speakers, and subjects them to disfavored treatment.

California gerrymandered this "facially content-based regulation[ ] of speech" to target pro-life pregnancy centers, raising the "realistic possibility that official suppression of ideas is afoot" with the "intent or effect of favoring some ideas over others." *Reed*, 135 S. Ct. at 2237, 2238 (Kagan, J., concurring); *see also Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S.

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[1] Respondent Montgomery argues that Fallbrook's claims against him are not ripe because there is no imminent threat of enforcement. But no Respondent has disclaimed an intent to enforce the law. Pet.App.55a. Because "[t]he State has not suggested that the newly enacted law will not be enforced, ... plaintiffs have alleged an actual and well-founded fear that the law will be enforced against them." *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 393 (1988).

622, 642 (1994) (content-based regulations threaten to "excis[e] certain ideas or viewpoints from the public dialogue").

California's efforts to dispute the Act's content-based nature, State Br. 47–48, are meritless and inconsistent with its prior position. Laws compelling speech are content based because they "necessarily alter[ ] the content" of what the speaker would otherwise say. *Riley*, 487 U.S. at 795. The Ninth Circuit had no trouble reaching this conclusion. Pet.App.18a. And California conceded below that the Act is content based, *see* State 9th Cir. Br. 40–42, 42 n.16, as did a legislative committee that analyzed it, *see* JA 49–50 (the licensed and unlicensed notices are "content-based").

Not only is the Act content based, it targets Petitioners as "disfavored speakers," much like the law invalidated in *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 564 (2011). Targeting is shown on the face of the Act—specifically in the obvious disparity between the statute's scope and its asserted purposes. Pet. Br. 31–34. To support the Compelled Abortion Referral, California says it has a compelling interest in informing pregnant women about all state-funded services for pregnancy. State Br. 27–28, 52. Yet the Abortion Referral specifically mentions abortion—while omitting childbirth or labor and delivery—as an option, revealing the government's bent.

In addition to its skewed message, the Act excludes most doctors serving pregnant women from making the compelled statement. Of the Abortion Referral's numerous coverage gaps, *see* Pet. Br. 31–34, two are particularly noteworthy: (1) it does not

apply to free community clinics that serve pregnant women unless their "primary purpose is providing family planning or pregnancy-related services," Pet.App.78a; and (2) it does not apply to any private physicians, even those (like obstetricians) whose primary purpose is providing pregnancy-related services, Pet. Br. 32. California does not even attempt to explain its failure to cover the first category. And its conjecture that low-income pregnant women do not seek care from providers that charge fees is belied by its own programs.[2] Only the pro-life centers are unable to avoid speaking the government's message.

Such gerrymandering shows that California has singled out Petitioners for disfavored treatment and imposed burdens on their speech in violation of *Sorrell*. California misreads *Sorrell* and says that the Court there primarily relied on "the legislative record." State Br. 51. In fact, the Court's analysis started with the law "[o]n its face," 564 U.S. at 563, and consulted the legislative record only to confirm what the statutory text already showed, *id.* at 564–65. Likewise, here, the facial gerrymandering is confirmed by statements in the legislative record expressing intent to target pregnancy centers espousing pro-life views.

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[2] *Compare* State Br. 49–50, *with Find a Qualified Provider to Enroll*, California Department of Health Care Services, http://www.dhcs.ca.gov/services/medi-cal/eligibility/Pages/Find-a-Qualified-Provider-to-Enroll.aspx (listing many private doctors for "low income women who believe they are pregnant and do not have Medi-Cal").

B. The Abortion Referral forces Petitioners to facilitate abortion in violation of their conscience.

The Act forces licensed centers to utter speech that violates their conscience. Although they exist to help pregnant women choose life for their unborn children, Pet.App.91a, the Act mandates that they be "instrument[s] for fostering" abortion services, which they "find[ ] unacceptable," *Wooley v. Maynard*, 430 U.S. 705, 715 (1977). This is antithetical to their core mission and makes them complicit in facilitating abortion, which they view as a grave moral wrong and harmful to the women they serve. It violates their protected choice "not to propound a particular point of view," which "is presumed to lie beyond the government's power to control." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 575 (1995).

The demand to facilitate abortion is so intolerable to their conscience—and the impact of the Act's civil penalties so financially crippling—that the centers are pressured to end their pro-life advocacy altogether. *See* Pet.App.105a ("Plaintiff Facilities intend to not comply with the Act"); *id.* at 106a (the Act's penalties will "significantly harm" Petitioners' "ability to continue their expressive operations"); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 257 (1974) (a compelled speaker "might well conclude that the safe course" is to stop the speech triggering the compulsion). This would drive out Petitioners, thereby "limit[ing] the variety of public debate," *Pac. Gas & Elec. Co. v. Pub. Util. Comm'n of Cal.*, 475 U.S. 1, 10 (1986) (plurality opinion) (citation omitted) ("*PG&E*"), and "reduc[ing] the quantity of

expression," *Riley*, 487 U.S. at 794 (citation omitted). That will only harm the many women who desire Petitioners' compassionate pro-life counsel and services.

Moreover, when the State "identifies a favored speaker" (here, itself) and forces groups with a contrary view (Petitioners) "to assist in disseminating the [favored] speaker's message," that "necessarily burdens the expression of the disfavored speaker[s]." *PG&E*, 475 U.S. at 15 (plurality opinion); *see also Sorrell*, 564 U.S. at 565 ("Given the legislature's expressed statement of purpose, it is apparent that [the law] imposes burdens ... that are aimed at a particular viewpoint"). California cannot force pro-life centers to be couriers of its message.

C. The Unlicensed Mandate is inaccurate and onerous.

The Unlicensed Mandate wrongly suggests that an unlicensed center should become "licensed as a medical facility by the State of California" for the services it provides. Pet.App.81a. But California does not require licensing for such services. Forcing those centers to post or advertise a message with this negative connotation hurts their efforts to reach women in need of the resources they provide. And it risks harming the women who are discouraged from accessing the free baby supplies, maternity clothes, educational resources, and spiritual and emotional support that Petitioners provide in a way the State does not. In this sensitive realm of discussions about abortion, California is doing the misdirection.

The Unlicensed Mandate particularly burdens the centers' outreach. Requiring a prominent, multi-

language disclaimer in *all print and digital advertisements* (1) forecloses channels of communications with size or character limitations (e.g., internet), (2) increases the cost of media charging by the amount of space (e.g., newspapers, billboards), and (3) clutters and reduces the effectiveness of other alternatives (e.g., bus ads). *See, e.g.*, Heartbeat International Am. Br. 24 (depicting sample ad); *see also Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation, Bd. of Accountancy*, 512 U.S. 136, 146–47 (1994) (finding that "[t]he detail required in the disclaimer ... effectively rule[d] out" certain ads).

California has not pointed to any other example where it mandates multiple languages and conspicuous fonts in advertising. Yet its state laws show that it knows how to impose language requirements in a less burdensome manner.[3] The hardship that the Act imposes on unlicensed centers' messaging is so obvious that California dodges it.

California attempts to retreat from the clear statutory language and speculates that it might be construed to make the advertising requirements less onerous. State Br. 26 n.23.[4] These new alternative constructions come too late, *see Sprietsma v. Mercury Marine*, 537 U.S. 51, 56 n.4 (2002), and contradict the

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[3] *E.g.*, CAL. INS. CODE § 10133.10 (insurers advertising in non-English language in smaller health insurance markets must make certain key documents available "in the same non-English language").

[4] For the first time, the State claims "primary threshold languages" is unclear. State Br. 26 n.23. But all the provisions they cite are triggered by specific numbers clearly set forth and regularly updated on a state website. *See* Pet. Br. 11 n.7.

face of the statute. California also claims that Petitioners did not present these arguments below. State Br. 24. But Petitioners have raised the burdensome size, length, and language requirements at each stage of litigation.[5]

D. It does not matter whether the compelled speech endorses beliefs, is attributed to Petitioners, or forbids Petitioners' other speech.

California argues that the Act "does not require an endorsement or statement of belief." State Br. 38. But compelled statements of "fact" violate the First Amendment just like compelled statements of "opinion"—"either form ... burdens protected speech." *Riley*, 487 U.S. at 797–98.

Nor does this Court require an explicit "endorsement" of a compelled statement as a predicate. *Wooley* found a constitutional violation even though the motorist was not forced to express endorsement of the state motto on his license plate.[6] California tries to distinguish *Wooley* and other cases as more ideological than this one. State Br. 38–39. But the nature of Petitioners' speech—conversations about motherhood, childbirth, and abortion—is

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[5] *See* Pet.App.100a, 107a, 110a; NIFLA Mem. in Support of Mot. for Preliminary Injunction 9–10; Prelim. Inj. Hr'g Tr. at 16–17; NIFLA 9th Cir. Br. 17, 20, 26, 54; 9th Cir. Arg. Tr. at 22:27–24:32, available at https://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000009827; NIFLA En Banc Pet. 3. California responded to these arguments during oral argument on appeal. 9th Cir. Arg. Tr. at 40:35–43:30.

[6] *Riley* and *PG&E* also did not require speakers to expressly endorse or affirm the mandated message.

quintessentially ideological and fully protected. This case calls for at least the same scrutiny as a dispute over a state motto on a license plate.

California cites *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47 (2006), for its claim that the government can force speakers to disclose facts even within the context of a "vigorous debate." State Br. 40–41. But *Rumsfeld* is entirely unlike this case: the law at issue "regulate[d] conduct, not speech. It affect[ed] what law schools must *do*—afford equal access to military recruiters—not what they may or may not *say*." 547 U.S. at 60. Here, Petitioners are undeniably speaking when they encourage women to give birth and when making the compelled statements. Additionally, the law in *Rumsfeld* did "not dictate the content of the speech at all, which [was] only 'compelled' if, and to the extent, the school provide[d] such speech for other recruiters." *Id.* at 62. But the Act dictates precise words that must be said and provides no means of avoiding the compelled expression.

Moreover, a compelled-speech claim does not depend on whether a hypothetical observer would misattribute the speech to the compelled speaker. *But see* State Br. 42–44. That is why the business in *PG&E* could not be forced to transmit a third-party newsletter in its billing envelope, even though the newsletter explicitly stated that it was not the business's speech. *See* 475 U.S. at 6–7, 15 n.11 (plurality opinion). Nor is it dispositive that Petitioners are free to "disavow" the compelled speech. State Br. 20, 43. The freedom to otherwise speak does not undo a compelled-speech violation. *See Hurley*, 515 U.S. at 576 (government cannot "require

speakers to affirm in one breath that which they deny in the next") (citation omitted); *PG&E*, 475 U.S. at 11 ("the State is not free ... to force appellant to respond to views that others may hold").

II. No Basis Exists to Apply Commercial or "Professional" Speech Standards.

A. Petitioners' compelled speech is not subject to review under *Zauderer*.

California and the United States argue that *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985), governs the Unlicensed Mandate. State Br. 19; U.S. Br. 33. But they ignore that *Zauderer* applies only to commercial speech. 471 U.S. at 651 ("The State has attempted only to prescribe what shall be orthodox in commercial advertising"). This Court has never applied *Zauderer* outside the narrow context of proposing commercial transactions. *See Milavetz, Gallop & Milavetz v. United States*, 559 U.S. 229, 249 (2010) (applying *Zauderer* to "commercial speech"); *Riley*, 487 U.S. at 796 n.9 (citing *Zauderer* for the proposition that "[p]urely commercial speech is more susceptible to compelled disclosure requirements"); *Hurley*, 515 U.S. at 573 (*Zauderer* is confined to "commercial advertising").

Zauderer thus does not apply here because the centers never engage in commercial speech. Yet the United States relies on both *Zauderer* and *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983), to argue for commercial speech standards. U.S. Br. 21–22. But *Bolger* identified "an economic motivation" as an element of commercial speech, 463 U.S. at 67, which has no relevance here because Petitioners

operate without any profit motive. Likewise, the United States' claim that a commercial actor who offers "free samples" or "free consultations" "to attract [paying] customers" is engaged in commercial speech, U.S. Br. 21, has no bearing because Petitioners never solicit paying customers.

Zauderer does not apply for another reason. As the United States concedes, *Zauderer* governs "laws that require providers of *commercial* services to disclose factual, uncontroversial information *about their services*." U.S. Br. 9 (emphasis added). Here, however, the Unlicensed Mandate does not describe the centers' own (noncommercial) services.

California and the United States ask this Court to turn *Zauderer* into a free-floating test for all disclosures, commercial or not. Divorcing *Zauderer* from commercial speech would allow mandated disclosure of government-selected facts in fully protected contexts and radically empower the government to control speech. It would lessen speech protections for all kinds of religious and advocacy nonprofits. Such an expansion would subject church soup kitchens to disclosure requirements as restaurants and control women's shelters' speech because they offer hotel-like services. This may be an outcome the government prefers, but the Free Speech Clause forbids it.[7]

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[7] Nor does *Zauderer* apply to the Abortion Referral. *Zauderer* is not even triggered because licensed centers do not engage in commercial speech. Moreover, that standard is not satisfied because, as the United States argues, the Abortion Referral is controversial, and it does not describe licensed centers' services. U.S. Br. 24–25. And as *PG&E* confirms, *Zauderer* does not apply

B. Licensed centers' claims are not subject to a "professional speech" doctrine.

California and the United States argue for reduced constitutional protection whenever the government compels speech by professionals, inviting this Court to create a new speech doctrine.[8] The United States says the standard is "heightened (rather than strict) scrutiny," U.S. Br. 13, but California does not even suggest a standard, admitting that "[t]his Court has never directly articulated the test," State Br. 31. These novel arguments should be rejected.

The proposed "professional speech" rule is unworkable and lacks clear parameters. Even the United States is confused about how to apply its proposed test, suggesting that professional speech is "[1] speech by members of a regulated profession [2] related to their services." U.S. Br. 13. But while acknowledging that the Abortion Referral "does not describe petitioners' own services at all," *id.* at 24, the United States surprisingly concludes that it is professional speech nonetheless, *id.* at 25.

Adopting the requested "professional speech" doctrine would weaken First Amendment protections, giving the government greater power to compel speech. It would permit, for example, a state to require Catholic hospice facilities to post a sign

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"where the messages themselves are biased against or are expressly contrary to the [speaker]'s views." 475 U.S. at 15 n.12.

[8] Neither California nor the United States argues that the "professional speech" doctrine applies to unlicensed centers, presumably because the unlicensed centers are not part of any licensed profession.

saying: "Assisted suicide is a legal option in this state. Call this number for more information."

The suggestion that strict scrutiny does not apply to professionals is refuted by this Court's precedent, and neither California nor the United States has been able to distinguish *In re Primus*, 436 U.S. 412 (1978), or *NAACP v. Button*, 371 U.S. 415 (1963). The distinction they attempt to make is that the NAACP and ACLU were exercising "associational freedoms," U.S. Br. 22, and recruiting "members and allies," State Br. 36. But the United States concedes that the activities there were fundamentally "expressive" and the laws at issue "impaired [the] ability to disseminate the organization[s'] message." U.S. Br. 22–23. The same is true here.

Nor were this Court's holdings based on a finding that the advocacy groups were recruiting associates rather than pro bono clients. The NAACP and ACLU were offering free services to clients, just as Petitioners are here. *See, e.g., Primus*, 436 U.S. at 427 (expression at issue was "solicit[ing] a client for a non-profit organization"). The "professional speech" standard California and the United States propose would require overruling *Button* and *Primus*.

Finally, the theoretical underpinnings supporting "professional speech" arguments do not apply to the Abortion Referral. The State itself says that professional speech occurs when a professional "purports to exercise judgment" on behalf of a client "in the light of his individual needs or circumstances." State Br. 34 (quoting *Lowe v. SEC*, 472 U.S. 181, 232 (1985) (White, J., concurring)); *see also* Cato Institute Am. Br. 3–9 (explaining that professional speech is (1)

based on "specialized knowledge" and (2) tailored to a particular client's circumstances). But the Abortion Referral does not involve exercising judgment or personally tailored advice—and it cannot be justified on these grounds.

C. Licensed centers' claims are not subject to informed-consent principles.

Informed-consent principles, like those discussed in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 881–84 (1992) (plurality opinion), do not justify the Abortion Referral. A doctor's obligation to obtain informed consent arises within an existing patient-clinician relationship when the patient seeks to undergo a medical intervention. The doctor's duty to inform the patient is limited to disclosing "information about the nature of the procedure" under consideration and its risks, consequences, and alternatives. *Id.* at 882. The medical community confirms this understanding of informed consent. According to the American College of Obstetricians and Gynecologists ("ACOG"), informed consent is "the willing and uncoerced acceptance of a medical intervention by a patient after appropriate disclosure by the clinician of the nature of the intervention and its risks and benefits as well as the risks and benefits of alternatives."[9]

Unlike performing an abortion, confirming a pregnancy is not a medical intervention. No woman needs to give consent to a physician to continue her

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[9] *ACOG Guidelines for Women's Health Care* 80 (3d ed. 2007); *see also Informed Consent*, American Medical Association, https://www.ama-assn.org/delivering-care/informed-consent (similar).

pregnancy, and no doctor is required to discuss abortion with all pregnant patients. But licensed centers must convey the Abortion Referral to every client, regardless of whether she is contemplating any medical intervention the center performs, and despite the fact that abortion is not an "alternative" to any of the limited medical services these centers provide.[10] Informed-consent principles thus do not support the Abortion Referral.

D. Protecting Petitioners' rights will not undermine routine disclosure requirements.

Existing doctrines ensure a proper balance between the government's need to regulate and individuals' right to expressive freedom. Those doctrines belie California's and the United States' claims that ruling for Petitioners will subject "all disclosure requirements" to "strict scrutiny," "overrul[e]" cases applying "lower levels of scrutiny to required disclosures," and invalidate a host of disclosure requirements. *E.g.* State Br. 48; U.S. Br. 10, 12–17.

Unlike this case, where California has inserted its message into fully protected speech, the government has wide latitude to require commercial-speech disclosures. In fact, many of the disclosures California says will be called into question—examples that include "credit-solicitation disclosures" and labeling

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[10] Licensed centers offer short-term services to diagnose pregnancy and refer women to OB/GYNs for comprehensive prenatal care, and labor and delivery. Pet.App.91a.

requirements, State Br. 48 n.41—are inserted into commercial speech and thus subject to *Zauderer*.

Additionally, a state's regulation of professional *conduct* is generally free from First Amendment oversight.[11] States may set standards for licensing in a particular profession and regulate conduct through, for example, professional codes. But the Act is not an across-the-board regulation of any specialized profession or professional activity; it applies selectively to a group of pro-life speakers—and controls their words, not their actions.

Moreover, disclosures requiring an entity to merely explain or implement its legal duty are typically subject to minimal constitutional review. *See Sorrell*, 564 U.S. at 566–67 (the First Amendment does not forbid laws "directed at commerce or conduct"). This explains why obligations to disclose patients' privacy rights, State Br. 42 n.34, and building-evacutation emergency procedures, *id.* at 48 n.41, are constitutional.

Some medically related disclosures fall within informed consent. *See supra* Part II.C. That doctrine justifies many of the medical disclosures that the California cites in its brief. For example, the obligation to disclose the availability of clinical trials, State Br. 35 & n.27, and dangerous substances used in treatments and prescriptions, *id.* at 43 nn.35–36, are classic examples of such laws.

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[11] The State now claims that the Abortion Referral is "not necessarily" speech at all, but "expressive conduct" that can be regulated. State Br. 44. But when the government mandates that certain words be spoken, that is speech.

Finally, even outside these contexts, the government may mandate disclosures if it satisfies strict scrutiny. All of these doctrines demonstrate that the government has many constitutionally sound tools to implement disclosures.

III. The Act's Compelled-Speech Provisions Fail Any Level of Review.

California "bears the burden" of satisfying heightened or strict scrutiny. *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 816 (2000) (strict scrutiny); *see also McCullen v. Coakley*, 134 S. Ct. 2518, 2539 (2014) (heightened scrutiny); *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429 (2006) (government bears the burden to satisfy strict or heightened scrutiny on a preliminary injunction). It must do so with record evidence of "an actual problem" needing a solution, *Playboy*, 529 U.S. at 822; and when ambiguity exists, the State does not get "the benefit of the doubt," *id.* at 818.

Perhaps recognizing its failure to meet the standard, Calfornia now stretches to justify its one-sided speech mandate with new evidence outside the record. But those paltry references—a few anecdotes and unsupported accusations, State Br. 5 n.10, 7 n.13—were not important enough for California to support with actual evidence and are too little to remedy California's continued failure to establish a sufficient government interest for infringing on free speech.

A. The Abortion Referral does not satisfy strict or intermediate scrutiny.[12]

1. *No compelling or substantial interest.* California claims that the Abortion Referral furthers its interest in providing timely information to low-income women who are pregnant. State Br. 27–28, 52–53. But the State itself has shown that it does not regard this interest as compelling or even substantial because the Act's sizable holes in coverage leave "appreciable damage to that supposedly vital interest." *Reed*, 135 S. Ct. at 2232 (citation omitted). If California believes its informational interest is so vital, the significant gaps in coverage are inexplicable. As is the fact that California's own advertising lacks any mention of abortion. Pet.Br.Add.7a–8a.

To support its informational interest, California plucks isolated statements from *Sorrell*. In so doing, it turns *Sorrell* on its head. When *Sorrell* endorsed citizens having more information, it was not approving government-compelled speech; rather, it was endorsing the flow of information as freely determined by speakers, without government interference. *See* 564 U.S. at 568.

2. *Not narrowly tailored.* The narrow-tailoring analysis considers a law's underinclusiveness, its overinclusiveness, and the availability of less restrictive means. *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 805 (2011). The Act's gerrymandered design demonstrates that the Abortion Referral is

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[12] Neither California nor the United States argues that rational basis applies to the Abortion Referral.

underinclusive. And it is overinclusive because it mandates speech to *all* who visit the centers, regardless of whether they are already familiar with California's public-health programs, are visiting for free diapers and baby formula, or have their own moral convictions against abortion.

Petitioners have offered, and California has not explained the inadequacy of, several less restrictive alternatives. Pet. Br. 55–56.[13] But "it is the Government's obligation to prove that the alternative will be ineffective to achieve its goals." *Playboy*, 529 U.S. at 816; *see also McCullen*, 134 S. Ct. at 2539. California thus has it exactly backwards when it claims that Petitioners have not "support[ed] their contentions" about less restrictive alternatives. State Br. 53. The burden is California's, and it has failed to meet it.

California's focus on the need to reach low-income women opens the door to many additional alternative means of achieving its interest. California has programs that already connect directly with low-income households: CalFresh (assistance benefits in food purchases), CalWORKs/TANF (cash aid and benefits administered through county welfare offices), and WIC (supplemental nutrition and healthcare referrals for mothers, infants, and children).[14] California could easily distribute the information in the Abortion Referral through those programs. And

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[13] Petitioners' suggestions below for how the law could be more narrowly drawn, *see* U.S. Br. 30, in no way concede that those alternatives would survive scrutiny.

[14] *See California*, Benefits.Gov, https://www.benefits.gov/benefits/browse-by-state/state/146.

whatever methods it employs to enroll low-income individuals in these programs should be suitable for delivering the information in the Abortion Referral. But California apparently does none of this.

Responding to alternatives that Petitioners already identified, California argues that posting information on government websites and other forms of self-advertising are not realistic options because California has already engaged in undescribed "outreach efforts." State Br. 53. But no evidence in the record supports this, and the most California can muster are vague statements in the legislative history and links to never-before-cited materials. *See id.* at 5 n.10. Additionally, the State's assumption that women lack the information in the Abortion Referral is based on the number of "people who are eligible for publicly funded healthcare" but "unenrolled." State Br. 53. But a decision not to enroll does not equate to absence of information. California has failed to satisfy its burden: compelling speech "must be a last—not first—resort." *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 373 (2002).

B. The Unlicensed Mandate does not satisfy strict or intermediate scrutiny.

1. *No compelling or substantial interest.* California claims that the Unlicensed Mandate advances its asserted interest in ensuring that women are not confused or deceived when they visit unlicensed pregnancy centers. State Br. 19–25. But those interests are not sufficient here.[15]

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[15] California does not argue that the Abortion Referral furthers its interest in avoiding confusion or deception, and for good

California has not introduced any evidence of actual fraud or deception by unlicensed centers. Nor did the legislature make findings of either. Though the legislature referred to a document drafted by NARAL, State Br. 6–7 nn.12 & 14, a quick skim reveals that the report is a nonobjective advocacy piece, repeatedly referring to pro-life pregnancy centers as "insidious threat[s] to reproductive freedom." NARAL Pro-Choice America, *Crisis Pregnancy Centers Lie: The Insidious Threat to Reproductive Freedom* (2015) (available at https://www.prochoiceamerica.org/wp-content/uploads/2017/04/cpc-report-2015.pdf); *see also* Pet. Br. 52 n.17.[16]

More damning is the absence of any prosecutions for fraud, deceptive practices, or unlicensed practice of medicine against unlicensed centers in California.[17] Either there has been no unlawful deception, or California has deemed it not important enough to prosecute.[18] This dooms the State's attempt to satisfy

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reason: the message does not explain what the licensed centers do; it merely references state-funded services.

[16] California claims that unlicensed centers use "lab coats," State Br. 6, but cites nothing corroborating that accusation other than the NARAL document, which it did not introduce into the record. Likewise, California's allegation that the centers "prevent ... access[ ] to abortion," *id.* at 7, or engage in "misdirection," *id.* at 18, is never explained and not based on evidence.

[17] *E.g.*, under CAL. BUS. & PROF. CODE § 2052 (practicing medicine without a license), CAL. BUS. & PROF. CODE § 17200 et. seq. (unfair competition), or CAL. BUS & PROF. CODE § 17500 (misrepresenting the nature of a business).

[18] California's assertion that unlicensed centers are improperly performing ultrasounds is made without any evidence. State Br. 6–7 n.12. They are not performing ultrasounds. *See, e.g.*, Pet.App.100a–101a. In addition, California does not even

strict or heightened scrutiny. *Riley*, 487 U.S. at 800 (government must "vigorously enforce its antifraud laws" rather than infringing on speech to ensure "that government not dictate the content of speech absent compelling necessity"); *see also McCullen*, 134 S. Ct. at 2537 (same considerations under intermediate scrutiny).

California's interest in notifying women that unlicensed centers' services are "limited" cannot be substantial, much less compelling, when the limited nature of these centers is perfectly permissible under state law. Indeed, all California nonprofits, medical facilities, and other businesses—even the State itself—have finite purposes and offer limited services.

The State raises concerns about logistical challenges facing low-income women as its sole support for the burdensome advertising requirements. State Br. 24–25. But that argument is hopelessly speculative, laced with phrases like "the effect may be," State Br. 18, and "may be too late," *id.* at 24. At bottom, California's argument is that women might be delayed in receiving care. But these centers already direct women to other providers for prenatal care. Pet.App.91a–92a. To the extent that California is arguing a woman's abortion might be delayed, this Court has said that even a mandatory waiting period for abortion is permissible. *See Casey*, 505 U.S. at 885–86 (plurality opinion). Moreover, California's assertion about delay rests on an unproven, likely false, premise: that women who are unsure about the

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require ultrasounds to be performed by licensed medical professionals, and permits "keepsake" and "entertainment" ultrasounds. *See* CAL. HEALTH & SAFETY CODE §123620.

center's services cannot or will not ask questions before visiting. *See Riley*, 487 U.S. at 799.

2. *Not narrowly tailored.* The Unlicensed Mandate is not adequately tailored because it compels precise words crafted to inaccurately suggest that an unlicensed center should do something to become "licensed as a medical facility by the State of California" for its services. Pet.App.81a. On this point, California's reliance on the unchallenged provision in *Riley* is unpersuasive. *See* State Br. 19–20. The *Riley* Court did not rule on the requirement that fundraisers disclose their employer's name and address, but noted that revealing "professional status" in this manner would be constitutional. 487 U.S. at 799 n.11. Unlike the Unlicensed Mandate, that does not insinuate the lack of a required license.

Far from narrow tailoring, the advertising requirements are anomalous in their excessiveness. California has done nothing to defend the font size, number of words, or number of languages required—all of which are needlessly burdensome and evident from the face of the statute. While California argues that the threshold language requirement "serves important purposes" because of its "substantial populations of low-income non-English speakers," State Br. 24, it does not impose these multiple-language advertising requirements anywhere else in California law.

The State claims a lack of record development on this point and tells this Court it "has no basis to reverse." State Br. 25. But the burdensome means are evident on the statute's face, and this Court may rule accordingly. *See Riley*, 487 U.S. at 795–801 (affirming

summary judgment determination that statute compelling speech was unconstitutional with no indication of how it was applied).[19] Highlighting the burden on the unlicensed centers, the government discloses on its own websites that 59% of California's population resides in counties with six or more threshold languages.[20]

In fact, the Unlicensed Mandate is so onerous that it would not even satisfy *Zauderer*. That standard does not permit laws that are overly burdensome—and the multi-language, conspicuous-font advertising requirements are plainly that.

CONCLUSION

A law that inserts the government's message into discussions about deeply divisive issues is dangerous. It threatens "to suppress unpopular ideas or information ... through coercion rather than persuasion." *Turner*, 512 U.S. at 641. The Act does just that, singling out faith-based charities whose mission is to support women in choosing motherhood without fear or cost. The Act violates the First Amendment and must be invalidated.

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[19] Petitioners also brought an as-applied challenge. *See, e.g.*, Pet.App.120a.

[20] *See Estimates*, California Department of Finance, http://www.dof.ca.gov/Forecasting/Demographics/Estimates/E-1/documents/E-1_2017PressRelease.pdf (population by county); *Statistical Briefs*, California Department of Health Care Services, http://www.dhcs.ca.gov/dataandstats/statistics/Documents/Threshold_Language_Brief_Sept2016_ADA.pdf (threshold languages by county).

Respectfully submitted,

JOHN C. EASTMAN
CENTER FOR CONSTITUTIONAL JURISPRUDENCE
c/o Chapman University Fowler School of Law
One University Drive
Orange, CA 92866
(877) 855-3330

ANNE O'CONNOR
NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES
5601 Southpoint Centre Blvd.
Fredericksburg, VA 22407
(540) 372-3930

DEAN R. BROYLES
THE NATIONAL CENTER FOR LAW AND POLICY
539 West Grand Avenue
Escondido, CA 92025
(760) 747-4529

MICHAEL P. FARRIS
KRISTEN K. WAGGONER
DAVID A. CORTMAN
Counsel of Record
KEVIN H. THERIOT
JAMES A. CAMPBELL
DENISE M. HARLE
ELISSA M. GRAVES
ALLIANCE DEFENDING FREEDOM
440 1st Street N.W.
Suite 600
Washington, D.C. 20001
(202) 393-8690
dcortman@ADFlegal.org

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No. 16-1140

In the Supreme Court of the United States

NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES, DBA NIFLA, ET AL., PETITIONERS

v.

XAVIER BECERRA, ATTORNEY GENERAL OF CALIFORNIA, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING NEITHER PARTY

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
CHAD A. READLER
Acting Assistant Attorney General
JEFFREY B. WALL
Deputy Solicitor General
HASHIM M. MOOPPAN
Deputy Assistant Attorney General
JONATHAN C. BOND
Assistant to the Solicitor General
DOUGLAS N. LETTER
MARK R. FREEMAN
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the disclosures required by the California Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act violate the protections set forth in the Free Speech Clause of the First Amendment, applicable to the States through the Fourteenth Amendment.

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BRIEF FOR THE UNITED STATES
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INTEREST OF THE UNITED STATES

This case concerns whether a state statute that compels family-planning clinics to make certain disclosures violates the First Amendment, applicable to the States through the Fourteenth Amendment. The United States has a substantial interest in protecting citizens' constitutional right of free expression. It also has a substantial interest in the application of numerous statutory and regulatory requirements that persons disclose information to the public related to goods or services they provide.

STATEMENT

1. a. Like other States, California regulates the licensure and practice of medical professionals. See, *e.g.*, Cal. Bus. & Prof. Code §§ 2000 *et seq.* (West 2012) (medical practice); *id.* §§ 4000 *et seq.* (West 2011) (pharmacies); Cal. Health & Safety Code §§ 1200 *et seq.* (West 2016) (clinics). It also provides medical-insurance coverage to low-income individuals through various programs. Medi-Cal, California's Medicaid program, "offers free or low-cost health coverage for California residents who meet eligibility requirements" through a network of participating providers.[1]

The Family Planning, Access, Care, and Treatment (Family PACT) Program is a Medi-Cal initiative that offers "comprehensive clinical family planning services" to lower-income individuals. Cal. Welf. & Inst. Code § 14132(aa)(1) (West Supp. 2018). Those services include contraception, counseling, and diagnosis and treatment of cancer and other conditions related to reproductive health. *Id.* § 14132(aa)(8). Family PACT services do "not include abortion," *ibid.*, but "all [Food and Drug Administration (FDA)] approved contraceptive methods and supplies" are provided.[2] Medi-Cal also provides coverage for abortion services.[3]

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[1] California Dep't of Health Care Servs. (CDHCS), *Medi-Cal Eligibility and Covered California – Frequently Asked Questions*, http://www.dhcs.ca.gov/services/medi-cal/eligibility/Pages/Medi-CalFAQs2014a.aspx#1; see CDHCS, *Medi-Cal Overview*, http://www.dhcs.ca.gov/services/medi-cal/Pages/default.aspx.

[2] CDHCS, *What does Family PACT cover?*, http://www.familypact.org/Get%20Covered/what-does-family-pact-cover.

[3] See Health & Human Servs. Agency, CDHCS, *All Plan Letter 15-020* (Sept. 30, 2015), http://www.dhcs.ca.gov/formsandpubs/Documents/MMCDAPLsandPolicyLetters/APL2015/APL15-020.pdf; Br. in Opp. 2, 31 n.21.

b. In 2015, California enacted the California Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act (FACT Act or the Act), 2015 Cal. Stat. 5351-5354 (Cal. Health & Safety Code §§ 123470 *et seq.* (West Supp. 2018)) (Pet. App. 75a-83a). The Act's stated purpose is to "ensure that California residents make their personal reproductive health care decisions knowing their rights and the health care services available to them." § 2. The Legislature found that, although the State "provides insurance coverage of reproductive health care and counseling to eligible, low-income women," many women who become pregnant are "unaware of the public programs available to provide them with contraception, health education and counseling, family planning, prenatal care, abortion, or delivery." *Id.* § 1(a) and (b). The Legislature further determined that it is "vital that pregnant women in California know when they are getting medical care from licensed professionals." *Id.* § 1(e). In light of those determinations, the FACT Act imposes two disclosure requirements.

First, the Act requires state-licensed medical facilities that provide pregnancy-related services to inform their clients that California offers public assistance for various family-planning and pregnancy-related services (Licensed Notice). Cal. Health & Safety Code § 123472(a) (West Supp. 2018). The Licensed Notice applies to clinics licensed by California "whose primary purpose is providing family planning or pregnancy-related services" and that satisfy at least two of the following six criteria:

> (1) The facility offers obstetric ultrasounds, obstetric sonograms, or prenatal care to pregnant women.

(2) The facility provides, or offers counseling about, contraception or contraceptive methods.

(3) The facility offers pregnancy testing or pregnancy diagnosis.

(4) The facility advertises or solicits patrons with offers to provide prenatal sonography, pregnancy tests, or pregnancy options counseling.

(5) The facility offers abortion services.

(6) The facility has staff or volunteers who collect health information from clients.

Id. § 123471(a). The Act exempts clinics maintained or operated by the United States or its agencies, and those "enrolled as a Medi-Cal provider and a provider in the [Family PACT] Program." *Id.* § 123471(c).

Facilities subject to the Licensed Notice requirement must disseminate the following message to their clients:

> California has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women. To determine whether you qualify, contact the county social services office at [insert the telephone number].

Cal. Health & Safety Code § 123472(a)(1) (West Supp. 2018). This notice may be disseminated either as a "public notice posted in a conspicuous place," a printed notice distributed to all clients, or as a digital notice printed in the same point type as other digital notices, and it may be combined with other disclosures. *Id.* § 123472(a)(2) and (3).

Second, the Act requires certain facilities that are not licensed by the State and do not employ licensed medical providers to disclose those two facts to their clients (Unlicensed Notice). Cal. Health & Safety Code § 123472(b) (West Supp. 2018). The Unlicensed Notice requirement applies to any facility "that is not licensed by the State of California and does not have a licensed medical provider on staff or under contract who provides or directly supervises the provision of all of the services, whose primary purpose is providing pregnancy-related services," and that satisfies at least two of the following four criteria:

> (1) The facility offers obstetric ultrasounds, obstetric sonograms, or prenatal care to pregnant women.
>
> (2) The facility offers pregnancy testing or pregnancy diagnosis.
>
> (3) The facility advertises or solicits patrons with offers to provide prenatal sonography, pregnancy tests, or pregnancy options counseling.
>
> (4) The facility has staff or volunteers who collect health information from clients.

Id. § 123471(b). The same two exceptions for federal facilities and for Medi-Cal and Family PACT participants apply. *Id.* § 123471(c).

Clinics subject to the Unlicensed Notice requirement must disseminate the following notice:

> This facility is not licensed as a medical facility by the State of California and has no licensed medical provider who provides or directly supervises the provision of services.

Cal. Health & Safety Code § 123472(b)(1) (West Supp. 2018). The Unlicensed Notice must be communicated both "onsite"—in a sign posted at the facility's entrance "and at least one additional area where clients wait to receive services"—and also "in any print and digital advertising materials including Internet Web sites." *Id.* § 123472(b)(2). It must be provided in the primary threshold languages for Medi-Cal beneficiaries in the county where the facility is located. *Id.* § 123472(b).

Facilities subject to either the Licensed Notice requirement or the Unlicensed Notice requirement that fail to comply are subject to civil penalties of $500 for the first violation and $1000 for each subsequent violation. Cal. Health & Safety Code § 123473(a) (West Supp. 2018).

2. a. Petitioners are three nonprofit organizations. Pet. App. 10a. Petitioner National Institute of Family and Life Advocates is a national organization of family-planning and pregnancy centers, including 111 centers—some licensed, others unlicensed—in California. *Ibid.* Petitioner Pregnancy Care Clinic is a licensed clinic that provides ultrasounds and medical referrals; its staff includes doctors of obstetrics, gynecology, radiology, and anesthesiology. *Id.* at 10a-11a. Petitioner Fallbrook Pregnancy Center is an unlicensed clinic that provides pregnancy tests, educational programs, and medical referrals; it employs nurses, but no doctors, and contracts with a licensed medical provider for referrals for ultrasounds nearby. *Id.* at 11a. All petitioners are strongly opposed to abortion.

In 2015, before the FACT Act became effective, petitioners brought this suit against respondents, California officials who enforce the Act. Pet. App. 11a. As relevant here, petitioners alleged that the Act's disclosure

requirements violate petitioners' freedom of speech and free exercise of religion under the First Amendment. *Id.* at 11a-12a; *id.* at 109a-112a, 114a-116a. They sought a preliminary injunction on both grounds. *Id.* at 12a.[4]

b. The United States District Court for the Southern District of California denied a preliminary injunction. Pet. App. 44a-71a. The court determined that the Licensed Notice is subject to rational-basis review because it does not "ban speech or otherwise prohibit [petitioners] from discussing their message with patients," or is subject at most to intermediate scrutiny as a regulation of professional speech. *Id.* at 61a-64a. Under either standard, the court held, the Licensed Notice survives review because it advances the State's interest in ensuring that women are informed of their rights and treatment options, is "neutral as to any particular view or opinion," and does not preclude petitioners from conveying their views. *Id.* at 64a-65a; see *id.* at 61a-62a.

The district court determined that the Unlicensed Notice "withstands any level of [First Amendment] scrutiny." Pet. App. 66a. The court reasoned that California has a compelling interest in "ensuring pregnant women know when they are receiving medical care from licensed profession[als]," and a "notice that a facility is not licensed and has no licensed medical provider on

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[4] Petitioners' complaint also alleged that the FACT Act violates the Due Process Clause of the Fourteenth Amendment; 42 U.S.C. 238n, which prohibits state and local entities that receive federal aid from discriminating against providers that do not provide or refer patients for abortions; and the California Constitution. Pet. App. 112a-114a, 116a-120a. Petitioners did not seek injunctive relief on those grounds, *id.* at 12a n.3; D. Ct. Doc. 3-1, at 7-25 (Oct. 21, 2015), and the lower courts did not address them, Pet. App. 1a-71a.

staff is narrowly tailored" to that interest. *Id.* at 66a-67a.[5]

3. The court of appeals affirmed. Pet. App. 1a-43a. It held that the Licensed Notice "is subject to intermediate scrutiny" because it "regulates professional speech"—*i.e.*, speech "between professionals and their clients in the context of their professional relationship." *Id.* at 29a, 42a. Such speech, the court reasoned, receives less exacting review because professionals have "specialized knowledge that their clients usually do not" and on which their clients rely. *Id.* at 29a (citation omitted). Although the Act is "content-based," the court held, it is not viewpoint-based; its requirements apply "regardless of what, if any, objections [facilities] may have to certain family-planning services," subject to "two narrow exceptions that do not disfavor any particular speakers." *Id.* at 20a. The court rejected the parties' various other arguments for applying different levels of scrutiny.

The court of appeals held that the Licensed Notice survives intermediate scrutiny. Pet. App. 33a-36a. California, it stated, has a substantial interest in ensuring that its citizens are aware of state-sponsored "medical services relevant to pregnancy." *Id.* at 34a. The court determined that the Licensed Notice is "narrowly drawn to achieve" that interest because it requires facilities merely to inform clients "of the existence of publicly-funded family-planning services"; does not compel "more speech than necessary"; and does not "encourage, suggest, or imply that women should use those state-funded services." *Ibid.*

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[5] The district court also held that petitioners were unlikely to succeed on their free-exercise claim and had not demonstrated irreparable harm. Pet. App. 67a-69a, 71a.

The court of appeals agreed with the district court that the Unlicensed Notice provision would survive First Amendment review under any level of scrutiny. Pet. App. 36a-39a. California, it held, has a compelling interest in informing women seeking medical services whether the facility from which they seek care is licensed. *Id.* at 37a. The Unlicensed Notice, the court concluded, is "narrowly tailored" to that interest. *Ibid.* It "helps ensure that women * * * are fully informed that the clinic they are trusting with their well-being is not subject to the traditional regulations" applicable to medical professionals. *Id.* at 38a. It "is also only one sentence long" and "merely states that the facility in which it appears is not licensed by California and has no state-licensed medical provider." *Ibid.*[6]

SUMMARY OF ARGUMENT

I. This Court's precedent establishes several principles that guide analysis of petitioners' First Amendment challenges to the FACT Act's disclosure requirements. In the context of fully protected speech, laws that compel private persons to convey a particular message are generally subject to strict scrutiny. In certain other contexts, however, that general rule does not apply, two of which are relevant here. First, laws that require providers of commercial services to disclose factual, uncontroversial information about their services will be upheld if reasonably related to an appropriate governmental interest. *Zauderer* v. *Office of Disciplinary Counsel of the Supreme Court*, 471 U.S. 626, 650-651 (1985). Second, regulations of speech by professionals related to their own services may be subject to

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[6] The Ninth Circuit also rejected petitioners' free-exercise claim. Pet. App. 39a-42a. This Court did not grant review of that claim.

heightened rather than strict scrutiny. See, *e.g.*, *Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978).

The parties' various categorical arguments for lower or higher standards are unpersuasive. Respondents' suggestion below that abortion-related disclosure laws are subject to rational-basis review under *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, 505 U.S. 833 (1992) (plurality opinion), is incorrect. Conversely, petitioners' contention that all disclosure requirements are subject to strict scrutiny is also wrong and inconsistent with this Court's precedent. Petitioners further overreach in suggesting that neither *Zauderer* nor heightened scrutiny ever applies to speech by providers who offer services for free.

II. The Licensed Notice violates the First Amendment. It is not subject to deferential review under *Zauderer* because it does not concern uncontroversial information about the licensed clinics' own services; instead, it requires them to advertise services provided by others, including abortion, that are deeply divisive and that they strongly oppose. The Licensed Notice is therefore subject at least to heightened scrutiny.

The Court need not determine here whether heightened scrutiny or strict scrutiny applies because the Licensed Notice fails even the lower standard. Licensed clinics have a strong interest in refraining from speech that advertises third-party services they find morally repugnant. California has not substantiated any particularized interest in having licensed clinics themselves disseminate the notice. Instead, the State has relied on a more generalized interest in public awareness of state-sponsored services, but has not demonstrated any

specific interest in having covered licensed clinics advertise those services, which they oppose. In any event, California's asserted interest is insufficient to justify requiring petitioners to serve as "billboard[s]" for the State's programs, *Wooley* v. *Maynard*, 430 U.S. 705, 713-717 (1977), because the Licensed Notice is not appropriately tailored. There are multiple alternative potential ways the State might pursue it without infringing petitioners' speech, including advertising state-sponsored services itself.

Petitioners argue that the Licensed Notice is also viewpoint-based. If true, that would warrant strict scrutiny, but it is unclear on the current record whether that is correct. The Court need not reach that issue because the Licensed Notice fails heightened scrutiny.

III. By contrast, the Unlicensed Notice survives First Amendment review. That requirement is subject to *Zauderer* because it merely requires service providers to disclose an accurate, uncontroversial fact about their own services: that they are not provided by a state-licensed medical professional. In any event, the Unlicensed Notice survives review even under heightened scrutiny. The State has a strong interest in ensuring that women know whether services such as ultrasounds and sonograms are provided by licensed medical professionals. The Unlicensed Notice is appropriately tailored to that objective: it requires a single-sentence disclosure of the fact that the providers are unlicensed.

Petitioners contend that the requirement will be unduly burdensome because in certain localities they may be required to repeat the notice in multiple languages, making advertising cost-prohibitive. The concern petitioners raise is significant and might provide a valid basis for an as-applied challenge in an appropriate case.

But petitioners do not appear to have developed a record to support that argument here, and the courts below did not address it. This Court should not address that contention in the first instance.

ARGUMENT

I. THE STANDARD OF FIRST AMENDMENT SCRUTINY THAT APPLIES TO LAWS COMPELLING SPEECH DEPENDS ON THE CONTEXT

Laws that compel speech, like laws that restrict speech, warrant careful First Amendment scrutiny. See, *e.g.*, *West Va. State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 636-642 (1943). As with speech restrictions, the "level of scrutiny to apply to a compelled statement" depends on the context, and the Court's "lodestars" for determining the appropriate standard are "the nature of the speech taken as a whole and the effect of the compelled statement thereon." *Riley* v. *National Fed'n of the Blind*, 487 U.S. 781, 796-797 (1988). Thus, "in the context of fully protected expression," *id.* at 797, "[l]aws that compel speakers to utter or distribute speech bearing a particular message" are generally subject to strict scrutiny. *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 642 (1994); see, *e.g.*, *Wooley* v. *Maynard*, 430 U.S. 705, 713-717 (1977) (law compelling license plate to display ideological message).

Just as speech restrictions in certain contexts are not subject to strict scrutiny, however, see, *e.g.*, *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n*, 447 U.S. 557, 562-563 (1980) (commercial speech), so too some types of compelled disclosures are not subject to strict scrutiny. Two such contexts are potentially relevant here. First, laws requiring providers of commercial services to disclose "purely factual and uncontroversial information about the terms under which" their

"services will be available" generally will be upheld where they are "reasonably related to the State's interest." *Zauderer* v. *Office of Disciplinary Counsel of the Supreme Court*, 471 U.S. 626, 651 (1985). Second, laws restricting speech by members of a regulated profession related to their services will be upheld where they satisfy heightened (rather than strict) scrutiny, see, *e.g.*, *Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978), and the same principle applies to disclosures related to a professional's services. The applicability of these principles here is discussed below, Parts II-III, *infra*. As a threshold matter, the parties have advanced various categorical arguments for applying lower or higher standards in this area, but their arguments are mistaken.

A. Laws That Require Professionals To Make Disclosures Related To Their Own Services Generally Are Subject To Review Under *Zauderer* Or Heightened Scrutiny

1. This Court has declined to apply strict scrutiny to laws that require providers of commercial services in the marketplace to disclose factual, uncontroversial information about their own services. *Zauderer*, 471 U.S. at 651. As the Court has explained, a speaker's "constitutionally protected interest in *not* providing" such "factual information" about its services "is minimal." *Ibid.* Accordingly, the Court has applied a more deferential standard, holding that such requirements pass First Amendment muster "as long as [they] are reasonably related to the State's interest." *Ibid.* Although *Zauderer*'s standard does not permit compelled disclosures that are "unjustified or unduly burdensome," it also does not require the government to use the "'least restrictive means'" available. *Id.* at 651-652 & n.14.

In *Zauderer* itself, for example, this Court upheld a requirement imposed by Ohio bar rules that attorneys who advertise their willingness to represent clients for a contingency fee must also disclose whether the fee arrangement would require clients to pay court costs in the event of a loss. See 471 U.S. at 639-653. The Court expressly declined to apply strict scrutiny, explaining that, "because disclosure requirements trench much more narrowly on an advertiser's interests than do flat prohibitions on speech, 'warning[s] or disclaimer[s] might be appropriately required ... in order to dissipate the possibility of consumer confusion or deception.'" *Id.* at 651 (brackets in original) (quoting *In re R. M. J.*, 455 U.S. 191, 201 (1982)). An advertiser's First Amendment "rights are adequately protected," the Court explained, "as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers." *Ibid.*; see *id.* at 651-652 n.14.

This Court reaffirmed the *Zauderer* standard in *Milavetz, Gallop & Milavetz P. A.* v. *United States*, 559 U.S. 229, 248-253 (2010) (rejecting First Amendment challenge to federal statute requiring persons who advertise debt-relief services to include certain factual disclosures about the nature of their services). The Court "agree[d]" with the government that, because the law there targeted misleading commercial speech and

"impose[d] a disclosure requirement rather than an affirmative limitation on speech, * * * the less exacting scrutiny described in *Zauderer* govern[ed]." *Id.* at 249.[7]

Although the *Zauderer* standard is deferential, it is not toothless. This Court has made clear that *Zauderer* does not shield disclosure requirements that are "unjustified" and "unduly burdensome." *Ibanez* v. *Florida Dep't of Bus. & Prof'l Regulation*, 512 U.S. 136, 146 (1994) (citation omitted); *id.* at 146-147 (invalidating requirement that certain professionals advertising themselves as "specialists" include a detailed disclaimer, where State identified no "potentially real, not purely hypothetical," harm and disclaimer "effectively rule[d] out" using the "'specialist' designation on a business card or letterhead, or in a yellow pages listing"). And *Zauderer* applies only to required disclosures that are "uncontroversial." 471 U.S. at 651.

2. This Court also has held that the government may regulate speech by members of regulated professions related to their services in certain circumstances without satisfying strict scrutiny. The States have "broad power to establish standards for licensing practitioners and regulating the practice of professions," *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 792 (1975), and have done so "from time immemorial." *Dent* v. *West Va.*,

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[7] Although *Zauderer* and *Milavetz* involved laws based on the government's interest in preventing deception, *Zauderer*, 471 U.S. at 651; *Milavetz*, 559 U.S. at 249, courts of appeals have held that *Zauderer* also extends to other interests. See, *e.g.*, *CTIA-The Wireless Ass'n* v. *City of Berkeley*, 854 F.3d 1105, 1117 (9th Cir. 2017); *American Meat Inst.* v. *United States Dep't of Agric.*, 760 F.3d 18, 22 (D.C. Cir. 2014) (en banc), overruling, *e.g.*, *R.J. Reynolds Tobacco Co.* v. *FDA*, 696 F.3d 1205 (D.C. Cir. 2012); *New York State Rest. Ass'n* v. *New York City Bd. of Health*, 556 F.3d 114, 132-134 (2d Cir. 2009).

129 U.S. 114, 122 (1889); see *Barsky* v. *Board of Regents*, 347 U.S. 442, 449 (1954). And just as "the State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity," *Ohralik*, 436 U.S. at 456, so too "[t]he power of government to regulate the professions is not lost whenever the practice of a profession entails speech," *Lowe* v. *SEC*, 472 U.S. 181, 228 (1985) (White, J., concurring in the result) (examining SEC prosecution for engaging in investment advising without a license).

Accordingly, the Court has upheld restrictions on professionals' speech related to their services without requiring that they satisfy strict scrutiny. See, *e.g.*, *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U.S. 833, 884 (1992) (plurality opinion) (upholding disclosure requirements for doctors who perform abortions because "the physician's First Amendment rights not to speak are implicated * * * but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State"); *id.* at 968 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part); *Ohralik*, 436 U.S. at 460 (upholding State's ban on in-person solicitation by lawyers and noting its "special responsibility for maintaining standards among members of the licensed professions"). The Court's decisions indicate that, in general, heightened rather than strict scrutiny is appropriate for disclosure requirements that pertain to services provided by the professional who is subject to the regulation.

In *Ohralik*, for example, the Court explained that, although an attorney's solicitation of business was "entitled to some constitutional protection," it "f[ell] within the State's proper sphere of economic and professional

regulation" and thus was "subject to regulation in furtherance of important state interests." 436 U.S. at 459. The Court upheld the law, explaining that the State had demonstrated that its ban on in-person solicitation furthered "a legitimate and important state interest"—namely, "preventing those aspects of solicitation that involve fraud, undue influence, intimidation, overreaching, and other forms of 'vexatious conduct.'" *Id.* at 462; see *id.* at 460-468. Lower courts similarly have applied heightened rather than strict scrutiny to laws requiring professionals to make disclosures related to the services they provide. See *Pickup* v. *Brown*, 740 F.3d 1208, 1228 (9th Cir.), cert. denied, 134 S. Ct. 2871 and 134 S. Ct. 2881 (2014); *King* v. *Governor of N.J.*, 767 F.3d 216, 232 (3d Cir. 2014), cert. denied, 135 S. Ct. 2048 (2015); *Moore-King* v. *County of Chesterfield*, 708 F.3d 560, 568-570 (4th Cir. 2013).[8]

This heightened scrutiny differs from both rational-basis review and strict scrutiny. Whereas rational-basis review requires only that a "law could be thought to further a legitimate governmental goal, without reference to whether it does so at inordinate cost," heightened scrutiny "require[s] the government goal to be substantial," requires "the cost to be carefully calculated," and requires that the government "affirmatively establish [a] reasonable fit" between the restriction and the government's interest. *Board of Trs.* v. *Fox*, 492 U.S. 469, 480

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[8] In some circumstances, a law may not be subject to First Amendment scrutiny at all because it proscribes unlawful conduct that is merely "initiated, evidenced, or carried out" through speech. *Ohralik*, 436 U.S. at 456 (citation omitted); *e.g.*, *United States* v. *Williams*, 553 U.S. 285, 297 (2008) (offers to engage in unlawful transactions).

(1989). Unlike strict scrutiny, however, heightened scrutiny does not impose "a least-restrictive-means requirement"; it requires a "fit that is not necessarily perfect, but reasonable." *Ibid.* Under this standard, the government may not ignore obvious, available, and effective alternatives. See *City of Cincinnati* v. *Discovery Network, Inc.*, 507 U.S. 410, 417 n.13 (1993) (The existence of "numerous and obvious less-burdensome alternatives * * * is certainly a relevant consideration in determining whether the 'fit' between ends and means is reasonable.").

This heightened-scrutiny standard "take[s] account of the difficulty of establishing with precision the point at which restrictions become more extensive than their objective requires, and provide[s] the Legislative and Executive Branches," as well as the States, "needed leeway in a field" such as the professions "'traditionally subject to governmental regulation.'" *Fox*, 492 U.S. at 480-481 (quoting *Ohralik*, 436 U.S. at 455-456). It also reflects the societal interest in ensuring that licensed professionals do not abuse the influence that they hold over the public as a consequence of their specialized knowledge and training—knowledge and training that is typically communicated through speech.

B. The Parties' Categorical Arguments For Different Standards Of Scrutiny Lack Merit

The parties have advanced several broad arguments that different standards of scrutiny apply to the kinds of disclosure requirements at issue in this case. None of those arguments is persuasive.

1. In the court of appeals, respondents argued that the Licensed and Unlicensed Notices are subject only to rational-basis review under *Casey*, *supra*. Resp. C.A. Br. 23-24. As the court noted, some lower courts have

construed *Casey* to impose a "reasonableness" standard for "abortion-related disclosure law[s]." Pet. App. 25a. The court correctly rejected this reading of *Casey*. *Id.* at 25a-27a.

Casey upheld a Pennsylvania law requiring physicians to make certain abortion-related disclosures to patients. See 505 U.S. at 881-884 (plurality opinion); *id.* at 968 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part). The plurality reasoned that the "physician's First Amendment rights not to speak are implicated * * * but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State," and concluded that there was "no constitutional infirmity" in the requirement at issue. *Id.* at 884. Although neither the plurality nor Chief Justice Rehnquist applied strict scrutiny, they also did not specify which lesser level of scrutiny applied. *Casey* should not be construed to create a special form of First Amendment scrutiny applicable only to abortion-related laws. Pet. App. 25a-26a; see *Stuart* v. *Camnitz*, 774 F.3d 238, 249 (4th Cir. 2014).

2. Petitioners argue (Br. 28-31) that *Reed* v. *Town of Gilbert*, 135 S. Ct. 2218 (2015), requires applying strict scrutiny to all content-based regulations of speech, including all disclosure requirements. *Reed* held unconstitutional a town ordinance subjecting "ideological signs" and "political signs" to different rules than signs displaying other types of content. *Id.* at 2224-2225. In so holding, the Court stated that "[c]ontent-based laws * * * are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Id.* at 2226. Petitioners maintain that all disclosure requirements are "content-based" in the sense that they

mandate specific disclosures, and thus are subject to strict scrutiny after *Reed*. Br. 28.

As discussed above, however, this Court has made clear that in certain contexts disclosure requirements and speech restrictions are subject to less demanding forms of scrutiny. See *Milavetz*, 559 U.S. at 250; *Casey*, 505 U.S. at 844; *Zauderer*, 471 U.S. at 649-651; *Central Hudson*, 447 U.S. at 562-563. Nothing in *Reed* called these longstanding principles into doubt. Moreover, *Reed* itself addressed an affirmative restriction on certain speech. 135 S. Ct. at 2226; *id.* at 2224, 2227-2231. The Court had no occasion to address requirements to disclose truthful, factual information regarding one's own services. Indeed, since *Reed* this Court has assumed the continuing vitality of *Zauderer* and related cases. See *Expressions Hair Design* v. *Schneiderman*, 137 S. Ct. 1144, 1151 (2017) (remanding for lower courts to decide whether law governing price disclosures should be "upheld as a valid disclosure requirement" under *Zauderer*).

3. Petitioners also appear to suggest (Br. 21-22, 40-46) that neither the *Zauderer* standard nor heightened scrutiny ever applies—and therefore strict scrutiny always governs—when professionals offer their services without charge. This categorical rule is also incorrect.

This Court has never held that the applicable level of First Amendment scrutiny for speech related to commercial or professional services depends on the price charged. Courts have not doubted, for instance, that the government may regulate malpractice or misconduct by attorneys, tax preparers, and medical professionals without regard to whether a professional charges for a particular service or provides it pro bono. As the

court of appeals observed, "[a] lawyer who offers her services to a client pro bono, for example, nonetheless engages in professional speech." Pet. App. 32a n.8; cf. *Polk County* v. *Dodson*, 454 U.S. 312, 323 (1981) (public defenders are subject to ordinary ethics rules); *Barker* v. *Capotosto*, 875 N.W.2d 157, 167 (Iowa 2016) (attorneys serving indigent clients remain subject to ordinary malpractice law). Likewise, the fact that a doctor treats a patient for free should not automatically absolve the doctor from otherwise-applicable professional standards—such as a requirement to apprise the patient of the risks of forgoing certain medical treatments, even if the doctor himself opposes those treatments.

Petitioners appear to contend that *Zauderer* and other commercial-speech principles are inapplicable because commercial speech "'does no more than propose a commercial transaction,'" and providers of free services like petitioners do not "propose commercial transactions." Br. 21 (quoting *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976)). It does not follow from the fact that a professional elects not to charge for a particular service that disclosure requirements governing that service do not regulate commercial speech. A manufacturer that offers free samples as a promotion, or a professional that offers free consultations to attract customers, is still entering the marketplace in competition with other providers, and the government's interest in requiring disclosures about the goods or services does not automatically disappear merely because they are offered without charge.

Accordingly, this Court has held that speech may be commercial even if is not a "proposal[] to engage in commercial transactions." *Bolger* v. *Youngs Drug Prods.*

Corp., 463 U.S. 60, 66 (1983); see *id.* at 62, 65-68 (holding that "informational pamphlets discussing the desirability and availability of prophylactics in general or Youngs' products in particular," but not proposing a transaction, were commercial speech). For example, a service provider may already have entered into a transaction with a client and be in the course of providing the agreed-to service. There is no evident reason why, because the parties' subsequent communications will concern the execution of a commercial transaction rather than its proposal, the government should lose its ability to regulate those communications or require appropriate disclosures.

Petitioners cite (Br. 41, 44) *In re Primus*, 436 U.S. 412 (1978), and *NAACP* v. *Button*, 371 U.S. 415 (1963), but neither held that strict scrutiny always applies to speech by professionals who offer their services for free. Both *Button* and *Primus* addressed prohibitions on soliciting pro bono clients for litigation by advocacy organizations "furthering [their] civil-rights objectives," which the Court held violated the organizations' associational freedoms. See *Primus*, 436 U.S. at 421-432; *Button*, 371 U.S. at 431-445. As the *Primus* Court explained, *Button* applied strict scrutiny because the NAACP's litigation activity itself constituted "expressive and associational conduct at the core of the First Amendment's protective ambit." 436 U.S. at 424. "For such a group," *Button* observed, "association for litigation may be the most effective form of political association." 371 U.S. at 431; see *id.* at 429-445.

Button thus "establish[ed] the principle that 'collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection

of the First Amendment.'" *Primus*, 436 U.S. at 426 (citation omitted). Applying that same principle, *Primus* held that a prohibition on soliciting pro bono clients for similar litigation was subject to, and failed, strict scrutiny, because it impinged on the associational freedoms of the ACLU and impaired its ability to disseminate the organization's message through litigation. See *id.* at 424. *Button* and *Primus* thus do not establish a categorical rule exempting providers of pro bono services from otherwise-applicable First Amendment principles. It was not the fact that the organizations offered their services without charge standing alone, but rather the fact that those services were a form of political association, that the Court held warranted strict scrutiny.

Petitioners also cite (Br. 21-22) *Riley*, *supra*, but it similarly does not support categorically exempting professionals who do not charge for their services from otherwise-applicable First Amendment principles. *Riley* addressed a state law requiring that paid fundraisers begin their interactions with potential donors by disclosing the percentage of charitable contributions collected by the fundraiser that were actually turned over to charity. 487 U.S. at 795-801. The Court did not apply strict scrutiny because any services were offered for free; indeed, the challenged law required professional (*i.e.*, non-volunteer) fundraisers to disclose their profits from fundraising. Rather, the Court applied strict scrutiny because any commercial component of the speech was "inextricably intertwined with otherwise fully protected speech." *Id.* at 796. *Riley* had no occasion to address whether different First Amendment standards apply to regulation of speech by professionals who provide services pro bono. None of petitioners' cases thus supports

a categorical exception for speech related to pro bono services.

II. THE LICENSED NOTICE VIOLATES THE FIRST AMENDMENT

A. The Licensed Notice Fails Under Heightened Scrutiny

1. Applying the foregoing principles, the Licensed Notice cannot be sustained. The Licensed Notice is not subject to deferential review under *Zauderer* because it does not mandate the disclosure of "purely factual and uncontroversial information about the terms under which [the regulated entity's] services will be available." 471 U.S. at 651. Indeed, the Licensed Notice does not describe petitioners' own services at all. Instead, it effectively conscripts licensed clinics like petitioners into advertising state-supported services, including abortion, that they do not provide and that they strongly oppose.

Moreover, regardless of whether the information conveyed by the Licensed Notice is "factual," the Notice is not "uncontroversial." *Zauderer*, 471 U.S. at 651. This Court has recognized "the controversial nature" of the abortion debate, in which millions of Americans believe "that an abortion is akin to causing the death of an innocent child," while other millions "fear that a law that forbids abortion would condemn many American women to lives that lack dignity." *Stenberg* v. *Carhart*, 530 U.S. 914, 920 (2000). The State has taken its own position on that issue by providing state assistance for abortion services, and the Licensed Notice requires petitioners to advertise the State's efforts. Unlike the "minimal" interest *Zauderer* identified in a professional's withholding factual information about his own services, 471 U.S. at 651, petitioners have a very strong

interest in refraining from advertising services they deeply oppose.

2. The Licensed Notice is accordingly subject at least to the heightened scrutiny applicable to regulation of speech by professionals related to the services they provide. The court of appeals held that heightened (rather than strict) scrutiny applies on that basis. Pet. App. 30a; see *id.* at 28a-33a. This Court, however, need not resolve whether that standard or a more stringent form of scrutiny governs here because the Licensed Notice fails any form of heightened scrutiny. Under heightened scrutiny, "the State bears the burden of justifying its restrictions" by demonstrating that the Licensed Notice's intrusion on private speech furthers a "substantial" interest and is "narrowly tailored" to—*i.e.*, has a "reasonable fit" with—the State's identified interest. *Fox*, 492 U.S. at 480. Respondents have not carried that burden.

a. Petitioners have a very strong First Amendment interest in refraining from speaking. Opposition to abortion is at the core of petitioners' beliefs and a basic purpose of their institutional existence. See, *e.g.*, Pet. App. 92a. The Licensed Notice requires petitioners effectively to advertise—by name—a procedure they fundamentally oppose. Petitioners are compelled to disclose the availability of state-funded abortion services and instruct clients as to how to obtain those services—which distorts petitioners' communications with clients in a manner that petitioners contend violates their most deeply held beliefs and undermines their organizations' purposes. Cf. *Riley*, 487 U.S. at 800 (holding invalid, under strict scrutiny, requirement that professional fundraisers engage in unpopular disclosures in part because "the disclosure will be the last words spoken as

the donor closes the door or hangs up the phone"). Compelled speech of that kind strikes at the heart of the First Amendment's protections. See *Centro Tepeyac* v. *Montgomery County*, 722 F.3d 184, 193 (4th Cir. 2013) (en banc) (Wilkinson, J., concurring) ("[C]ourts must be on guard whenever the state seeks to force an individual or private organization to utter a statement at odds with its most fundamental beliefs.").

Respondents have not demonstrated a substantial interest sufficient to justify that intrusion on petitioners' rights. They have not articulated, much less substantiated, any particularized interest in having the information contained in the Licensed Notice about state-sponsored abortion and other services disseminated by covered licensed clinics themselves, which do not provide those services. For example, the California Legislature did not find that licensed clinics had actively deceived women about the availability of free or low-cost family-planning services from the State, or about the cost or availability of particular health services. In the court of appeals, respondents noted that the bill's "author contend[ed]" that certain "crisis pregnancy centers" engaged in "intentionally deceptive advertising and counseling practices." *Analysis of Assembly Bill No. 775: Assemb. Comm. on Health*, 2015-2016 Reg. Sess. 3 (2015) (C.A. E.R. 86); see Resp. C.A. Br. 1, 5, 30. But the Act

makes no such finding, see FACT Act § 1, and at the petition stage in this Court respondents did not rely on an interest in counteracting deception.[9]

Instead, California's sole asserted interest in enacting the Licensed Notice requirement appears to be a more general interest in having California's programs advertised so that women in California are aware of the state-sponsored services available to them. The Legislature found that "[m]illions of California women are in need of publicly funded family planning services," but "at the moment they learn that they are pregnant, thousands of women remain unaware of the public programs available." FACT Act § 1(b). The Act's "purpose" was "to ensure that California residents make their personal reproductive health care decisions knowing their rights and the health care services available to them." *Id.* § 2. That generalized interest in having the State's programs advertised is at most loosely related to the services licensed clinics provide. Respondents have failed to demonstrate any specific, substantial state interest that is "direct[ly] and material[ly]" advanced by having state-sponsored services advertised by clinics that do not provide those services. *Turner Broad.*, 512 U.S. at 664 (opinion of Kennedy, J.).

b. Whatever the precise strength of California's interest, the Licensed Notice is "not narrowly tailored to achieve [that] objective," *Fox*, 492 U.S. at 480. California "must affirmatively establish [a] reasonable fit,"

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[9] It is also unclear how the Licensed Notice, which relates to the availability of State funding rather than the provision of medical advice, could remedy the type of deception asserted by the bill's author. Respondents have not identified anything in the legislative history suggesting, for instance, that pregnancy clinics have misled clients regarding the expense or availability of abortion services.

ibid.—namely, that "the means chosen do not 'burden substantially more speech than is necessary to further the government's legitimate interests.'" *Turner Broad.*, 512 U.S. at 662 (citation omitted). The availability of obvious alternatives, moreover, undermines that fit. Here, because its asserted interest in promoting public awareness of state-sponsored family-planning services is generalized, the State has ample other alternatives at its disposal to further that interest without compelling petitioners to advertise services they oppose.[10] The State's abstract interest in having its own programs advertised thus cannot justify conscripting licensed providers like petitioners into service as "billboard[s]" for those programs. *Maynard*, 430 U.S. at 715.

For example, the State itself may advertise the Family PACT Program and all of its component benefits to the public. See *Riley*, 487 U.S. at 800; *Evergreen Ass'n, Inc.* v. *City of N.Y.*, 740 F.3d 233, 250 (2d Cir.), cert. denied, 135 S. Ct. 435 (2014). Indeed, a state-run advertising campaign might be more effective than the Licensed Notice in increasing public awareness, given

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[10] See *Thompson* v. *Western States Med. Ctr.*, 535 U.S. 357, 371-373 (2002) (invalidating under heightened scrutiny prohibition on soliciting prescriptions for and advertisements of compounded drugs where government had not shown why multiple less-intrusive alternative measures sufficed); *Rubin* v. *Coors Brewing Co.*, 514 U.S. 476, 490-491 (1995) (law prohibiting beer labels from displaying alcohol content was "not sufficiently tailored" because the "availability of alternatives that would prove less intrusive" indicated that it was "more extensive than necessary"); *Shapero* v. *Kentucky Bar Ass'n*, 486 U.S. 466, 476 (1988) (state-bar rule banning "targeted, direct-mail solicitation" by lawyers not justified where State had other "obvious," "far less restrictive and more precise means" to address abuses).

that the notice applies only to a limited subset of medical providers in the State. As petitioners note (Br. 32-33), the Licensed Notice exempts federal facilities and clinics that participate in Medi-Cal and Family PACT, and it also appears to exclude individual doctors, general-practice clinics that do not primarily provide pregnancy-related services, and various other medical facilities. Cal. Health & Safety Code § 123471(a) and (c) (West Supp. 2018); see *id.* §§ 1204, 1206(h) (West 2016). Those exclusions suggest that the Licensed Notice lacks a reasonable fit due to its underinclusiveness. See *Brown* v. *Entertainment Merchs. Ass'n*, 564 U.S. 786, 802 (2011). At a minimum, the exclusions indicate that less-intrusive means may exist that could be equally or more effective.

The court of appeals observed that, in the current procedural posture, it was "unclear whether" a state-sponsored "advertising campaign" would have been "as effective[]," and did not resolve that question because under heightened scrutiny California "need not prove that the Act is the least restrictive means." Pet. App. 36a & n.9. Any such uncertainty, however, weighs against upholding the law because the State bore the burden of "affirmatively establish[ing]" that the Act is appropriately tailored, *Fox*, 492 U.S. at 480; see *Edenfield* v. *Fane*, 507 U.S. 761, 770-771 (1993) (State's burden not met with "speculation or conjecture"). And although California need not employ the least restrictive means, it could not simply disregard obvious potential alternatives. See p. 18, *supra*.

At the least, respondents have not shown why it is necessary to require licensed clinics to enumerate specific services they oppose, including abortion, that the Family PACT program offers. In the court of appeals,

petitioners argued that the State "could require licensed centers to merely tell patients a phone number where they can apply for Medi-Cal in general, and that Medi-Cal offers free or low-cost services." Pet. C.A. Br. 42. Although heightened scrutiny does not require the State to adopt the "least restrictive means," *Fox*, 492 U.S. at 479, the existence of multiple, "obvious less-burdensome alternatives," thus far unrebutted by respondents, further supports a determination that the Licensed Notice is not narrowly drawn. *Discovery Network*, 507 U.S. at 417 n.13; see p. 28 n.10, *supra*.

That the Licensed Notice here fails under heightened scrutiny casts no doubt on other federal and state laws that require professional or commercial disclosures.[11] Many such laws that require disclosure related to professional services or transactions in the marketplace, to the extent they are even subject to heightened scrutiny rather than *Zauderer*, would survive because they are appropriately tailored to advance substantial government interests. The Licensed Notice differs from such laws, and fails heightened scrutiny, because of the especially severe burden it imposes on speech and its particular lack of a sufficiently substantial interest and reasonable fit in requiring petitioners to advertise

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[11] See, *e.g.*, 21 U.S.C. 343(r)(6)(C) and (q)(5)(H) (requiring disclosure of nutrition information in certain circumstances and disclaimer that FDA has not evaluated claims regarding dietary supplements); 29 U.S.C. 627, 657(c)(1) (requiring employers to post notices regarding employee rights under age-discrimination and occupational-safety laws); 42 U.S.C. 2000e-10 (same under other antidiscrimination laws); 17 C.F.R. 229.10 *et seq.* (requiring securities issuers to disclose various information including legal proceedings, market risk, and executive compensation); 17 C.F.R. 243.100 (requiring issues to disclose certain information publicly when provided to certain entities, *e.g.*, stock analysts).

third-party services that are fundamentally antithetical to their own services.

B. The Court Need Not Decide Whether The Licensed Notice Discriminates On The Basis Of Viewpoint

1. Petitioners argue (Br. 31-37) that the Licensed Notice should be subject to strict scrutiny because it discriminates against petitioners based on their viewpoint. If that is true, strict scrutiny should apply. *Sorrell* v. *IMS Health Inc.*, 564 U.S. 552, 565-566 (2011). As *Sorrell* explained, viewpoint-based regulations of speech—*i.e.*, those that regulate speech "because of" the government's opinion of its "message"—are subject to strict scrutiny. *Id.* at 566 (citation omitted). *Sorrell* thus held that a state law was subject to strict scrutiny because both "the legislature's expressed statement of purpose" and the law's "practical operation" showed that it was "aimed at a particular viewpoint." *Id.* at 565 (citation omitted).

Of course, as the Court has made clear, the fact that the effects of a facially neutral law fall disproportionately on speakers who "share the same viewpoint * * * does not in itself demonstrate" that the law is viewpoint-based. *Madsen* v. *Women's Health Ctr., Inc.*, 512 U.S. 753, 763 (1994); see *Christian Legal Soc'y Chapter of the Univ. of Cal.* v. *Martinez*, 561 U.S. 661, 700 & n.2 (2010) (Stevens, J., concurring) (collecting cases establishing the "basic tenet of First Amendment law that disparate impact does not, in itself, constitute viewpoint discrimination"). Rather, as *Sorrell* recognized, a party contending that a law is viewpoint-based must show that a law singles out speech "*because of*" its "message." 564 U.S. at 566 (emphasis added; citation omitted); see *id.* at 565 (law was viewpoint-based because "[f]ormal legislative findings" showed it was "designed * * * to

target [certain] speakers and their messages for disfavored treatment").

Accordingly, if it were established here that the Licensed Notice targets organizations because of their opposition to abortion, it would be viewpoint-based, see *Greater Balt. Ctr. for Pregnancy Concerns, Inc.* v. *Mayor & City Council of Baltimore*, No. 16-2325, 2018 WL 298142, at *6 (4th Cir. Jan. 5, 2018), and strict scrutiny should apply. Indeed, a state law that singled out for disfavored treatment entities that do not provide or refer patients for abortions might violate various federal statutes that specifically prohibit such discrimination. See 42 U.S.C. 238n (prohibiting state and local governments that receive federal assistance from discriminating against a "health care entity" that does not provide or refer patients for abortions); 42 U.S.C. 300a-7(c) (similar).[12]

2. It is not clear whether petitioners have established that the Licensed Notice is viewpoint-based. On its face, the Licensed Notice does not appear to single out clinics based on their proprietors' views on abortion or other subjects. Its definition of licensed facilities encompasses clinics that provide an array of services—including those that offer abortions and those that do not. See Cal. Health & Safety Code §§ 123471(a), 123472(a) (West Supp. 2018). Two types of facilities are excluded: (1) federal facilities, which avoids federal preemption, *id.* § 123471(c)(1); and (2) providers that participate in Medi-Cal and Family PACT, *id.* § 123471(c)(2), which

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[12] Petitioners' complaint alleged that the Licensed Notice violates 42 U.S.C. 238n, but they did not press that claim in seeking a preliminary injunction, and the courts below did not address that issue. See p. 7 n.4, *supra*.

can "enroll patients immediately" in California's programs. FACT Act § 1(c). Thus, the manner in which the State defines the scope of the Licensed Notice requirement does not itself indicate viewpoint discrimination.

But petitioners contend (Br. 31) that the Licensed Notice's "operational effect and exemptions" and the "legislative record" show that its purpose is to target clinics that oppose abortion. They maintain (Br. 32, 34-35) that in practice the law's exclusions render the Licensed Notice "uniquely applicable to pro-life pregnancy centers," and the bill's sponsor evinced "hostility" to such "crisis pregnancy centers." It is not clear, however, whether petitioners have developed an adequate factual record demonstrating that the State purposefully targeted them because of their viewpoint. This Court need not resolve that issue because the Licensed Notice fails under any form of heightened scrutiny for the reasons given earlier. See Part II.A, *supra*.

III. THE UNLICENSED NOTICE DOES NOT VIOLATE THE FIRST AMENDMENT

By contrast, the Unlicensed Notice comports with the First Amendment. Unlike the Licensed Notice, the Unlicensed Notice is subject to review under *Zauderer* because it requires covered facilities merely to disclose "purely factual and uncontroversial information about the terms under which * * * services will be available." 471 U.S at 651. The Unlicensed Notice applies only to clinics that are not licensed by the State of California as medical facilities, that do not employ a licensed medical provider, and that provide or advertise particular services that clients might regard as medical in nature—such as pregnancy tests, obstetric ultrasounds, and sonograms. Cal. Health & Safety Code § 123471(b) (West

Supp. 2018). And it requires such clinics to disseminate only a one-sentence notice stating that they are not licensed and do not employ a licensed provider. *Id.* § 123472(b)(1). That disclosure is factual, and it is accurate as to the only entities subject to the Unlicensed Notice, which are unlicensed. Petitioners also have not shown how that factual disclosure is controversial. Petitioners' "constitutionally protected interest in *not* providing [that] particular factual information" is therefore "minimal," and the Unlicensed Notice must be upheld so long as it is reasonably related to an appropriate state interest. *Zauderer*, 471 U.S. at 651.

The Unlicensed Notice satisfies the *Zauderer* standard, and would also survive under heightened scrutiny. The Unlicensed Notice is premised on California's interest in ensuring that pregnant women "know when they are getting medical care from licensed professionals." FACT Act § 1(e). That interest is a substantial one. The Unlicensed Notice advances that interest by requiring providers that are not licensed—but that provide services of a medical nature that their clients might reasonably believe are administered by licensed medical professionals, such as ultrasounds and sonograms—to disclose their unlicensed status to existing clients, and to prospective clients when advertising their services. There is also at least a reasonable fit between the means chosen and the State's interest. The Unlicensed Notice requires a simple, one-sentence disclosure of the fact the Legislature determined its residents should, but may not, know. It accordingly survives even heightened First Amendment scrutiny. See *Evergreen*, 740 F.3d at 247; *Centro Tepeyac*, 722 F.3d at 190, 192.

Indeed, the Unlicensed Notice closely resembles a disclosure requirement regarding one's professional

status that this Court in *Riley* made clear would comport with the First Amendment. Although *Riley* held invalid a requirement that professional fundraisers disclose their past profits, it disclaimed any "suggest[ion] that the State may not require a fundraiser to disclose unambiguously his or her professional status." 487 U.S. at 799 n.11. "On the contrary," the Court stated, "such a narrowly tailored requirement would withstand First Amendment scrutiny." *Ibid.* The Unlicensed Notice satisfies heightened scrutiny for the same reasons.

Petitioners argue (Br. 38) that the Unlicensed Notice imposes an excessive burden on their speech because, in some circumstances, they may be required to reprint the notice in their advertisements in multiple languages, which petitioners assert would be cost-prohibitive. The FACT Act requires a clinic to reproduce the Unlicensed Notice in its advertising in each of the "threshold languages" of the geographic region in which a clinic operates. Cal. Health & Safety Code § 123472(b) (West Supp. 2018). Petitioners contend (Br. 11-13, 38) that, as a result, some centers will be compelled to provide the Unlicensed Notice in as many as 13 languages, rendering effective advertisements infeasible.

The burdens petitioners assert are concerning, and such an argument might provide a basis for an as-applied challenge to the Unlicensed Notice in an appropriate case if properly presented and factually supported. See, *e.g.*, *Ibanez*, 512 U.S. at 146-147. It is unclear, however, whether petitioners pressed such an as-applied claim below based specifically on the threshold-languages requirement; they do not appear to have developed a factual record to support it; and respondents have disputed whether the issue is properly preserved. Br. in Opp. 26-27; see C.A. E.R. 33-64; D. Ct.

Doc. 3-1; D. Ct. Doc. 30 (Nov. 20, 2015). Moreover, neither court below passed upon the threshold-languages issue. Consistent with its ordinary practice as a "court of review, not of first view," the Court should "decline to consider th[is] question[] in the first instance." *Expressions Hair Design*, 137 S. Ct. at 1151 (citation omitted).

CONCLUSION

The judgment of the court of appeals should be vacated as to the Licensed Notice and affirmed as to the Unlicensed Notice, and the case should be remanded for further proceedings.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
CHAD A. READLER
Acting Assistant Attorney General
JEFFREY B. WALL
Deputy Solicitor General
HASHIM M. MOOPPAN
Deputy Assistant Attorney General
JONATHAN C. BOND
Assistant to the Solicitor General
DOUGLAS N. LETTER
MARK R. FREEMAN
Attorneys

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No. 16-1140

IN THE

Supreme Court of the United States

NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES, D/B/A NIFLA, *et al.*,

Petitioners,

v.

XAVIER BECERRA, ATTORNEY GENERAL, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* ALPHA CENTER, A PREGNANCY HELP CENTER REGISTERED UNDER THE LAWS OF SOUTH DAKOTA IN SUPPORT OF PETITIONERS

HAROLD J. CASSIDY
Counsel of Record
THOMAS J. VIGGIANO III
JOSEPH R. ZAKHARY
THE CASSIDY LAW FIRM
750 Broad Street, Suite 3
Shrewsbury, New Jersey 07702
(732) 747-3999
hjc@thecassidylawfirm.com

Counsel for Amicus Curiae

277902

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Whether the disclosures required by the California Reproductive FACT Act violate the protections set forth in the Free Speech Clause of the First Amendment, applicable to the States through the Fourteenth Amendment.

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INTEREST OF AMICUS CURIAE[1]

Alpha Center, a Pregnancy Help Center Registered Under the Laws of South Dakota: Alpha Center is a 501(c)(3) charitable corporation, maintaining an eight thousand square foot facility in Sioux Falls, South Dakota. Sioux Falls has the largest population of any city in South Dakota. South Dakota's only abortion clinic, run by Planned Parenthood, is located in Sioux Falls. Alpha Center has provided pregnancy help counseling and services for more than thirty-three years in Sioux Falls and is the largest pregnancy help center in the state. Typically, over the years, Alpha Center provided pregnancy services to between 2,000 and 3,000 women in a year. Over one thousand of these women seek pregnancy testing. Of the 500 to 750 women who test positive for pregnancy, about half indicate that they are considering, or someone is urging them, to have an abortion. Alpha Center provides counseling about what assistance is available to women who prefer to keep their children. Alpha Center provides parenting classes and provides clothing, cribs and information about financial assistance. Of the women who initially indicate that they are considering or being pressured into an abortion, about 85% of them carry the child to term and about 90% to 95% of these women exercise their right to keep and raise their children.

Alpha Center has created a warm and welcoming environment for the pregnant mothers. There are licensed

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1. All parties received notice of amicus' intent to file this brief and have consented. No counsel for any party authored this brief in whole or in part and no person or entity other than amicus funded its preparation or submission.

nurses and social workers on staff and there is a sonogram machine on the premises, used under the supervision of a Medical Director, a practicing physician in Sioux Falls. There are twenty-two physicians who participate in Alpha center's doctor's certificate program. These doctors are located in many different communities in the state, and provide initial consultations for pregnant mothers without charge.

All of Alpha Center's services are provided to the women free of charge.

Alpha Center's main mission is to help a pregnant mother keep and maintain her relationship with her child. The services at Alpha Center are intended to provide a safe haven free from pressure for the mother to give up her parental rights. As a result, Alpha Center does not refer pregnant mothers to any facility or entity which is involved in terminating the mother's relationship with her child. Thus, Alpha Center does not refer women to abortion doctors or clinics.

In 2011, Alpha Center became one of the first two pregnancy help centers to be placed on the State Registry of Pregnancy Help Centers pursuant to South Dakota's Anti-Coercion law. That statute was designed to protect pregnant mothers from being coerced or pressured into an abortion they preferred not to have. To be placed on the registry maintained by the South Dakota Department of Health, a pregnancy help center: (1) cannot perform abortions and cannot have an affiliation with an organization that performs abortions (SDCL §34-23A-58(3)); (2) cannot refer women for abortions (SDCL §34-23A-58(4)); and (3) cannot place children for adoption

(SDCL §34-23A-58(8)). The purpose of the registered pregnancy help center is to provide a facility that focuses on the needs and desires of the pregnant mothers, and to help them exercise their right to raise their children.

Alpha Center also provides post-abortion counseling. Some of the counselors, and the founder of Alpha Center, are post-abortive women who understand the pressure placed upon pregnant women to have abortions, and understand the potential for abortion to have a devastating psychological harm for the mothers.

When Planned Parenthood sued the Governor and the Attorney General in 2005 asserting that South Dakota's newly enacted Informed Consent Abortion law violated the physician's First Amendment rights, Alpha Center intervened and participated fully in the entire litigation. Alpha center's concerns about the need for proper pre-abortion counseling and post-abortion trauma, and its work in those areas over the years were important to their participation in the litigation. They brought their experiences and the scientific literature to the attention of the court through their experts.

In 2005, South Dakota reaffirmed its reasonable patient disclosure standard (*See, Wheeldon v. Madison*, 374 N.W. 2d 367, 375 (S.D. 1985)), and its application to abortion procedures. SDCL §34-23A-1.7. Because of the extraordinary and unique nature of that particular medical procedure, the state imposed additional requirements to protect the pregnant mother's Fourteenth Amendment liberty interest in her relationship with her child. *See*, South Dakota's 2005 Abortion Informed Consent Statute, SDCL §34-23A-1.2 to 1.7; SDCL §34-23A-10.1(1), (2) & (3).

That South Dakota Informed Consent Statute was the subject of a constitutional challenge instituted by the only abortion clinic in the state in which the abortion providers claimed that the required disclosures violated the physicians' First Amendment rights. The state and Alpha Center, one of the two pregnancy help centers who intervened, successfully defended the statute, prevailing on all contested issues, but the litigation required the state and Intervenors to win three different U.S. Court of Appeals decisions, including decisions by two separate *en banc* panels. *See, Planned Parenthood of Minn, North Dakota, South Dakota, and Dr. Carol Ball, MD v. Gov. Mike Rounds, Alpha Center, et al.*, 530 F.3d 724 (8th Cir. 2008) (*en banc*) ("*Rounds I*"); *Planned Parenthood, et al. v. Rounds, Alpha Center, et al.*, 650 F. Supp. 2d 972 (Dist. SD, 2009); *Planned Parenthood, et al. v. Rounds, Alpha Center, et al.*, 653 F.3d 662 (8th Cir. 2011) ("*Rounds II*"); *Planned Parenthood, et al. v. Rounds, Alpha Center et al.*, 686 F.3d 889 (8th Cir. 2012) (*en banc*) ("*Rounds III*").

One provision of the South Dakota 2005 statute was that the physician had to disclose to the pregnant mother "that an abortion terminates the life of a whole, separate, unique, living human being." SDCL §34-23A-10.1(1)(a).

The court upheld that disclosure, holding that the burden was on the abortion provider to demonstrate that the disclosures were false, misleading or not relevant to the mother's decision. *Rounds I*, at 733-738. *Rounds I* found that the disclosure was a truthful statement of scientific fact, and was relevant to the decision of the pregnant mother. *Rounds I* is consistent with the standard of scrutiny in commercial speech cases enunciated in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626,

637, 650-651 (1985) and the decision of the U.S. Court of Appeals for the Third Circuit in *Planned Parenthood of S.E. Pa. v. Casey*, 947 F.2d 682, 705-706 (3rd Cir. 1991), *aff'd* in relevant part, 505 U.S. 833 (1992); *see, also, Texas Medical Providers Performing Abortion Services v. Lakey*, 667 F.3d 570 (5th Cir. 2012).

South Dakota and its registered pregnancy help centers have an interest in preserving a healthy and vibrant network of pregnancy centers which assist pregnant mothers to keep their rights and their relationship with their children when that is their true preference. The importance of the work of the pregnancy centers is reflected in the state legislature's 2011 Concurrent Resolution which proclaimed the need for, and importance of, these pregnancy centers. The resolution was adopted by both the Senate and the House of Representatives by a joint vote of 100 to 1. *See*, Senate Concurrent Resolution No. 1–A Concurrent Resolution Honoring Pregnancy Care Centers: http://www.sdlegislature.gov/Legislative_Session/Bills/Bill.aspx?File=SCR1ENR.htm&Session=2011&Version=Enrolled&Bill=SCR1

In 2012, an *en banc* panel of the United States Court of Appeals for the Eighth Circuit ruled that the requirement of South Dakota's statute that the abortion doctor must disclose that an abortion places a woman at increased risk for suicide ideation and suicide was constitutional because it was truthful and relevant to the decision of the pregnant mother. *Rounds III* (*en banc*).

In 2011, Alpha Center, in its capacity as a registered pregnancy help center, intervened in Planned Parenthood's attack on South Dakota's Anti-Coercion Abortion Statute.

See, SDCL §34-23A-53 to 62 (2011). That case is pending. The entire purpose of that statute, and the entire purpose of Alpha Center's services and counseling, like that of most pregnancy centers, is to help pregnant mothers keep their children if that is what they prefer, free from coercion, pressure, or undue influence from others, and to help provide what the mother needs to exercise her right to keep her relationship with her child.

Alpha Center finds a referral to an abortion facility, which acts to terminate the pregnant mother's relationship with her child, completely antithetical to the very purpose of the center and its fundamental mission.

SUMMARY OF ARGUMENT

Pregnant mothers come to pregnancy centers seeking counseling and assistance to help them keep their relationship with the children they carry. Often they come to find refuge from people pressuring them into having an abortion. California requires licensed pregnancy centers to advise these mothers that the state of California will provide them with free or low cost abortions, and to tell them where they can call to find out if they can obtain a free abortion. California Health and Safety Code §123472(a)(1).

The statute compels content based speech and requires the pregnancy center to give advice that is antithetical to the pregnancy center's mission and one that conflicts with the very reason that the mother seeks the help of the centers.

Under no circumstance would these pregnancy help centers provide and promote this information on their own

because the compelled disclosures operate to undermine their effort to help the pregnant mothers keep their relationship with their children and they are completely irrelevant to the particular services they provide.

The mission of pregnancy help centers in South Dakota and across the country is to provide counseling, education and assistance to pregnant mothers to help them maintain and keep their constitutionally protected relationship with their unborn children. SDCL §34-23A-54(4)&(5).

The abortion procedure terminates the life of a whole, separate, unique, living human being. SDCL §34-23A-10.1(1)(b).

An *en banc* panel of the United States Court of Appeals held that the state compelling that disclosure was constitutional and did not violate the First Amendment rights of the physician, because the statement was a statement of fact which was truthful, non-misleading and relevant. *Rounds I* (*en banc*). Upon remand, the U.S. District Court held that doctors performing abortions in South Dakota must use the precise language of the statutory disclosure, and should explain it. *Planned Parenthood, et al. v. Rounds, Alpha Center et al.*, 650 F.Supp.2d 972 (Dist. SD, 2009). A subsequent panel of the U.S. Court of Appeals affirmed that part of the District Court's decision. *Rounds II*.

Thus, an abortion is one method to terminate a pregnant mother's constitutionally protected relationship with her child.

Consequently, the pregnancy centers serve an essential role in protecting the mothers' parental rights. However, the California statute, in large measure, defeats the mission of the centers and undermines the help the mothers seek.

The pregnant mother who comes to the pregnancy centers as a safe haven to speak with understanding counselors who can help her keep her child and to resist the pressure to have an abortion, is immediately met with a message of who to call to terminate her relationship and obtain an abortion she does not want. It is a message hostile to the mother's needs and desires and it forces the pregnancy centers to deliver a message hostile to their very purpose.

California is compelling the pregnancy centers to deliver a message hostile to their mission, hostile to the pregnant mother's purpose in seeking their services, and irrelevant to the precise services the centers provide. In the process, the state effectively eliminates and suppresses the alternative voice of the centers which promote the mother's interest in her child's life, by enlisting them – against their will – to deliver that message which is hostile to the mother's desires and the center's purpose. That is the essence of viewpoint discrimination compelled speech, or, at the very least, the kind of content based compelled speech which is subjected to strict scrutiny and which requires a compelling state interest to justify it. *See, Riley v. Nat'l Fed'n of the Blind of N. Carolina, Inc.*, 487 U.S. 781, 795 (1988); *Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, 642 (1994). Whether the message content is obvious – which we think it is – or whether it is subtle, is irrelevant. In either event, the compelled speech

is subject to strict scrutiny. *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2227 (2015).

California disapproves of the pregnancy centers' mission to encourage mothers to maintain their relationship with their children (JA85), preferring instead to support "forward thinking" programs which provide abortion services. JA84. Such targeting of particular views, rather than just the subject matter, is an even more blatant First Amendment violation. *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995) (*citing*, *R.A.V. v. St. Paul*, 505 U.S. 377, 391 (1992)). The government must not regulate speech when, as here, "the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Id.*

The state has no legitimate interest in promoting abortion as a method for a pregnant mother to terminate her constitutionally protected relationship with her child. State promotion of a mother giving up her constitutionally protected liberty interest conflicts with the state's duty to protect that interest. The state certainly has no interest in promoting the termination of the life of a mother's child when she seeks help to keep that child. State promotion of the taking of the life of a human being conflicts with the state's duty to protect the life of all human beings. Even if the state had a legitimate interest in giving information to a woman who wants an abortion, the state has no legitimate interest in providing that information to a woman who does not want an abortion. The state has no interest of any kind to give a message about free abortions to a woman who seeks the sanctuary of a pregnancy center to avoid pressure to have an abortion.

LEGAL ARGUMENT

I. State Mandated Compelled Speech Which Is Antithetical to the Central Mission of Pregnancy Centers, Which is to Help Pregnant Mothers Keep and Maintain their Constitutionally Protected Relationship with Their Children, Violates the Free Speech Clause of the First Amendment, Applicable to the States through the Fourteenth Amendment

The mission of pregnancy help centers in South Dakota is to provide counseling, education and other assistance to pregnant mothers to help them maintain and keep their constitutionally protected relationship with their unborn children. SDCL §34-23A-54(4) & (5).[2] South Dakota expressly recognizes that a pregnant mother has an existing relationship with the child she carries. SDCL §34-23A-1.3. South Dakota has passed a number of laws which have as their purpose, the protection of the pregnant mother's fundamental liberty interest in her relationship with the child she carries. *See, generally*, SDCL §34-23A-1.3, 1.4, 1.5.[3]

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2. While South Dakota has expressly set forth this mission in its statutory law, this is essentially the primary mission of all pregnancy help centers across the nation. Heartbeat International has identified 4,137 such centers in the United States. Heartbeat International, *Worldwide Directory of Pregnancy Help*, search by organization, name, country, state/province: U.S. only,https://www.heartbeatservices.org/worldwide-directory (last visited January 12, 2018).

3. "The Legislature finds that pregnant women contemplating the termination of their right to their relationship with their unborn children, including women contemplating such termination by an abortion procedure, are faced with making a profound decision most

South Dakota recognizes that an abortion procedure, whether surgical or chemically induced, terminates the life of a whole, separate, unique, living human being. SDCL §34-23A-1.2. Consequently, the state requires a physician, and those assisting in an abortion, to disclose to the pregnant mother the fact "that the abortion will terminate the life of a whole, separate, unique, living human being." SDCL §34-23A-10.1(1)(b).

An *en banc* panel of the United States Court of Appeals held that the state compelling that disclosure was constitutional and did not violate the First Amendment rights of the physician, because the statement was a statement of fact which was truthful, non-misleading and relevant. *Rounds I* (*en banc*). Upon remand by the Eighth Circuit, the U.S. District Court held that doctors performing abortions in South Dakota must use the precise language of the statutory disclosure, and should explain it. *Rounds*, 650 F. Supp. 972. A subsequent panel of the U.S. Court of Appeals affirmed that part of the District Court's decision. *Rounds II*.

Thus, the pregnancy help centers have as their mission the protection of the pregnant mother's constitutional right to her relationship with her child. The function and role of the abortion providers is the complete antithesis of that mission: the termination of the mother's constitutionally protected relationship.

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often under stress and pressures from circumstances and from other persons, and that there exists a need for special protection of the rights of such pregnant women, and that the State of South Dakota has a compelling interest in providing such protection."

As a result, the standard of review for the pregnancy help centers, in the context of compelled speech, is far different from the standard applicable to the commercial speech of physicians in the context of medical providers seeking consent for an abortion.

A. The Nature of the Decision Faced by the Pregnant Mother

1. The Pregnant Mother's Fundamental Right to Continue and Maintain her Relationship with her Child

> "A Mother's unique relationship with her child during pregnancy is one of the most intimate and important relationship, and worthy of protection. The unique bond between mother and child creates a human relationship that may be the most rewarding in all of the human experience ... Our laws are based upon the premise that the mother's intrinsic natural right [to that relationship] is fundamental, and its termination is a great loss to the mother." Report of the South Dakota Task Force to Study Abortion (2005) (hereafter "SD Report"), p. 55.

The relationship between parents and their children has always been protected as fundamental. *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977); *Santosky v. Kramer*, 455 U.S. 745, 753, 759 (1982). The source of this liberty interest is the intrinsic natural rights which derive by virtue of the existence of the individual; not rights conferred by government. *Smith v. Organization of Foster Families*, 431 U.S. 816, 845 (1977); *Moore v. City of East Cleveland, supra.* This is an interest in the

"companionship" with one's children. *Santosky*, 455 U.S. at 759; *Lassiter v. Department of Soc. Serv.*, 452 U.S. 18, 27 (1981); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972). The entitlement to protection of this right is self-evident. *Lehr v. Robertson*, 463 U.S. 248 (1983); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

Since the interest protected is the interest in the relationship itself, the mother's interest in her relationship with her child is always protected as fundamental, even during pregnancy. The majority in *Lehr v. Robertson*, 463 U.S. 248 (1983), adopting the reasoning of Justice Stewart's dissent in *Caban*, 441 U.S. 380, 398-99 (1979), and that of Justice Stephens, 441 U.S. at 403-405, emphasized the difference in the father's relationship and that of the mother: "The mother carries and bears the child, and in this sense her parental relationship is clear." *Lehr* at 259-60; 260, n.16. *Lehr* thus recognized the mother's protected interest because during pregnancy the mother has an actual relationship with her child. To establish that she has a protected Due Process Right, the pregnant mother must simply have an existing relationship with the child, and it is the "biological" relationship which controls, not the "legal" status accorded by a state. *Glona v. Amer. Guar. & Liab. Ins. Co.*, 391 U.S. 73, 75-76 (1968).

In contrast to the birth mother, the genetic father does not always enjoy constitutional protection. The mere fact that a man is genetically related does not give rise to a liberty interest under the Fourteenth Amendment. *See and compare, Stanley*, 405 U.S. 645; *Caban*, 441 U.S. 380; *Quilloin v. Alcott*, 434 U.S. 246 (1978); *Lehr*, 463 U.S. 248. The difference in the reproductive roles of the mother who carries the child and a person who "fathers" the child not only distinguish how their reproductive rights can be

established, but justifies different treatment under the Fourteenth Amendment. *See*, e.g. *Tuan Anh Nguyen v. Immigration and Naturalization Services*, 523 U.S. 53, 62-73 (2001) (citing *Lehr, supra*).

Constitutional protection of the mother's right to her relationship with her child has taken different forms. For instance, a state court cannot enter an order terminating those rights unless the basis for such termination is proven by clear and convincing evidence. *Santosky*, 485 U.S. 745 (1982). That higher standard must be met even when the state is not a party to the action because it is the state order which terminates the mother's rights. *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996).

2. The Social Question and the Nature of the Services of the Pregnancy Centers

The first and most important question the pregnant mother faces is the primary and central question of whether she should keep her relationship with her child. *See*, SDCL §34-23A-1.5. Having adequate counseling as the mother contemplates that question is essential to the mother's needs, interests, and rights. S.D. Report, pp. 19-22. Only after she makes a decision of whether she can and should keep her relationship with her child, and *only* if the pregnant mother decides that she must give up and terminate her relationship with her child, does the secondary question of what method of termination she should employ arise. Only then does the mother face the question of whether termination should be by a court order in an adoption proceeding, with all of its safeguards against uninformed and involuntary termination; or by terminating that relationship by an abortion. The 2011 South Dakota Anti-Coercion Abortion Statute states, in part:

> "It is a necessary and proper exercise of the state's authority to give precedence to the mother's fundamental interest in her relationship with her child over the irrevocable method of termination of that relationship by induced abortion." SDCL §34-23A-54(5).

The central mission of pregnancy help centers is to assist the mother to keep her relationship with her child by providing protection against pressure and coercion, and information about all financial and other assistance which is available to her if she prefers to keep her child, including assistance from the pregnancy help centers.

Thus, the role of the pregnancy help centers which assist women in exercising their fundamental right to maintain their relationship with their child is the polar opposite of the abortion providers' purpose of terminating that relationship.

B. The Nature of the Abortion Procedure: Termination of the Mother's Constitutionally Protected Relationship with Her Child by Terminating the Life of the Child

By its nature, an abortion terminates the life of a whole, separate, unique, living human being. *Rounds I* (*en banc*).

South Dakota's Informed Consent Abortion Law requires a physician to disclose the nature of the abortion procedure by disclosing to the pregnant mother "that an abortion will terminate the life of a whole, separate, unique, living human being." SDCL §34-23A-10.1(1)(b). The Planned Parenthood affiliate which performs

abortions in Sioux Falls, South Dakota, sued the state in an action brought pursuant to 42 U.S.C. §1983 alleging that the compelled disclosure violated the physician's Fourteenth Amendment right of free speech. An *en banc* court of the U.S. Court of Appeals for the Eighth Circuit held that the disclosure was a statement of scientific fact – not a statement of ideology as maintained by Planned Parenthood – and that it was a truthful statement of fact relevant to the decision of a pregnant mother contemplating whether or not to sign a consent for an abortion.

It is well established that modern medicine recognizes that a physician who has a pregnant woman as a patient, has two separate patients, the mother and her unborn child and the physician has a duty to both. American College of Obstetricians & Gynecologists, ETHICS IN OBSTETRICS AND GYNECOLOGY 34 (2nd ed. 2004) ("The maternal-fetal relationship is unique in medicine ... because both the fetus and the woman are regarded as patients of the obstetrician"); Harrison, M.R., Golbus, M.S., Filly, R.A. (Eds); THE UNBORN PATIENT, 2nd Ed.; W.B. Saunders, Phil. 1991. Numerous courts have recognized this concurrent duty to both mother and child in utero, and recognize that the doctor has a duty to the unborn child, as with all patients, to disclose the risks and consequences of the procedure to the child by informing the mother of those risks, and the mother makes the decision for herself and her child.[4]

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4. The lead case is *Hughson v. St. Francis Hospital*, 92 A.D.2d 131, 132-33, 459 N.Y.S.2d 814, 816 (1983) ("both the mother and child *in utero* may each be directly injured and are each owed a duty, independent of the other"). Courts have specifically recognized this concept in the informed consent context, stating that the doctor has a duty to provide the mother – as surrogate for the child – of the

Thus, when a physician proposes to perform an abortion, the physician is proposing to terminate the life of a separate human being, who is one of the physician's patients. An abortion is not a medical procedure in the sense that it is not a procedure to cure or treat an illness or adverse medical condition. It is terminating the life of the child as a method to terminate the mother's relationship with her child.

If a pregnant mother feels that she cannot or should not raise her unborn child, there is one legal method other than abortion for the mother to terminate her relationship with her child: termination by a court order in the context of an adoption after a court hearing and findings of fact in a court of law.

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information regarding the consequences and risks the proposed treatment would have for the child. *Id.* ("encompassed within the independent duty flowing between the doctor and infant *in utero* is the obligation of the physician to obtain informed consent from the parent"); *see also Harrison v. United States*, 284 F.3d 293, 301 (1st Cir. 2002) (Massachusetts law); *Roberts v. Patel*, 620 F.Supp. 323, 326 (N.D. Ill. 1985); *Walker v. Mart*, 164 Ariz. 37, 41, 790 P.2d 735, 739 (1990); *In re A.C.*, 573 A.2d 1235, 1246 n. 13 (D.C. 1990); *Nold v. Pinyon*, 272 Kan. 87, 105, 31 P.3d 274, 289 (2001); *Draper v. Jasionowski*, 372 N.J.Super. 368, 376, 858 A.2d 1141, 1146 (N.J. App. Div. 2004); *Ledford v. Martin*, 87 N.C.App. 88, 91, 359 S.E.2d 505, 507 (1987). Other cases have recognized this two-patient concept in other malpractice contexts. *See*, e.g., *Burgess v. the Superior Court of Los Angeles*, 2 Cal.4th 1064, 1076, 831 P.2d 1197, 1203, 9 Cal.Rptr.2d 615, 621 (1992); *Ob-Gyn Associates of Albany v. Littleton*, 259 Ga. 663, 663, 386 S.E.2d 146, 147 (1989). *See*, also, *In re Certification of Question of Law from U.S. District Court (Farley)*, 387 N.W.2d 42 (S.D. 1986) (holding that a wrongful death malpractice action can be brought for the death of a stillborn child).

In the context of adoption, every effort is made to protect the mother's constitutional liberty interest in maintaining her relationship with her child – termination of the mother's rights is treated as the last option, and every effort is made to insure that the mother has every opportunity to avoid waiving her constitutional right to keep her child. For instance, under South Dakota's adoption laws, the petition which represents the waiver by a mother of her rights cannot be filed, at the earliest, until five days after the birth of her child. S.D.C.L. 25-5A-4. Even if the pregnant mother had decided to give up her rights early in pregnancy, no written document evidencing that decision is enforceable in law. The mother is given the entire gestational period to change her mind. The petition must set forth the reasons why the mother wants to give up her rights, and an express written consent to the termination of her rights. S.D.C.L. 25-5A-6 (5) & (7). To help insure that her decision is informed, the law requires that the mother receive counseling from an adoption agency, South Dakota DSS or a private counselor before she consents to giving up the rights. S.D.C.L. 25-5A-22. The counselor must determine that the waiver of rights is voluntary without undue influence of others; that all other alternatives were examined; must explain likely emotional losses involved; must disclose the legal right to counsel; must discuss the permanent consequences of the decision; and must make an assessment of the ability of the parent to understand the consequences. S.D.C.L. 25-5A-23. This counseling must take place at least fifteen days before the mother petitions the court. A report must be submitted to the court certifying that all of these matters were discussed with the mother and the mother must sign a statement verifying that she understood the counseling. S.D.C.L. 25-5A-24.

The court must then hold a hearing before it can terminate the mother's rights. S.D.C.L. 25-5A-9. That court must determine that the consent is knowing, informed and voluntary. *See, e.g., Matter of D.D.D.*, 294 N.W.2d 423, 426 (1980). *In the Matter of J.M.J.* 368 N.W. 2d 602, 606-607 (S.D. 1985) the S.D. Supreme Court ruled that a judgment terminating a mother's rights should be vacated, even if the trial court found that her decision was informed and voluntary, if the record does not support the court's finding. The law even allows the mother under certain circumstances to withdraw her consent. In *Matter of Everett*, 286 N.W.2d 810 (S.D. 1979).

Thus, in the adoption context a mother must be fully counseled about how she can keep her child, cannot give up her rights until after the birth of her child, and her rights cannot be terminated except by a court order entered by a judge following a hearing in which the court concludes, upon an adequate record, that the mother's waiver of her rights was informed, knowing and voluntary. California has similar protections for women in the adoption context. In California, a pregnant mother voluntarily surrendering her rights in an adoption is not bound by an agreement she signs before the birth of the child. Only an agreement signed after she leaves the hospital following the child's birth can be used as a basis to terminate her relationship with the child. Cal. Fam. Code §8801.3(b)(2). Even if the mother signs such a post-birth consent, the mother has thirty days to revoke the consent. (Fam. Code, §8814.5(a). The mother can request immediate return of the child. (Fam. Code, §8815(b).

By contrast, the pregnant mother who goes to an abortion clinic often does not know her child already exists

and that she has a constitutional right she is giving up. Typically, the decision is made by the pregnant mother in a single day. Unlike promising to give up her rights in an adoption, the abortion is totally irrevocable. This decision – which may be the most important decision she makes in her entire life – is made without her receiving any meaningful counseling.

In short, the essential difference between the pregnancy center and the abortion provider is that the pregnancy help center is providing help to the mother that increases her ability to exercise her constitutional right to preserve and maintain her relationship with her child; while the abortion provider irrevocably terminates her constitutionally protected relationship, usually in a single day, in a short span of only hours, and without adequate counseling.

The two missions are polar opposites, and the purpose of an abortion is the very antithesis of the central mission of the pregnancy centers.

C. The Traditional Standards Applicable to Required Disclosures Made by a Physician Before Obtaining Consent for a Medical Procedure

All states require a physician to obtain a written consent before the physician can perform a medical procedure on a patient, and failure to obtain such consent exposes the physician to liability for a battery. *See*, e.g. *Cobbs v. Grant*, 502 P.2d 1, 7 (Cal.1972) ("Where a doctor obtains consent of the patient to perform one type of treatment and subsequently performs a substantially

different treatment for which consent was not obtained, there is a clear case of battery"); *Howard v. UMDNJ*, 800 A.2d 73, 80 (N.J. 2002); *see, also, Duncan v. Scottsdale Medical Imaging*, 70 P.3d 435, 439 (Ariz. 2003) (*en banc*); *Humboldt General Hospital v. The Sixth Judicial District Court*, 326 P.3d 167, 171 (Nev. 2016).

Thirty-five states and the federal government now have fetal homicide statutes making it a criminal homicide to kill an unborn child. In twenty-six of these jurisdictions, including South Dakota, killing an unborn child at any age after conception is a homicide. Consequently, in these states (and in the other ten jurisdictions depending upon the age of the "fetus"), failure to obtain a written consent exposes a physician to conviction of not just battery, but for homicide.[5]

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5. *See,* Alabama, Ala. Code 1975 §13A-6-1 (2001) (conception); Alaska, AS. §11.41.150 (2006) (conception); Arizona, Ariz. Rev. Stat §13-1103 (A)(5); Arkansas, ARST §5-1-102(13)(B)(i)(ii)(iii) (2013) (conception); California, Cal. Penal Code §187(a) (1970) (fetal stage); Federal, 18 U.S.C. §1841(C) (2004) (conception); Florida, F.S.A. §782.09 (2005) (quickening); Georgia, Ga. Code Ann. §16-5-80 (2006) (conception); Idaho §§11-4001; 18-4006 (2006) (conception); Illinois, 720 ILCS 5/9-1.2 (2010) (conception); Indiana, IC 35-42-1-3 *et seq.* (1997) (viability); Iowa, I.C.A. §707.8 (1996) (conception); Kentucky, KRS §§507A.010, 507A.020 (2004) (conception); Louisiana, LSA-RS Ann §14:32.5 *et seq.* (2006) (conception); Massachusetts, *Comm. v. Crawford*, 722 NE.2d 960 (Mass. 2000) (viability); Michigan, M.C.L.A. §750.322 (1970) (quickening); Minnesota, M.S.A. §609.266 *et seq.* (2007) (conception); Mississippi, Miss. Code. Ann. §97-3-37 (2011) (conception); Missouri, V.A.M.S. 1.205 (Mo. 1988) (conception) and *State v. Rollen*, 133 SW.3d 57 (2003); Nebraska, Neb. Rev. St. §28-388 *et seq.* (2002) (conception); Nevada, N.R.S. 200.210 (1995) (quickening); New York, McKinney's Penal Law §125.00 (24 weeks pregnant); North Carolina, N.C.G.S.A. §14-23.1

There are two general standards for physician disclosure under the laws of the various states, with some modest variations. The older standard is the "professional standard" in which a doctor must disclose the risks of a proposed procedure which practitioners determine should be disclosed. *See, Canterbury v. Spence*, 464 F.2d 772 (D.C. Cir. 1972).

Canterbury introduced the newer standard of disclosure, the "reasonable patient standard," under which the physician must disclose the nature of the procedure, all of the risks of the procedure, and the alternatives that a reasonable patient would consider relevant to the patient's decision. *See*, e.g. *Cobbs v. Grant*, 502 P.2d 1, 10-11 (Cal. 1972); *Largey v. Rothman*, 540 A.2d 504, 506 (N.J. 1988); *Wheeldon*, 374 N.W. 2d at 375; *Sard v. Hardy*, 379 A.2d 1014, 1022 (Md. Ct. of App. 1977); *Scott v. Bradford*, 606 P.2d 554, 558 (Okla. 1979); *Downs v. Trias*, 49 A.3d 180, 186 (Con. 2012); *Dennis v. Jones*, 928 A.2d 672, 676 (D.C. Ct. of App. 2007).

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et seq. (2011) (conception); North Dakota NDCC 12.1-17.1-02 *et seq.* (1987) (conception); Ohio, R.C. §2903.01 *et seq.* (1996) (conception); Oklahoma, 21 Okl. St. Ann §691 (2006) (conception); Pennsylvania, 18 Pa. C.S.A. §106 (1997) (conception); Rhode Island, Gen. Laws 1956 §11-23-5 (1975) (quickening); South Carolina, Code 1977 §16-3-1083 (2006) (conception); South Dakota, SDCL §22-16-1.1 (1995) (conception); Texas, V.T.C.A. Penal Code §1.07, 19.01-19.06 (2011) (conception); Utah, U.C.A. 1953 §76-5-201 *et seq.* (2010) (conception); Virginia, VA Code Ann. §18-2-32.2 (2004) (fetal stage); Washington, Wash Rev. Code Ann. §9A.32.060 (2004) (quickening); West Virginia, W. Va. Code §61-2-30, 61-2-1, 61-2-4, 61-2-7 (2005) (conception); Wisconsin, W.S.A. 940.04 *et seq.* (2012) (quickening); and Wyoming, W.S. 1977 §6-2-109 (2010) (conception).

Uninformed consent is a negligence concept, being a breach of a duty. In "reasonable patient" jurisdictions, there is no need to prove the standard of care by expert testimony – unlike in most professional malpractice cases – because what a reasonable patient would want to know is a fact question for the jury. *See*, e.g. *Cobbs, supra; Largey, supra; Canterbury, supra.*

Some states still adhere to the "professional standard" of negligence in obtaining a consent for a medical procedure. *See*, e.g. *Whittington v. Mason*, 905 So.2d 1261, 1266 (Miss. 2005); *Laui v. NYU Hospital Center*, 133 AD. 3d 830, 832 (N.Y. App. Div. 2015); *Fain v. Smith*, 479 So.2d 1150, 1151 (Ala. 1985); *Gorab v. Zook*, 943 P.2d 423, 427(Ga. 1997); GA Code ANN. §31-9-6.1 (Georgia Statutory Law); *Anderson v. Hollingsworth*, 42 P.3d 228, 231 (Idaho 2002).

In "professional standard" jurisdictions, in order to establish the standard of care with respect to the physician's duty to disclose before taking a consent, the plaintiff patient must have an expert testify to what the accepted standard was in the profession. *See*, e.g. *Whittington, supra; Laui v. NYU, supra.*

Thus, the states have always regulated the medical profession and have imposed standards of conduct upon physicians before they can take a written consent from a patient before performing a medical procedure.

However, the abortion procedure is unique and there are far more interests of the mother and the state at stake when the physician proposes to perform an abortion: (1) the procedure terminates the mother's constitutionally

protected interest in her relationship with her child; (2) the procedure, by its nature, deliberately terminates the life of a human being, which would constitute a homicide if a written consent were not obtained; (3) in the overwhelming majority of cases, no adverse medical condition is being "treated;" and (4) the mother, because of the death of the child and termination of her right to her relationship, is placed at increased risk for suicide ideation and suicide. *Rounds III (en banc).*

Therefore, the state's interest in compelling accurate and complete information before a physician takes a consent for an abortion, and its interest in insuring that the consent is truly voluntary, is greater than in any other medical procedure.

D. State Mandated Disclosures Imposed upon Physicians in Connection with Proposed Medical Treatment, Including Abortion Procedures, Are Subject to Simple Rational Basis Scrutiny, So That it Is Sufficient That the Disclosure Is True, Non-Misleading and Relevant to the Patient's Decision

The U.S. Court of Appeals for the Third Circuit held that a physician could be required by a state to make certain disclosures to a pregnant mother before the physician could take a written consent for an abortion from the mother.

To successfully challenge the state's mandate, an abortion doctor would have to show that the specific disclosure was untruthful, misleading, or not relevant to the mother's decision pertaining to the specific medical procedure involved. *Casey*, 947 F.2d at 705-706.

In affirming the Third Circuit, the United States Supreme Court did not impose a greater standard of scrutiny.

When imposing the rational basis standard of scrutiny, the Third Circuit followed the exact same standard earlier announced by the U.S. Supreme Court in professional commercial compelled speech cases. *Zauderer*, 471 U.S. at 637, 650-651 (1985).

Subsequent to the *Casey* decision, two other circuit courts followed the standard imposed by the Third Circuit in *Casey*. In *Rounds I*, an *en banc* panel of the Eighth Circuit held that as long as the disclosure imposed upon an abortion doctor was relevant to the procedure, the disclosure will be upheld if it embodies a true statement of fact. That standard was followed by the Fifth Circuit in *Lakey*, 667 F.3d 570 and again by the Eighth Circuit by a second *en banc* court in *Rounds III*; *but see*, *Stuart v. Camnitz*, 774 F.3d 238 (4th Cir. 2014).

The critical fact that resulted in imposition of the rational basis standard is that the disclosure in question related directly to a particular procedure the physician intended to perform. The doctor has no obligation to disclose risks or other information which relate to other kinds of procedures and matters not before the physician.

E. California's Statute Which Compels the Pregnancy Centers to Advise Pregnant Mothers of Information about How to Obtain an Abortion Is Antithetical to the Central Mission and Purpose of the Pregnancy Centers and the Reasons Why the Pregnant Mothers Seek Their Help. The Statute Violates the Free Speech Rights of the Pregnancy Center, Their Personnel and Those of the Mothers Guaranteed by the Fourteenth Amendment

Pregnant mothers come to California pregnancy centers seeking counseling and assistance to help them keep their relationship with the children they carry. Often they come to find refuge from people pressuring them into having an abortion. California requires licensed pregnancy centers to advise these mothers that the state of California will provide them with free or low cost abortions, and to tell them where they can call to find out if they can obtain a free abortion. California Health and Safety Code §123472(a)(1).

The statute compels content based speech which promotes a view point and requires the pregnancy center to give advice that is antithetical to the pregnancy center's mission and one that conflicts with the very reason that the mother seeks the help of the centers.

Under no circumstance would these pregnancy help centers promote this information on their own because the compelled disclosures operate to undermine their effort to help the pregnant mothers keep their relationship with their children and they are completely irrelevant to the services they provide. The abortion procedure terminates

the pregnant mothers' relationship with their children, the very result the mothers seek to avoid when they seek the help of the pregnancy centers. The abortion procedure terminates the life of a living human being, an act that violates the moral conscience of the pregnancy center personnel, and the disclosure compels them to promote an act repugnant to their conscience. The pregnant mother who comes to the pregnancy center as a safe haven to speak with understanding counselors who can help her keep her child and to resist the pressure to have an abortion, is immediately met with a message of who to call to terminate her relationship and obtain an abortion she does not want. It is a message hostile to the mother's needs and desires and it forces the pregnancy centers to deliver a message hostile to their very purpose.

It is axiomatic that in scrutinizing the constitutionality of a state statute which controls speech the court must first determine the appropriate level of scrutiny and identify the state's interest to determine if it satisfies that level of scrutiny.

Once we identify the nature of the abortion procedure – the termination of the mother's relationship with her child by terminating the child's life – the lack of any state interest becomes clear. The state has no legitimate interest in promoting the termination of a mother's constitutionally protected relationship with her child. Neither does it have an interest in promoting the killing of her child.

Whatever interest the state may have in letting a woman who wants an abortion know that she may qualify for a free or low cost abortion, the state has no interest in providing that information to women who do not seek

an abortion, women who didn't want an abortion, and women who have sought the help of a pregnancy center precisely because she wants help and advice to keep her relationship with her child, and be free from pressure to have an abortion.

The Act operates to compel pregnancy centers to communicate facts in furtherance of a message they find morally objectionable, that is antithetical to their *raison d'être*, and for which the state has no legitimate interest: that a woman should immediately and irrevocably terminate her relationship with her child by terminating that child's life. As such, it survives no level of judicial scrutiny, much less the strict scrutiny applicable to such content based and viewpoint discriminatory compelled speech.

1. The Act Is Content-Based on its Face, and Therefore Subject to Strict Scrutiny

California is compelling the pregnancy help centers to deliver a message hostile to their mission, hostile to the pregnant mother's purpose in seeking their services, and irrelevant to the precise services the centers provide. In the process, the state effectively eliminates and suppresses the alternative voice of the center which promotes the mother's interest in her child's life, by enlisting them – against their will – to deliver that message which is hostile to the mother's desires and the center's purpose. That is the essence of viewpoint discrimination compelled speech, or, at the very least, the kind of content based compelled speech which is subjected to strict scrutiny and which requires a compelling state interest to justify it. *See, Riley*, 487 U.S. at 795; *Turner Broadcasting System, Inc.*,

512 U.S. at 642. Whether the message content is obvious – which we think it is – or whether it is subtle, is irrelevant. In either event, the compelled speech is subject to strict scrutiny. *Reed*, 135 S. Ct. at 2227.

For the state to force the pregnancy centers to deliver a message that is relevant only to women who want an abortion is offensive to the rights of the centers and the women in equal measure. It forces the pregnancy centers to have a discussion that is disruptive to the one it normally conducts, and one that is contrary to the purpose of the mother's visit to the center. That mandate disturbs the free communication of the pregnancy centers "on matters of public concern." *Evergreen v. City of New York*, 740 F.3d 233, 250 (2nd Cir. 2014). The state is capable on its own of informing women of the information they wish to impart. Instead, the state conscripts the pregnancy centers to convey the state's message which can be made without their assistance (*Evergreen*, at 250), and the state compels the disclosures to be delivered in a totally inappropriate time and place.

"Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed*, 135 S. Ct. at 2227 (2015) (citing, e.g. *Sorrell v. IMS Health, Inc.*, 131 S.Ct. 2653, 2663-2664 (2011); *Carey v. Brown*, 447 U.S. 455, 562 (1980)). Telling a pregnant mother where to go to get information about an abortion clearly consists of speech which conveys a message. *See*, *Reed*, 135 S. Ct. at 2227.

Laws mandating speech which "a speaker would not otherwise make" are content-based regulations subject

to strict scrutiny. *Riley*, 487 U.S. at 795 (1988); *Turner Broadcasting System, Inc.*, 512 U.S. at 642 (1994); *see also, Reed*, 135 S. Ct. at 2227.

2. The Act Targets a Specific Class Based upon the Message That Class Conveys – One Intended to Help Mothers Keep Their Children – Making It a Content-Based Regulation Subject to Strict Scrutiny.

The Act effectively applies only to pro-life pregnancy centers. Only clinics providing pregnancy-related services which do not participate in government programs that provide abortion-related services fall within the Act's ambit. Petitioner's brief adequately explains that fact at some length. *See,* Petitioner's Brief, pp. 8-14; 31-34.

"[A] speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter." *Reed*, 135 S. Ct. at 2227 (2015) (*citing, Consolidated Edison Co. of N.Y. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 530, 537 (1980)).

The Act is content-specific, because it cannot be "justified without reference to the content of the regulated speech." *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293, (1984). Most offensive is that it forces a message contrary to the mission of the centers in order to suppress their message and force conformity to the message the state wishes to promote. Therefore, it is subject to strict scrutiny.

3. The Act Is Subject to Strict Scrutiny as a Viewpoint Discriminatory Law Because the Legislative Record Reveals the Animus Which Motivated the Bill's Enactment

The legislative record – although unsupported by any fact witnesses, expert testimony, or admissible evidence concerning the pregnancy centers' practices whatsoever – reveals the legislature's hostility to pregnancy centers, whose existence was deemed to be "unfortunate." JA84. Clearly, the Act was occasioned by the government's disagreement with the pregnancy centers' message. It is, therefore, content-based and subject to strict scrutiny. *Reed*, 135 S. Ct. at 2227 (*citing*, *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

The state disapproves of the pregnancy centers' mission to encourage mothers to maintain their relationship with their children (JA85), preferring instead to support "forward thinking" programs which provide abortion services. JA84. Such targeting of particular views, rather than just the subject matter, is an even more blatant First Amendment violation. *Rosenberger*, 515 U.S. at 829 (*citing*, *R.A.V.*, 505 U.S. at 391). The government must not regulate speech when, as here, "the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Id.* (*citing*, *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 46 (1983)).

Strict scrutiny is properly applied "to facially content-based regulations of speech... when there is any 'realistic possibility that official suppression of ideas is afoot.'" *Reed*, 135 S. Ct. at 2237 (Kagan, concurring) (*citing*, *Davenport*

v. Washington Ed. Assn., 551 U.S. 177, 189 (2007) (*quoting*, *R.A.V.*, 505 U.S. at 390).

Such is the case here.

By applying only to pregnancy centers who may be forced to shut down rather than comply with the Act's compelled speech requirements, the law serves to affect, alter and perhaps even eliminate discussion of an entire topic – how women can be assisted in maintaining their relationship with their children. Such content discrimination "raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace." *R.A.V.*, 505 U.S. at 387 (*quoting*, *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 116 (1991);

4. The Act Does Not Advance Any Legitimate State Interest, and So Fails to Meet Any Standard of Constitutional Scrutiny

To survive strict scrutiny, the Government must prove that the compelled speech is narrowly tailored to further a compelling state interest. *Arizona Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 734 (2011).

The state has no legitimate interest in promoting abortion as a method for a pregnant mother to terminate her constitutionally protected relationship with her child. State promotion of a mother giving up her constitutionally protected liberty interest conflicts with the state's duty to protect that interest. The state certainly has no interest in promoting the termination of the life of a mother's child when she seeks help to keep that child. State promotion

of the taking of the life of a human being conflicts with the state's duty to protect the life of all human beings. Even if the state had a legitimate interest in giving information to a woman who wants an abortion, the state has no legitimate interest in providing that information to a woman who does not want an abortion. The state has no interest of any kind to give a message about free abortions to a woman who seeks the sanctuary of a pregnancy center to avoid pressure to have an abortion.

In addition, the state has no legitimate interest in interfering with the lawful and competent counseling provided by the pregnancy centers.

CONCLUSION

For the foregoing reasons, the decision of the Ninth Circuit Court of Appeals should be reversed.

Respectfully submitted,

HAROLD J. CASSIDY
Counsel of Record
THOMAS J. VIGGIANO III
JOSEPH R. ZAKHARY
THE CASSIDY LAW FIRM
750 Broad Street, Suite 3
Shrewsbury, New Jersey 07702
(732) 747-3999
hjc@thecassidylawfirm.com

Counsel for Amicus Curiae

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Supreme Court of the United States

NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES, D/B/A NIFLA, ET AL.,

Petitioners,

v.

XAVIER BECERRA, ATTORNEY GENERAL, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Amici Curiae Brief of the American Academy of Pediatrics, California, the American College of Obstetricians and Gynecologists, the American Medical Women's Association, the American Nurses Association\California, the American Society for Reproductive Medicine, the Association of Reproductive Health Professionals, the California Medical Association, the National Abortion Federation, the National Perinatal Association, and the Society for Adolescent Health and Medicine in Support of Respondents

SIMONA G. STRAUSS
Counsel of Record
P. CASEY MATHEWS
SIMPSON THACHER & BARTLETT LLP
2475 Hanover Street
Palo Alto, California 94304
(650) 251-5000
sstrauss@stblaw.com

VERONICA R. JORDAN-DAVIS
SIMPSON THACHER & BARTLETT LLP
425 Lexington Avenue
New York, New York 10017
(212) 455-2000

Attorneys for Amici Curiae

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CONSENT TO FILE AS *AMICI CURIAE*

This brief is filed with the consent of the parties pursuant to Rule 37(3)(a) of the Rules of the Supreme Court of the United States.

INTEREST OF *AMICI CURIAE*[1]

The American Academy of Pediatrics, California, the American College of Obstetricians and Gynecologists, the American Medical Women's Association, the American Nurses Association\California, the American Society for Reproductive Medicine, the Association of Reproductive Health Professionals, the California Medical Association, the National Abortion Federation, the National Perinatal Association, and the Society for Adolescent Health and Medicine (collectively "*Amici*") respectfully submit this brief *Amici Curiae* in support of Respondents.

Amici are organizations dedicated to health care, research, and health policy. These organizations are committed to improving women's health and preserving women's access to comprehensive health care. *Amici* respectfully submit this brief to share their collective learning

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[1] Pursuant to Rule 37.6 of the Rules of the Supreme Court of the United States, counsel for *Amici Curiae* represent that no counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *Amici Curiae* and their counsel made such a monetary contribution.

about the likely negative impact that reversal of the decision below would have on women's health. *Amici* are as follows:

- The **American Academy of Pediatrics, California** ("AAP-CA") is a legally incorporated nonprofit member association, comprised of the four AAP California chapters statewide representing approximately 5,000 board-certified primary care and subspecialty pediatricians. The mission of the AAP-CA is to promote the health and well-being of all children and youth living in California. This includes support for access to medically accurate information regarding reproductive health care services for young women.

- The **American College of Obstetricians and Gynecologists** ("ACOG") is a non-profit, voluntary membership organization. With more than 58,000 members, ACOG is the premier professional membership organization of obstetricians and gynecologists and others dedicated to the improvement of women's health. ACOG promotes the advancement of women's health care through continuing medical education, practice, research, and advocacy.

- The **American Medical Women's Association** ("AMWA") is an organization of women physicians, medical students and others dedicated to serving as the unique voice for women's health and the advancement of women in medicine. AMWA does this by providing and developing leadership,

advocacy, education, expertise, and mentoring. AMWA is an active participant in setting health care policy to promote women's health issues.

- The **American Nurses Association\California** ("ANA\C") represents all registered nurses in the state of California, without regard to specialty or practice setting. The American Nurses Association ("ANA") and its state chapters advance the nursing profession by fostering high standards of nursing practice, promoting the rights of nurses in the workplace, projecting a positive and realistic view of nursing, and by lobbying the legislature and regulatory agencies on health care issues affecting nurses and the public. ANA\C is aligned with ANA policy in advocating for access to safe, timely, and quality care for all populations. ANA is a leader in promoting policies on reproductive and human rights, social justice, and ethical standards.

- The **American Society for Reproductive Medicine** ("ASRM") is a non-profit multidisciplinary organization dedicated to the advancement of the science and practice of reproductive medicine. ASRM accomplishes this mission through the pursuit of excellence in education and research and through advocacy on behalf of patients, physicians, and affiliated health care providers.

- The **Association of Reproductive Health Professionals** ("ARHP") brings together health care professionals across disciplines and specialties for evidence-based training and network building. ARHP delivers on its educational mission by translating good science into practice through producing accredited, peer-reviewed programs.

- The **California Medical Association** ("CMA") is a non-profit, incorporated professional association for physicians with approximately 43,000 members throughout the state of California. For more than 150 years, CMA has promoted the science and art of medicine, the care and well-being of patients, the protection of public health, and the betterment of the medical profession. CMA's physician members practice medicine in all specialties and settings, including providing reproductive health services.

- The **National Abortion Federation** ("NAF") is the professional association of abortion providers. NAF's mission is to ensure safe, legal, and accessible abortion care, which promotes health and justice for women. NAF's members include private and non-profit clinics, Planned Parenthood affiliates, women's health centers, physicians' offices, and hospitals. NAF is the leading organization offering accredited continuing medical education to health care professionals in all aspects of abortion care, and NAF

member providers adhere to NAF's evidence-based *Clinical Policy Guidelines*, which set the standards for quality abortion care.

- The **National Perinatal Association** ("NPA") is an interdisciplinary organization of professionals, parents, and advocates that is the leading voice in perinatal care in the United States. NPA educates, advocates, and integrates all voices with equality and respect to support pregnant women, infants, and their families and the professionals who care for them. NPA works to create positive change in perinatal care by partnering with health care, government, and nonprofit organizations.

- The **Society for Adolescent Health and Medicine** is a multidisciplinary organization committed to improving the physical and psychosocial health and well-being of all adolescents and young adults through advocacy, clinical care, health promotion, health service delivery, professional development and research.

SUMMARY OF ARGUMENT

The Ninth Circuit Court of Appeals below upheld California's Reproductive FACT (Freedom, Accountability, Comprehensive Care, and Transparency) Act, Cal. Health and Safety Code 123470 *et seq.*; Assemb. B. No. 775,2015-2016 Reg. Sess. (Cal. 2015) (the "FACT Act"). The FACT Act (1) requires licensed medical facilities that provide pregnancy-related services to notify women of the availability of free or low-cost access to comprehensive family planning services, prenatal care, and abortion to eligible women, and (2) requires facilities that offer pregnancy-related services but are not licensed and do not have a licensed medical provider (*i.e.*, a licensed health professional regulated under California statutes) on staff to inform women of these facts. An affirmance of the decision of the court below sustaining the constitutionality of the FACT Act would have a markedly positive effect on women's and children's health and well-being by preventing unnecessary delay in women's ability to access prenatal care, contraceptive services, and abortion services and ensuring that women are well-informed about the nature of the services offered and the credentials of the individuals and facilities offering those services.

Women's pregnancy-related health care services are highly time-sensitive, and unnecessary delay can pose significant risks to maternal and fetal health. Accordingly, requiring licensed medical facilities to inform women of the availability of free or low-cost care reduces certain avoidable risks associated with delayed care and thereby promotes

health. This is particularly true if the facility does not itself offer the comprehensive family planning services, prenatal care, or abortion that is being sought, in which case a woman must seek care elsewhere.

In addition, requiring unlicensed medical facilities to inform women that there are no licensed medical providers on staff serves two important public health goals: (1) it allows women to make more fully informed decisions about the pregnancy-related services that they receive; and (2) it prevents unlicensed facilities from misleading women into believing that the services being offered are medically necessary or beneficial.

As leading medical societies, *Amici* are profoundly interested in policies that allow women to obtain desired medical services as quickly and safely as possible. An affirmance of the decision below will help advance those policies and thus further the health of women and developing fetuses.

ARGUMENT

I. Women Should Be Informed About State-Funded Prenatal Care, Family Planning And Abortion Services

At issue in this case are efforts by the State of California to ensure that patients receive accurate information about the availability and accessibility of comprehensive reproductive health services in the State. To facilitate this goal, the FACT Act requires licensed medical facilities that provide reproductive

health services to inform patients of the availability of low-cost or free family planning services, prenatal care, and abortion. Cal. Health & Safety Code § 123472(a)(1). In doing so, the FACT Act ensures that women "quickly obtain the information and services they need to make and implement timely reproductive decisions." Assemb. B. No. 775, § 1(d), 2015-2016 Reg. Sess. (Cal. 2015). As discussed below, delay in reproductive-related decisions can result in serious negative health outcomes for women, developing fetuses and infants.

A. Delayed or Inadequate Prenatal Care Poses Risks to Maternal and Fetal Health

Prenatal (or "antenatal") care for pregnant women is a crucial aspect of women's health care and is critical for ensuring the health of pregnant women and developing fetuses throughout pregnancy. Prenatal care allows a health care provider to (1) identify and assess health risks to the pregnant woman and developing fetus, (2) prevent and manage pregnancy-related health conditions, pregnancy-related diseases, and concurrent diseases of the pregnant woman and developing fetus that could impact the health of either, and (3) provide education for the pregnant woman so that she may better care for her own health and the health of the fetus. World Health Org., *WHO Recommendations on Antenatal Care for a Positive Pregnancy Experience* 1 (2016). These three goals of prenatal care are necessary to reduce risks associated with pregnancy and to

improve health outcomes for pregnant women and developing fetuses throughout pregnancy and childbirth.

1. Delayed or Inadequate Prenatal Care Increases Health Risks for Pregnant Women

Delays in obtaining accurate medical counseling and prenatal care poses risks for pregnant women. For some women, the state of pregnancy itself poses significant health risks. These risks may be even more acute for women with certain preexisting conditions. Proper prenatal care allows physicians and other qualified health professionals to assess and mitigate these risks. Pregnant women are at risk of deep venous thromboses (DVTs, or blood clots) because pregnancy results in increased vein pressure and a hypercoagulable state. This is a serious condition that can lead to pulmonary embolism or even death. *Deep Vein Thrombosis*, Mayo Clinic, http://www.mayoclinic.org/diseases-conditions/deep-vein-thrombosis/basics/definition/con-20031922; *see also* Am. Coll. of Obstetricians & Gynecologists, *Practice Bulletin No. 123: Thromboembolism in Pregnancy*, 123 Obstetrics & Gynecology 718, 718 (2011) [hereinafter *ACOG Practice Bulletin No. 123*]. Early detection allows women with preexisting clotting disorders to manage their pregnancies with the use of blood-thinning medication. *ACOG Practice Bulletin No. 123*, *supra*, at 720-21.

Other conditions may not be related to a woman's preexisting condition but may manifest during pregnancy. Such pregnancy-related risks to women include gestational diabetes, which affects approximately 6% of pregnant women and requires careful blood glucose monitoring, and hypertension disorders, which affect approximately 5-10% of pregnant women. *See* Am. Coll. of Obstetricians & Gynecologists, *Practice Bulletin No. 190: Gestational Diabetes Mellitus*, 131 Obstetrics & Gynecology e49, e49 (2018) [hereinafter *ACOG Practice Bulletin No. 190*] ("7% of pregnancies were complicated by any type of diabetes and . . . approximately 86% of these cases represented women with [gestational diabetes]."); Am. Coll. of Obstetricians & Gynecologists, *Committee Opinion No. 638: First-Trimester Assessment for Early-Onset Preeclampsia*, 126 Obstetrics & Gynecology e25, e25 at 1 (2015) ("Hypertensive disorders with adverse sequelae (including preterm birth, maternal morbidity and mortality, and long-term risk of maternal cardiovascular disease) complicate 5-10% of pregnancies."). Hypertension-related disorders such as preeclampsia are particularly dangerous—they account for "approximately a quarter of maternal deaths and near misses." World Health Org., *supra*, at 40. Timely and quality prenatal care is therefore necessary to diagnose and treat these conditions when they occur.

Additionally, some pregnancies develop abnormally and pose serious maternal health risks that need to be treated as soon as possible. For example, ectopic pregnancy, in which the pregnancy develops outside the uterus, can result in rupture of

the fallopian tubes and life-threatening bleeding if it is allowed to continue. Ectopic pregnancy occurs in approximately 2% of all pregnancies, and mortality from ectopic pregnancy is usually due to the failure to seek or receive timely medical care. *See* Am. Coll. of Obstetricians & Gynecologists, *Practice Bulletin No. 193: Tubal Ectopic Pregnancy*, 131 Obstetrics & Gynecology e91, e91 (2018). Separately, molar pregnancies, in which an abnormal pregnancy develops into a tumor, can lead to a potentially deadly cancer if not detected and treated. See *Molar Pregnancy*, Mayo Clinic, https://www.mayoclinic.org/diseases-conditions/molar-pregnancy/symptoms-causes/syc-20375175.

In addition to the management of medical conditions during pregnancy like those described above, prenatal care provides opportunities for health care professionals to screen for other related issues, such as maternal substance use, domestic violence, perinatal depression, and HIV and other sexually transmitted infections ("STIs"). *See* World Health Org., *supra*, at xi-xiv; Am. Coll. of Obstetricians & Gynecologists, *Committee Opinion No. 630: Screening for Perinatal Depression*, 125 Obstetrics & Gynecology 1268, 1268 (2015). Ensuring that women are informed of the availability of prenatal care by qualified and licensed medical providers encourages use of those services so that these conditions can be diagnosed and, if necessary, treated in a timely manner, reducing avoidable health risks posed by delay.

2. *Delayed or Inadequate Prenatal Care Increases Health Risks for Developing Fetuses and Infants*

Delayed or inadequate prenatal care is associated with negative health outcomes in developing fetuses, including premature birth, stillbirth, early neonatal death (death of a newborn within 7 days of birth), late neonatal death (death of a newborn between 7 and 27 days after birth), and infant death (any death within 356 days of birth) relative to the developing fetuses and children of women who receive adequate prenatal care. Sarah Partridge et al., *Inadequate Prenatal Care Utilization and Risks of Infant Mortality and Poor Birth Outcome: A Retrospective Analysis of 28,729,765 U.S. Deliveries Over 8 Years*, 29 Am. J. of Perinatology 787, 787 (2012). Timely prenatal care can ensure that women take necessary preventative measures for the sake of fetal health. These measures include, but are not limited to, (1) daily iron and folic acid supplements; (2) screening for asymptomatic bacteriuria (bacteria present in urine without any other symptoms), tobacco use, and HIV and other STIs; and (3) other preventative measures such as tetanus, pertussis, and influenza vaccination, all of which may reduce the risk of negative fetal health outcomes, including death. World Health Org., *supra*, at xi-xiv.

Delay in accessing and receiving prenatal care may also delay critical screenings that are needed to detect fetal health issues and initiate treatment earlier in pregnancy. For example, prenatal care often includes screening for fetal congenital heart

impairments. Rebecca F. Liberman et al., *Delayed Diagnosis of Critical Congenital Heart Defects: Trends and Associated Factors*, 134 Pediatrics e373, e375 (2014). Delayed diagnosis of fetal congenital heart impairments is "associated with serious complications, including seizure, cardiac arrest, and death" of a developing fetus or newborn. *Id.* at e374. Without timely access to prenatal care, women whose fetuses develop congenital heart impairments face delayed diagnosis, fewer potential options for treatment, and delayed treatment of the impairments, resulting in increased risk of serious fetal and infant health outcomes.

Delay in prenatal care can also result in increased risks of STI-related complications, such as mother-to-infant transmission of STIs like HIV or poor health outcomes for developing fetuses, including fetal loss or premature birth. Florence M. Momplaisir et al., *Time of HIV Diagnosis and Engagement in Prenatal Care Impact Virologic Outcomes of Pregnant Women with HIV*, 10 PLoS ONE e0132262 (2015), *available at* http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0132262; Kristina Adachi et al., *Chlamydia and Gonorrhea in HIV-Infected Pregnant Women and Infant HIV Transmission*, 42 Sexually Transmitted Diseases 554, 555 (2015). Timely detection and treatment of STIs is important not only for maternal health, but also for fetal and infant health. For example, without medical intervention, there is a substantial likelihood that an HIV-positive pregnant woman will transmit HIV to her fetus either during pregnancy or during childbirth—a likelihood that is dramatically reduced when the pregnant woman

receives treatment for her HIV infection at an early stage in her pregnancy. Momplaisir et al., *supra*, at 2.

Pregnant women with other untreated STIs such as chlamydia and gonorrhea also face potential pregnancy complications including "fetal loss, premature rupture of membranes, and preterm labor and delivery." Adachi et al., *supra*, at 555. These infections, if untreated, can cause conjunctivitis (eye infections), blindness, permanent brain damage, chronic hepatitis B, and pneumonia in infants. *Id.* Moreover, when chlamydia infections are present but untreated in HIV-positive pregnant women, they lead to an increased risk of mother-to-infant transmission of HIV. *Id.* at 563.[2]

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[2] Prenatal care also may include screening for the hepatitis B virus ("HBV") and the herpes simplex virus ("HSV"). If a pregnant woman tests positive for HBV, her baby should receive hepatitis B immune globulin and the HBV vaccine in the first twelve hours after birth. Am. Coll. of Obstetricians & Gynecologists, *Practice Bulletin No. 86: Viral Hepatitis in Pregnancy*, 110 Obstetrics & Gynecology 941, 949 (2007); Am. Coll. of Obstetricians & Gynecologists, *Practice Bulletin No. 82: Management of Herpes in Pregnancy*, 109 Obstetrics & Gynecology 1489, 1494 (2007). If prenatal screening shows that a pregnant woman tests positive for HSV, a cesarean birth may be recommended to prevent neonatal HSV infections, which, if untreated, have only a 40 percent survival rate. Lawrence Corey & Anna Wald, *Maternal and Neonatal Herpes Simplex Virus Infections*, 361 New Eng. J. of Med. 1376, 1376 (2009). Detection of maternal HBV and HSV, and thus prevention or treatment of neonatal HBV and HSV, is less likely, however, for women who do not receive prenatal care.

B. Delay in Obtaining an Abortion Poses Health Risks to Pregnant Women

Delay in obtaining an abortion creates health risks for pregnant women seeking abortions. The risks come in two distinct forms: (1) inherent risks of remaining pregnant under certain circumstances, and (2) increased risks posed by an abortion performed later than necessary.

There are myriad barriers that delay women from accessing abortion. *See* Am. Coll. of Obstetricians & Gynecologists, *Committee Opinion No. 613: Increasing Access to Abortion*, 124 Obstetrics & Gynecology 1060, 1061-64 (2014) [hereinafter *ACOG Committee Opinion No. 613*] (describing barriers to abortion access including, but not limited to, legal restrictions on abortion providers, funding restrictions, a lack of abortion providers, and stigma and violence). Some of these barriers are logistic, such as receiving inappropriate or delayed referrals, and the need to raise money to cover procedure and travel costs. *See* Am. Coll. of Obstetricians & Gynecologists, *Practice Bulletin No. 135: Second-Trimester Abortion*, 121 Obstetrics & Gynecology 1394, 1394 (2013); Eleanor A. Drey et al., *Risk Factors Associated with Presenting for Abortion in the Second* Trimester 107 Obstetrics & Gynecology 1 (2006); *ACOG Committee Opinion No. 613, supra*, at 1062 ("[F]unding restrictions impede access to safe abortion care and, in some cases, function as a de facto abortion ban."); Deborah Karasek et al., *Abortion Patients' Experience and Perceptions of Waiting Periods: Survey Evidence Before Arizona's Two Visit 24-Hour Mandatory Waiting Period Law*,

26 Women's Health Issues 63 (2016) (finding that 39% of women studied had to delay abortion due to cost).[3] The FACT Act requirement that licensed facilities inform women of the availability of free or reduced-cost abortion services addresses a major cause of delayed access to abortion.

1. The Extra Time During Which a Woman Who Has Decided to Have an Abortion Remains Pregnant Poses Health Risks

Pregnancy itself poses health risks for women, including women who have pregnancy complications or concomitant health conditions. *See supra* Section I(A)(1). Thus, a woman who has decided to obtain an abortion but remains pregnant because of delay, whether as a result of cost, misinformation, or otherwise, is exposed to preventable health risks associated with her continued pregnancy. In some cases, remaining pregnant may seriously jeopardize a woman's health.

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[3] In one study, 36.5% of women in their first trimester of pregnancy cited the cost of an abortion as a reason for delay. Ushma D. Upadhyay et al., *Denial of Abortion Because of Provider Gestational Age Limits in the United States*, 104 Pub. Health 1687, 1687 (2014) [hereinafter Upadhyay et al., *Denial*]; *see also* Marshall H. Medoff, *Race, Restrictive State Abortion Laws and Abortion Demand*, 41 Rev. Black Pol. Econ. 225, 238 (2014) ("A [state] Medicaid funding restriction reduces the abortion rate of white women by 2.0%, black women by 4.1% and Hispanic women by 10.6%.").

Women who have decided to have an abortion are unlikely to seek prenatal care. *See* Susan Hatters Friedman et al., *Characteristics of Women Who Do Not Seek Prenatal Care and Implications for Prevention*, 38 J. of Obstetric, Gynecologic & Neonatal Nursing 174, 179 (2009) (finding that "failed plans to procure abortions" is one reason women do not obtain prenatal care). Among those women, those who have preexisting conditions that increase the health risks posed by pregnancy are thus less likely to obtain the care that they require, especially if they are not aware of the preexisting condition. For example, pregnant women with preexisting clotting disorders who are unaware of this disorder may develop DVTs, *see supra* Section I(A)(1), but may not receive care that would alert them of the risk—or identify and treat the DVTs—if they are seeking abortions.[4] The additional time that these women are pregnant is thus time during which they can suffer significant health problems that could have been avoided had they received access to appropriate medical services, including timely abortion care.

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[4] Similarly, women with chronic hypertension or preexisting diabetes may experience an exacerbation of their condition at any stage of pregnancy that increases the need for treatment. *See generally* Nat'l Collaborating Ctr. for Women's & Children's Health, *Hypertension in Pregnancy: The Management of Hypertensive Disorders During Pregnancy* 61–75 (2011), *available at* https://www.ncbi.nlm.nih.gov/books/NBK62651/; John L. Kitzmiller et al., *Managing Preexisting Diabetes for Pregnancy*, 31 Diabetes Care 1060, 1061 (2008); *A Healthy Pregnancy for Women with Diabetes*, Am. Coll. of Obstetricians & Gynecologists, https://www.acog.org/Patients/FAQs/A-Healthy-Pregnancy-for-Women-with-Diabetes.

The probability of a pregnancy-related complication that threatens maternal health—and the number of possible complications—increases as the pregnancy progresses. Gestational diabetes, for example, is generally not a concern before 24 weeks of pregnancy. *See ACOG Practice Bulletin No. 190, supra*, at e50. Similarly, pregnant women who develop preeclampsia typically develop the condition after 20 weeks, with only rare occurrences of preeclampsia before then. *See Preeclampsia and High Blood Pressure During Pregnancy*, Am. Coll. of Obstetricians & Gynecologists, https://www.acog.org/Patients/FAQs/Preeclampsia-and-High-Blood-Pressure-During-Pregnancy.

Other life-threatening pregnancy-related conditions that pregnant women can develop include ectopic and molar pregnancies, which must be treated immediately. *See supra* Section I(A)(1). Licensed medical professionals providing abortion services have the qualifications and training to diagnose ectopic and molar pregnancies and treat or appropriately refer a patient for treatment of these conditions. Women with ectopic and molar pregnancies who experience a delay in obtaining abortion services, however, remain at increased, and indeed life-threatening, risk longer than necessary. The risks of pregnancy are serious, and women who do not want to be pregnant should not be subjected to those risks.

2. Health Risks Associated with Abortion Increase as Pregnancy Progresses

Legal abortion is among the safest procedures in medicine, and it is significantly safer than childbirth. Sam Rowlands, *Review: Misinformation on Abortion*, 16 Eur. J. Contraception & Reprod. Health Care 233, 234 (2011); Elizabeth G. Raymond & David A. Grimes, *The Comparative Safety of Legal Induced Abortion and Childbirth in the United States*, 119 Obstetrics & Gynecology 215, 216 (2012). Indeed, legal abortions by all methods are thirty times less likely to cause death than childbirth, Rowlands, *supra*, at 234, and surgical abortion in the United States is seventy times less likely to cause death than childbirth. *Id.* at 235 tbl.1.

Medical abortion (*i.e.* abortion performed using medication only) is a common method of abortion early in pregnancy. It is approved by the FDA for use through ten weeks gestation. *Mifeprex (Mifepristone) Information*, U.S. Food & Drug Admin., http://www.fda.gov/Drugs/DrugSafety/PostmarketDrugSafetyInformationforPatientsandProviders/ucm111323.htm. Medical abortion is the preferred method for some women for a number of reasons, and an increasing percentage of women have chosen medical abortion in recent years. Nathalie Kapp et al., *Efficacy of Medical Abortion Prior to 6 Gestational Weeks: A Systematic Review*, 97 Contraception 90, 90 (2017) ("Medical abortion at less than 9 weeks of gestation accounted for 31% of all clinic-based abortions in 2014 in the US, as compared with 24% in 2011."); Tara C. Jatlaoui et

al., *Abortion Surveillance – United States, 2013*, Morbidity & Mortality Wkly. Rep.: Surveillance Summaries, Nov. 25, 2016, at 1, 8 ("[F]rom 2004 to 2013, use of early medical abortion increased 110% (from 10.6% of abortions to 22.3%).").

The FDA-approved regimen for medical abortion becomes somewhat less effective later in pregnancy, however, and medical abortion thus is generally not performed in the United States after ten weeks of gestation. *See* Am. Coll. of Obstetricians & Gynecologists, *Practice Bulletin No. 143: Medical Management of First-Trimester Abortion*, 123 Obstetrics & Gynecology 676, 677 (2014) ("Complete abortion rates are higher with earlier gestations; approximately 96-98% in gestations of up to 42 days, 91-95% in gestations from 43 days to 49 days, and less than 85% in gestations beyond 49 days."); David A. Grimes, *The Choice of Second Trimester Abortion Method: Evolution, Evidence and Ethics*, 16 Reprod. Health Matters 183, 184–85 (2008). As a result, some women who are delayed in obtaining an abortion because of tactics used to discourage abortions in some facilities covered by the FACT Act will be deprived of the option of having a medical abortion. *See* Grimes, *supra*, at 184. Among the most harmed are women for whom medical abortion may have been the most appropriate method, such as women who have uterine fibroids that make access to the fetus more difficult or infeasible. *See, e.g.*, Mitchell D. Creinin, *Medically Induced Abortion in a Woman with a Large Myomatous Uterus*, 175 Am. J. Obstetrics & Gynecology 1379, 1379 (1996).

Further, although the complication rate of both medical and surgical abortion is very low, it increases as gestational age increases. Justin Diedrich & Jody Steinauer, *Complications of Surgical Abortion*, 52 Clinical Obstetrics & Gynecology 205, 205, 206 (2009); Karasek et al., *supra*, at 65; Rebecca Allen & Alisa B. Goldberg, *Cervical Dilation Before First-Trimester Surgical Abortion (<14 Weeks' Gestation)*, 93 Contraception 277, 281 (2016); Christine Dehlendorf et al., *Disparities in Abortion Rates: A Public Health Approach*, 103 Am. J. Pub. Health 1772, 1776 (2013); Upadhyay et al., *Denial*, *supra* note 2, at 1687. Further, while the risks remain small, additional delay in obtaining an abortion later in pregnancy increases the risk of complications, including death, more than delay early in pregnancy. Diedrich & Steinauer, *supra*, at 205; Mary Gatter et al., *Efficacy and Safety of Medical Abortion Using Mifepristone and Buccal Misoprostol Through 63 Days*, 91 Contraception 269, 271-72 (2015). For example, the risk of major complications for surgical abortions in the first trimester is only 0.16%. Ushma D. Upadhyay et al., *Incidence of Emergency Department Visits and Complications After Abortion*, 125 Obstetrics & Gynecology 175, 178 (2015). That risk more than doubles for abortions performed in the second trimester (albeit still very low at 0.41%). *Id.*; *see also* Allen & Goldberg, *supra*, at 277.

In addition to the risk of complication, the risk of death from legal abortion is extremely low and significantly lower than from childbirth. *See* Raymond & Grimes, *supra*, at 215-16 ("The risk of death associated with childbirth is approximately 14

times higher than that with abortion. . . . The mortality rate related to legal induced abortion . . . was 0.6 deaths per 100,000 abortions."). Nonetheless, this risk increases as gestational age increases. Suzanne Zane et al., *Abortion-Related Mortality in the United States: 1998–2010*, 126 Obstetrics & Gynecology 258, 263 (2015). Indeed, "[g]estational age at the time of the abortion remains the strongest risk factor for abortion-related mortality." *Id.* Significantly, the risk of mortality—as with complications—increases disproportionately with time. The mortality rate for abortions (*i.e.*, the number of abortion-related deaths per every 100,000 legal induced abortions) is 0.3 before 8 weeks, 0.5 at 9–13 weeks, 2.5 at 14–17 weeks, and 6.7 at or after 18 weeks. *Id.* at 262. (It must be noted, however, that even later in the second trimester, abortion remains much safer than carrying a pregnancy to term. *See* Marian F. MacDorman et al., *Recent Increases in the U.S. Maternal Mortality Rate: Disentangling Trends from Measurement Issues*, 128 Obstetrics & Gynecology 1, 1 (2016) (finding maternal mortality rate of 23.8 deaths per 100,000 live births in the 2014).)

From a public health standpoint, any risks that can be avoided by unnecessary delays should be avoided. In the context of legal abortion, although it is overall an extremely safe procedure, health risks increase when a woman's access to proper medical care is delayed. Thus, while it is essential to view the increasing risks of abortion associated with advancing gestational age relative to the

significantly greater risks of continuing a pregnancy, it is equally essential to minimize any unnecessary delay in a legal abortion.

C. Delay Makes It More Likely That Some Women Will Be Denied an Abortion

Timely access to medical care is critical to optimize health and to reduce health care costs. Delay in obtaining an abortion not only increases a woman's health risks but also makes the service sought either harder to obtain or, at some point, impossible to obtain.[5] As a matter of public health policy and legal policy, women should have access to available medical services without unnecessary obstacles. *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 874 (1992) (indicating that legislation cannot unduly burden a woman's access to abortion services); *Restricted Access to Abortion Violates Human Rights, Precludes Reproductive Justice, and Demands Public Health Intervention*, Am. Pub. Health Ass'n, http://www.apha.org/policies-and-advocacy/public-health-policy-statements/policy-database/2016/01/04/11/24/restricted-access-to-abortion-violates-human-rights.

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[5] Although the majority of abortions in the United States take place during the first trimester of pregnancy, approximately 8.4% of abortions occur after 13 weeks of gestation. Jatlaoui et al., *supra*, at 1. Most women who had second trimester abortions, however, would have preferred to have had the procedure earlier. Upadhyay et al., *Denial*, *supra* note 2, at 1687; Valerie French et al., *Influence of Clinician Referral on Nebraska Women's Decision-to-Abortion Time*, 93 Contraception 236, 240 (2016).

First, abortions become more expensive as pregnancy advances, potentially limiting some women's ability to obtain an abortion. Upadhyay et al., *Denial, supra* note 2, at 1687 (showing that the cost of abortion at 20 weeks is roughly triple the cost of abortion at 10 weeks); *see also* Medoff, *supra* note 2, at 238.

Second, there are fewer trained abortion providers who perform abortions as pregnancy continues. "According to a national survey of abortion providers, 23% offer abortions after 20 weeks' gestation, and 11% do so at 24 weeks." Upadhyay et al., *Denial, supra* note 2, at 1687. Moreover, there is an overall dearth of abortion providers in the United States. *See ACOG Committee Opinion No. 613, supra*, at 1063 ("The number of facilities providing abortion in the United States decreased 38% from 1982 to 2000, and continues to decrease. More than one third of U.S. women live in the 89% of counties that lack an abortion care facility . . . ."). Thus, additional delay will force many women to travel long distances to obtain an abortion. In effect, this means that some women who are delayed from accessing abortion care earlier in their pregnancies will be precluded from obtaining an abortion at all.[6]

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[6] This outcome is most likely for women without access to transportation, those who must arrange for childcare, and those who must take time away from their jobs. *See* Upadhyay, *Denial, supra* note 2, at 1687.

Indeed, abortion does not remain an option for women for the entire duration of pregnancy, as states have greater leeway to restrict abortion after viability. *See Casey*, 505 U.S. at 846. Thus, for some women, delay in obtaining abortion will result in the loss of that option altogether even if it is in the best interests of the woman's health.

Women should be able to obtain medical services as appropriate for their circumstances. Medical options should not be limited by avoidable delay.

* * *

Notifying patients that comprehensive health care services are available to them significantly increases the likelihood that they will seek and receive those services and thereby reduces the risks associated with delayed or inadequate health care. The converse is also true: depriving patients of information regarding services that are critical to their health prevents or delays their access to those services. And even those patients who are aware that services exist but incorrectly believe that they cannot afford those services are unlikely to seek or obtain them. Accordingly, providing notice to women as early as possible that free or low-cost prenatal care, family planning and abortion services are available to them reduces the significant health-related harms detailed above. The FACT Act facilitates women's awareness of, and thus access to, this care.

II. Women Must Be Informed Whether Or Not Health Care They Receive Is Provided By Or Under The Supervision Of A Licensed Medical Provider

A core principle of the practice of medicine is the duty of a licensed medical provider to competently provide medical treatment. Am. Med. Ass'n, *AMA Code of Medical Ethics* 1 (2001), *available at* https://www.ama-assn.org/sites/default/files/media-browser/principles-of-medical-ethics.pdf ("A physician shall be dedicated to providing **competent** medical care . . . ."); Am. Nurses Ass'n, *Code of Ethics for Nurses with Interpretive Statements* §5.5, at 19 (2015), *available at* http://nursingworld.org/DocumentVault/Ethics-1/Code-of-Ethics-for-Nurses.html ("Nurses must maintain competence and strive for excellence in their nursing practice, whatever the role or setting."). Unlicensed persons providing medical care without adequate competency run the risk of harming patients and violating the law through their unlicensed practice of medicine. *See* Am. Coll. of Obstetricians & Gynecologists, *Code of Professional Ethics* 3 (2011) [hereinafter *ACOG Code of Professional Ethics*], *available at* https://www.acog.org/-/media/Departments/National-Officer-Nominations-Process/ACOGcode.pdf?dmc=1&ts=20180224T2126120836 ("The obstetrician-gynecologist should recognize the boundaries of his or her particular competencies and expertise and must provide only those services and use only those techniques for which he or she is qualified by education, training, and experience."); Cal. Bus. & Prof. Code §§ 2052, 2053.5.

Patients can neither fully consent nor make fully informed decisions about their health care if they are not meaningfully informed about the care they are receiving or the qualifications and expertise of the individual who will be providing the care. *Informed Consent: Code of Medical Ethics Opinion 2.1.1*, Am. Med. Ass'n, https://www.ama-assn.org/delivering-care/informed-consent ("Patients have the right to receive information and ask questions about recommended treatments so that they can make well-considered decisions about care."); *Withholding Information from Patients: Code of Medical Ethics Opinion 2.1.3*, Am. Med. Ass'n, https://www.ama-assn.org/delivering-care/withholding-information-patients ("Truthful and open communication between physician and patient is essential for trust in the relationship and for respect for autonomy."); Am. Nurses Ass'n, *supra*, §2.1, at 5 ("Honest discussions about available resources, treatment options, and capacity for self-care are essential.").

In addition, the health care professional and the patient share responsibility for the patient's health, and the well-being of the patient depends upon their collaborative efforts. *Patient Rights: Code of Medical Ethics Opinion 1.1.3*, Am. Med. Ass'n, https://www.ama-assn.org/delivering-care/patient-rights; *see also* Am. Coll. of Obstetricians & Gynecologists, *Committee Opinion No. 578: Elective Surgery and Patient Choice*, 122 Obstetrics & Gynecology 1134, 1135 (2013) ("The goal should be decisions reached in partnership between patient and physician."); Am. Nurses Ass'n, *supra*, § 1.2, at 1 ("Nurses establish relationships of trust and provide nursing services according to need . . . ."). Within the

patient–provider relationship, the provider's respect for the patient's autonomy is fundamental. *ACOG Code of Professional Ethics*, *supra*, at 1; Am. Coll. of Obstetricians & Gynecologists, *Committee Opinion No. 390: Ethical Decision Making in Obstetrics and Gynecology*, 110 Obstetrics & Gynecology 1479, 1481 (2007); *cf. Doe v. Bolton*, 410 U.S. 179, 197 (1973) (recognizing a "woman's right to receive medical care in accordance with her licensed physician's best judgment"); *Cruzan ex rel. Cruzan v. Dir., Missouri Dep't of Health*, 497 U.S. 261, 289 (1990) (O'Connor, J., concurring) (recognizing a "patient's liberty, dignity, and freedom to determine the course of her own treatment"). Deciding on the best form of pregnancy-related health care for any given patient should take place within this established patient-provider relationship. This is particularly true given the highly personal nature of the reproductive health and family planning services at issue.

Patients must be aware when what may ***appear*** to be medical care provided by a licensed medical professional and at a licensed facility is in fact being provided by an unlicensed provider or clinic that does not receive important quality oversight from the relevant licensing board within the California Department of Consumer Affairs or the California Department of Public Health. That awareness will allow them to make a better-informed decision whether to seek care elsewhere and whether to have a procedure done at all.

One such example relates to the provision of ultrasounds, procedures that use high-frequency sound waves to scan a woman's abdomen and pelvic

cavity to create a picture of the fetus. Ultrasounds are commonly used by health care professionals during a woman's pregnancy. *Ultrasound Imaging*, U.S. Food & Drug Admin., https://www.fda.gov/Radiation-EmittingProducts/RadiationEmittingProductsandProcedures/MedicalImaging/ucm115357.htm. Thus, a woman may reasonably assume that if she is offered an ultrasound, the ultrasound is medically necessary. She also may reasonably assume, unless informed otherwise, that the ultrasound is being performed by or at the direction of a competent and licensed medical provider. She further may assume that she will be informed of the need for follow-up evidence-based medical care if the ultrasound reveals any abnormalities or issues. All of these assumptions may be incorrect, however.[7]

Licensed medical providers are the only ones in a position to provide pregnant women with the information they need to decide whether and when an ultrasound should be performed. They also are best able to interpret the ultrasound's results in a competent manner. *ACOG Practice Bulletin No. 175*, *supra* note 7, at e245-46 ("[U]ltrasonography should

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[7] Some ultrasounds are provided by facilities offering "keepsake" ultrasounds, which provide women with images of the developing fetus for non-medical reasons. Other ultrasounds are provided by facilities that seek to convince women not to have an abortion. The use of ultrasonography without a medical indication is inappropriate and contrary to responsible medical practice. *See* Am. Coll. of Obstetricians & Gynecologists, *Practice Bulletin No. 175: Ultrasound in Pregnancy*, 128 Obstetrics & Gynecology e245, e245-46 (2016) [hereinafter *ACOG Practice Bulletin 175*].

be performed only when there is a valid medical indication and, in all cases, the lowest possible ultrasound exposure settings that obtain adequate image quality and gain the necessary diagnostic information should be used, following the as-low-as-reasonably-achievable (ALARA) principle.").

When non-medically necessary ultrasounds are administered, "patients may not receive the necessary support, information, and follow-up" for any abnormalities. *Id.* at e247. Moreover, "nonmedical ultrasonography may falsely reassure pregnant women who may incorrectly believe that the ultrasound imaging is diagnostic." *Id.* Indeed, non-medical ultrasounds may be incorrectly viewed as a substitute for needed medical care. As the International Society of Ultrasound in Obstetrics and Gynecology ("ISUOG") has recognized, even if "sessions are described as 'non-medical,'... 'customers' often assume they have undergone a medical scan and may therefore forfeit a regular, scheduled medical scan." J. Abramowicz et al., *ISUOG Statement on the Non-Medical Use of Ultrasound, 2009*, 33 Ultrasound in Obstetrics & Gynecology 617, 617 (2009). Further, if an unlicensed medical provider performs an ultrasound and provides inaccurate results (whether intentionally or due to lack of training), health concerns such as fetal abnormalities and ectopic pregnancies can be overlooked and left untreated. Due to these concerns, "[t]he position of the [American Institute of Ultrasound in Medicine] is that only qualified individuals should perform sonograms, and that they must be able to recognize

important conditions, such as birth defects, and, conversely, artifacts that may mimic fetal pathology." *Id.* at 619.[8]

The risks associated with women incorrectly believing that a service is both medically indicated and being performed in a competent manner, including recommendations for follow-up medical care if necessary, are reduced when the women are

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[8] Indeed, a number of prominent regulatory and health organizations have advised women not to get non-medical ultrasounds. *See, e.g.*, *Avoid Fetal "Keepsake" Images*, U.S. Food & Drug Admin., https://www.fda.gov/ForConsumers/ConsumerUpdates/ucm095508.htm ("[T]he FDA strongly discourages [ultrasound] use for creating fetal keepsake images and videos."); Stanley B. Barnett et al., *International Recommendations and Guidelines for the Safe Use of Diagnostic Ultrasound in Medicine*, 26 Ultrasound in Med. & Biol. 358, 364 (2000); Press Release, Am. Inst. of Ultrasound in Med., The AIUM Reaffirms its Opposition to Entertainment Ultrasound (Apr. 2, 2004), *available at* http://www.aium.org/press/viewRelease.aspx?id=66 ("The use of either two-dimensional (2-D) or three-dimensional (3-D) ultrasound to only view the fetus, obtain a picture of the fetus or determine the fetal gender without a medical indication is inappropriate and contrary to responsible medical practice."); Abramowicz et al., *supra*, at 617 ("ISUOG disapproves of the use of ultrasound for the sole purpose of providing souvenir images of the fetus."); *Non-Diagnostic Use of Ultrasound for Entertainment Purposes in the Obstetrical Setting*, Soc'y of Diagnostic Med. Sonography (June 8, 2011), https://sdmspositionstatements.wordpress.com/2011/06/08/6/ ("The use of two-dimensional (2D), three-dimensional (3D) or four-dimensional (4D) ultrasound to only view the fetus, obtain a picture of the fetus or determine the fetal gender without a medical indication is inappropriate and, in the view of the Society of Diagnostic Medical Sonography (SDMS), contrary to responsible medical practice.").

informed that the facility does not have a licensed medical provider on staff. The FACT Act, which requires an unlicensed facility administering pregnancy-related services to provide notice that the facility is unlicensed and that it has no licensed medical provider on staff, will enable pregnant women to make informed decisions about their health and the health of the developing fetus.

CONCLUSION

Amici respectfully request that the Court affirm the decision below.

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Respectfully submitted,

/s/ Simona G. Strauss
Simona G. Strauss
P. Casey Mathews
SIMPSON THACHER & BARTLETT LLP
2475 Hanover Street
Palo Alto, California 94304
(650) 251-5000

Veronica R. Jordan-Davis
SIMPSON THACHER & BARTLETT LLP
425 Lexington Avenue
New York, New York 10017
(212) 455-2000
Attorneys for Amici Curiae

No. 16-1140

In the Supreme Court of the United States

NATIONAL INSTITUTE OF FAMILY & LIFE ADVOCATES, ET AL.,
Petitioners,

v.

XAVIER BECERRA, ATTORNEY GENERAL OF CALIFORNIA, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICI CURIAE* OF THE AMERICAN ASSOCIATION OF PRO-LIFE OBSTETRICIANS AND GYNECOLOGISTS, AMERICAN COLLEGE OF PEDIATRICIANS, AND CHRISTIAN MEDICAL ASSOCIATION IN SUPPORT OF PETITIONERS

STEVEN H. ADEN
Counsel of Record
RACHEL N. BUSICK
DEANNA M. WALLACE
AMERICANS UNITED FOR LIFE
2101 Wilson Blvd., Suite 525
Arlington, VA 22201
Steven.Aden@aul.org
(202) 741-4917
Counsel for Amici Curiae

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are national medical organizations and their combined membership of thousands of physicians, nurses, physician assistants, pharmacists and other healthcare professionals who share a profound commitment to protecting maternal health and the sanctity of human life and who express that commitment through serving with and empowering pro-life pregnancy centers like Petitioners. *Amici's* members include physicians and nurses who serve as medical staff at pregnancy centers, obstetrician/gynecologists whose patients see abortion providers and then return to their care, emergency physicians and other staff who treat emergent complications caused by abortion, and clinical staff who counsel women regarding abortion and treat its damaging physical and psychological consequences.

American Association of Pro-Life Obstetricians & Gynecologists (AAPLOG) is a non-profit professional medical organization that consists of 3,000 obstetrician-gynecologist members and associates. AAPLOG held the title of "special interest group" within the American College/Congress of Obstetricians and Gynecologists (ACOG) from 1973 to 2013 until this designation was discontinued by ACOG. AAPLOG is concerned about

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[1] No party's counsel authored any part of this brief. No person other than *Amici* and their counsel contributed any money intended to fund the preparation or submission of this brief. The parties to this case have consented to the filing of this brief and letters indicating their consent are on file with the Clerk.

the quality of care provided to pregnant women and the potential long-term adverse consequences of abortion on women's future health, and explores data from around the world regarding abortion-associated complications (such as depression, substance abuse, suicide, other pregnancy-associated mortality, subsequent preterm birth, and *placenta previa*) in order to provide the general public and others with a realistic appreciation and understanding of abortion-related health risks.

American College of Pediatricians (ACPeds) is a national not-for-profit organization of pediatricians and other healthcare professionals formed in 2002 dedicated to the health and well-being of children. The mission of ACPeds is to enable all children to reach their optimal physical and emotional health and well-being. To this end, ACPeds has written a number of position statements on matters unique to children and continues to produce sound policy based upon the best available research to assist parents and society in the care of children. Membership is open to qualifying healthcare professionals who share the ACPeds' Mission, Vision, and Values. ACPeds currently has members in forty-seven states, as well as in several countries outside of the United States.

Christian Medical Association (CMA), founded in 1931, is a non-profit national membership organization primarily for physicians. With more than 19,000 members, CMA provides a public voice on bioethics and healthcare policy. CMA provides missionary doctors and medical education to the

developing world, provides continuing medical education, and sponsors student chapters at most U.S. medical schools.

SUMMARY OF ARGUMENT

The freedom of speech is a bedrock principle of our nation, enshrined in the Free Speech Clause of the First Amendment. The right to speak or not to speak, however, is not unlimited. There are certain narrow exceptions when the government can, in fact, compel speech, including in the commercial or professional context. But the disclosure required by the California Reproductive FACT Act is neither commercial speech nor professional speech. See Pet. Br. Part II.A–B. Nor does the Act regulate informed consent by any medical standard. See *id.* Part II.C.

Informed consent in the medical context requires a discussion of the risks, consequences, and alternatives of a specific proposed medical procedure. The limited medical services generally offered by pregnancy centers are pregnancy tests, limited ultrasounds, and sexually transmitted infection (STI) testing and treatment. The Act, however, requires licensed pregnancy centers (which retain medical officers and clinical staff from members of *Amici* professional groups) to disclose to anyone who enters the center that California has public programs that offer free or low-cost access to contraception, prenatal care, and abortion—services the centers do not offer as a matter of their conscientious (often religious) convictions. Information about State public programs providing access to contraception and abortion is not a risk, consequence, or alternative to a pregnancy

test, a limited ultrasound, or STI testing. As such, the required disclosures cannot properly be considered informed consent for any of the medical services provided by pregnancy centers.

Pregnancy centers follow industry standard procedures for all medical services that they offer, which are the same procedures used by other clinics, including those offering abortion procedures. Pregnancy centers also maintain high professional standards of care, are dedicated to providing the highest standard of patient care, and follow comprehensive and ethical guidelines, including the Hippocratic Oath.

The Act does not require a medical professional to discuss the disclosure with a client or ensure that the client understood its contents, which are essential elements of informed consent. A sign on the wall in the waiting room is not informed consent, and no legitimate medical practitioner would regard it as such.

The coerced disclosure mandated by the California Reproductive FACT Act does not operate as a regulation of the informed consent process for a specific medical procedure and, as such, violates the Free Speech Clause of the First Amendment.

ARGUMENT

I. Pregnancy centers offer limited medical services pursuant to generally accepted standards of practice, the Hippocratic Oath, and comprehensive ethical guidelines and standards of care.

Pregnancy centers are not-for-profit charitable institutions that exist to provide care and encouragement for expectant women who choose to carry their pregnancies to term. They do so by offering free information and educational resources on prenatal development, nutrition, adoption, childcare, and social services available to new mothers; baby clothing and accessories; and referrals for structural supports like housing and employment.

A. Pregnancy centers offer limited medical services, which do not include abortion, pursuant to generally accepted standards of practice.

Pregnancy centers also provide certain limited medical services under the supervision of licensed clinical medical directors who serve without compensation. Licensed centers generally provide three principal forms of medical services—all free of charge.

Pregnancy tests. Generally, a woman is given a urine pregnancy test kit, which detects hCG (human chorionic gonadotropin), a hormone produced by the placenta during pregnancy. Occasionally, a

pregnancy center will conduct a blood pregnancy test to detect the presence of hCG in the blood.

Limited ultrasounds. A limited ultrasound is one which is "performed when a specific question requires investigation."[2] Pregnancy centers conduct limited ultrasounds to confirm the presence of an intrauterine (as opposed to ectopic) pregnancy and, in some cases, to offer an estimate of gestational age.

Sexually Transmitted Infection (STI) testing. Some pregnancy centers also provide testing for sexually transmitted infections. This is done (depending on the type of STI involved) by taking a swab sample of the affected area or by urine testing. A blood test may be utilized to follow up some preliminary diagnoses.

These limited medical services—none of which are abortion—are provided under guidelines established by medical directors and incorporated into "standing orders" for center staff. Additionally, licensed clinical staff may provide specific care to individual clients within their area of expertise.

Pregnancy centers inform prospective clients of the limited nature of the services they offer before agreeing to provide medical services, and in turn, the prospective clients acknowledge in writing the limited scope of services to be provided. Pregnancy centers also obtain written informed consent for the limited

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[2] Am. Institute of Ultrasound in Med., AIUM Practice Parameter for the Performance of Obstetric Ultrasound Examinations 2 (2013), www.aium.org/resources/guidelines/obstetric.pdf.

medical services they provide by communicating the risks and benefits of those procedures before they are administered.

Thus, pregnancy centers and their licensed clinical staff do not assume any obligation to provide primary or ongoing care to maternal or fetal clients. Nor do they provide emergent care; if a situation appears to involve a medical emergency, pregnancy center staff will instruct the woman to immediately contact her attending physician or go to an emergency room. Likewise, if pregnancy centers determine that a client is pregnant, staff encourage the client to locate a physician to provide prenatal care. If needed, centers will provide referrals to medical practitioners who offer such care.

B. Pregnancy centers can limit what services they provide under generally accepted standards of practice and the Hippocratic Oath.

Under generally accepted standards of practice, licensed clinical staff at pregnancy centers have no ethical obligation to treat all prospective patients who present in a non-emergency situation. Medical practitioners may decline to enter into a physician-patient relationship for many reasons, including those recognized by the American Medical Association (AMA). Under the AMA Code of Medical Ethics, appropriate grounds for limiting the scope of care include: (i) when providing a specific legal treatment option would be incompatible with the physician's personal, religious, or moral beliefs; and (ii) when the physician lacks resources to provide

comprehensive care to the patient. AMA Code of Medical Ethics Op. 1.1.2(a)–(b) (Prospective Patients). Another basis for limiting services is when the medical practitioner concludes, based on his or her professional judgment, that a therapy will provide no medical benefit or will result in harm to the patient.[3] Examples may include certain forms of bariatric surgery, female genital mutilation, or a patient who exhibits drug-seeking behavior requesting a refill for an opioid prescription. In circumstances involving a recognized basis for limiting services, the AMA Code of Medical Ethics does not require the medical practitioner to discuss the requested services or to provide a referral to a physician who may provide them.

Pregnancy centers and *Amici* follow the AMA Code of Medical Ethics, as well as the ethical guidelines articulated in the Hippocratic Oath as their basis for professional care of patients. The Oath defines the scope of the physician-patient relationship. It imparts to the physician fiduciary responsibilities to act at all times in the best interests of his or her patient, while simultaneously forbidding acts which are intrinsically harmful to patients, including euthanasia and elective abortion.

This Court recognized the enduring value of the Oath in *Roe v. Wade*:

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[3] *See Nonmaleficence*, McGraw-Hill Concise Dictionary of Modern Medicine (2002) ("Nonmaleficence" is "[a] central guiding principle of the ethical practice of medicine, first expressed by Hippocrates, and translated into Latin as *primum non nocere*, first do no harm.").

> [The Hippocratic Oath] represents the apex of the development of strict ethical concepts in medicine, and its influence endures to this day. . . . [With the end of Antiquity] [t]he Oath "became the nucleus of all medical ethics" and "was applauded as the embodiment of truth."

410 U.S. 113, 131–32 (1973) (quoting L. Edelstein, The Hippocratic Oath 63, 64 (1943)). *Roe* also affirmed the well-recognized bases of personal convictions and medical judgment for declining to offer certain medical services, citing favorably an AMA House of Delegates' resolution that stated:

> [N]o physician or other professional personnel shall be compelled to perform any act which violates his good medical judgment. Neither physician, hospital, nor hospital personnel shall be required to perform any act violative of personally-held moral principles. In these circumstances good medical practice requires only that the physician or other professional personnel withdraw from the case so long as the withdrawal is consistent with good medical practice.

Id. at 143 n.38 (quoting Proceedings of the AMA House of Delegates 220 (June 1970)). Further, this Court in *Doe v. Bolton* left in place a statutory provision that permitted hospitals to decline to admit patients for abortions and prohibited hospitals from requiring medical professionals to perform or assist in abortions, calling the provision an "appropriate protection to the individual and to the denominational hospital." 410 U.S. 179, 197 (1973).

Thus, both *Roe* and *Doe* affirmatively reject the notion that the State has the right to require a medical professional to participate in abortion against his or her conscience or professional judgment.

When a medical practitioner cannot provide certain treatments in good conscience, it is proper practice to disclose the specific interventions or services the medical practitioner cannot provide. See AMA Code of Medical Ethics Op. 1.1.7(b) (Physician Exercise of Conscience). Medical practitioners may do this before entering into a professional relationship with a prospective patient, but they may also do so at any point after the relationship has been established when it has become clear from their interaction that the treatment is a medically indicated option that they cannot provide. The patient is then free to seek such services from another qualified professional.

When a medical practitioner agrees to provide a specific medical procedure, standards of medical practice require that the medical practitioner obtain informed consent for the procedure. The duty to obtain informed consent is shaped and limited by the nature of the particular care agreed upon. When a limited course of medical care has been offered and agreed upon, current standards of medical practice do not require the medical practitioner to provide medical advice about risks and benefits of therapeutic options that are outside the limited agreed-upon scope of care. Providing such medical advice is regarded as providing medical care, which the medical practitioner may decline to provide as outlined above. Thus, a licensed clinical staff member at a pregnancy center is not obliged to provide

information that would be needed to obtain informed consent for a procedure he or she does not offer and would not provide to a patient.

C. Pregnancy centers, including members of *Amici* medical organizations, follow comprehensive ethical guidelines and standards of care.

Amici medical organizations require members to agree with their mission statements and core values, as well as follow ethical guidelines and standards of care that show a profound respect for life and informed consent. The mission statement of *Amicus* American Association of Pro-Life Obstetricians and Gynecologists (AAPLOG) states:

> We are committed to educate abortion-vulnerable patients, the general public, pregnancy care center counselors, and our medical colleagues regarding the medical and psychological complications associated with induced abortion, as evidenced in the scientific literature; and [w]e are deeply concerned about the profound, adverse effects of elective abortion, not just on women, but also on the entire involved family, and on our society at large.[4]

The Core Values and Objectives of *Amicus* American College of Pediatricians (ACPeds) call on members to:

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[4] AAPLOG, *Our Mission Statement* (2016), http://aaplog.org/about-us/our-mission-statement/.

- Recognize[] the unique value of every human life from the time of conception to natural death and pledge[] to promote research and clinical practice that provides for the healthiest outcome of the child from conception to adulthood. . . .
- Recognize[] that health professionals caring for children must maintain high ethical and scientific standards and pledge[] to promote such practice. . . .
- [P]romote the highest standards of medical practice among its Members and within the field of pediatrics.[5]

Finally, *Amicus* Christian Medical Association's (CMA) ethical guidelines for their membership includes the following standards:

- We will do no harm to our patients by acts of either omission or commission. . . .
- We hold all human life to be sacred as created in God's image. . . .
- We affirm the standard of honesty in all circumstances.
- We believe that our patients have the right to be carefully taught about all aspects of their disease and treatment so that they may give consent that is properly informed.[6]

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[5] ACPeds, *About Us* (2016), https://www.acpeds.org/ about-us.

[6] CMA, *Principles of Christian Excellence Ethics Statement* (1991), https://www.cmda.org/resources/publication/principles-of-christian-excellence-ethics-statement.

These principles of medical ethics are also embodied in nationally recognized standards of care for pregnancy care centers. National pregnancy center organizations, to which most pregnancy centers belong, require compliance with comprehensive standards of care. Affiliates must abide by these stringent guidelines in order to maintain affiliation.

For example, affiliates of Care Net and numerous other national pregnancy center organizations are required to abide by a "Commitment of Care and Competence." This detailed code of practice—which is strictly followed by licensed pregnancy centers (including by members of *Amici* medical organizations) in California and across the nation—mandates that:

- Client pregnancy tests are distributed and administered in accordance with all applicable laws. . . .
- Clients receive accurate information about pregnancy, fetal development, lifestyle issues, and related concerns.
- [Center staff] do not offer, recommend or refer for abortions or abortifacients, but are committed to offering accurate information about abortion procedures and risks. . . .
- Medical services are provided in accordance with all applicable laws, and in accordance with pertinent medical

> standards, under the supervision and direction of a licensed physician.[7]

Therefore, despite claims to the contrary by Respondents and others, organizations and individual medical professionals with moral, ethical, or scientific objections to certain elective procedures are not abdicating their ethical duties to their patients. To the contrary, *Amici* medical professionals and the pregnancy centers they support adhere to a higher ethical standard which requires them to at all times to protect the lives of the patients entrusted to their care, both born and unborn, and to ensure that their patients are given the highest quality of care available under the specific sets of circumstances.

II. The Act's coerced disclosure bears no relation to informed consent for the limited medical services offered by pregnancy centers.

A. Under *Casey*, a state can regulate informed consent for specific medical procedures, including abortion.

The First Amendment provides broad free speech protections to healthcare professionals, including the right of the speaker to decide "what not to say." *Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Grp. of Bos.*, 515 U.S. 557, 573 (1995); see also *Pickup v. Brown*, 740 F.3d 1208, 1227 (9th Cir. 2014) ("[D]octor-

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[7] Care Net, Commitment of Care & Competence (2009), https://cdn2.hubspot.net/hub/367552/file-2184391815-pdf/Commitment-of-Care-Comp-6-09-C.pdf?t=1515701103876.

patient communications about medical treatment receive substantial First Amendment protection."); *Conant v. Walters*, 309 F.3d 629, 639 (9th Cir. 2002) (affirming injunction prohibiting government from threatening revocation of a physician's license for recommending medical use of marijuana). These protections, however, are not unlimited. As this Court explained in *Casey*, a State may regulate speech in the context of informed consent. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 881 (1992) (plurality opinion); see also *id.* at 884 (explaining that even when physicians' First Amendment right not to speak is implicated as part of the practice of medicine, it is "subject to reasonable licensing and regulation by the State").

Informed consent is defined in the American College of Obstetricians and Gynecologists (ACOG) *Guidelines for Women's Health Care* as "the willing and uncoerced acceptance of a medical intervention by a patient after appropriate disclosure by the clinician of the nature of the intervention and its risks and benefits as well as the risks and benefits of alternatives." ACOG, Guidelines for Women's Health Care 80 (3d ed. 2007) True consent is "the informed exercise of a choice, and that entails an opportunity to evaluate knowledgeably the options available and the risks attendant upon each [option]." *Canterbury v. Spence*, 464 F.2d 772, 780 (D.C. Cir. 1972). "The point of informed consent laws is to allow the patient to evaluate her condition and render her best decision under difficult circumstances." *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 579 (5th Cir. 2012); *see also Stuart v. Camnitz*, 774 F.3d 238 (4th Cir. 2014) ("Grounded in self-

determination, obtaining informed consent prior to medical treatment is meant to ensure that each patient has the information she needs to meaningfully consent to medical procedures." (internal quotation marks omitted)); AMA Code of Medical Ethics Op. 2.1.1 (Informed Consent) ("Patients have the right to receive information and ask questions about recommended treatments so that they can make well-considered decisions about care.").

In practice, medical practitioners are "responsible for securing the patient's informed consent" for the specific medical procedure, and all such discussions and information materials provided "should be documented appropriately in the patient's medical record." Guidelines for Women's Health Care, *supra*, at 125.

Under the AMA Code of Ethics, a medical practitioner seeking informed consent should:

> (a) Assess the patient's ability to understand relevant medical information and the implications of treatment alternatives and to make an independent, voluntary decision.
>
> (b) Present relevant information accurately and sensitively, in keeping with the patient's preferences for receiving medical information. The physician should include information about:
>
> 1. The diagnosis (when known)

> 2. The nature and purpose of recommended interventions
> 3. The burdens, risks, and expected benefits of all options, including forgoing treatment
>
> (c) Document the informed consent conversation and the patient's . . . decision in the medical record in some manner.[8]

Undoubtedly, informed consent for an abortion procedure is a proper subject for state regulation. In *Casey*, this Court stated, "[A] requirement that a doctor give a woman certain information as part of obtaining her consent to an abortion is, for constitutional purposes, no different from a requirement that a doctor give certain specific information about any medical procedure." 505 U.S. at 884. States can have legitimate concerns about women receiving information concerning the way in

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[8] AMA Code of Medical Ethics Op. 2.1.1 (informed consent); see also Peter Lars Jacobson, *Valid Informed Consent in Clinical and Academic Practice*, 14 (Univ. of N.C.), http://beta.aan.com/globals/axon/assets/6115.pdf (Valid informed consent in clinical practice has three elements: (1) the ability to understand and decide, i.e., capacity; (2) disclosure of material information and recommendations; and (3) a decision without undue influence or coercion.); *Stuart*, 774 F.3d at 351–52 (Informed consent has two essential elements: (1) comprehension, or the requirement that "the physician convey adequate information about the diagnosis, the prognosis, alternative treatment options (including no treatment), and the risks and likely results of each option"; and (2) free consent, or the requirement that "the patient be able to exercise her autonomy free from coercion.").

which the fetus will be killed in the exercise of abortion choice. *Id.* at 873; see also *id.* ("States are free to enact laws to provide a reasonable framework for a woman to make a decision that has such profound and lasting meaning"); *id.* at 872 ("Though the woman has a right to choose to terminate or continue her pregnancy before viability, it does not at all follow that the State is prohibited from taking steps to ensure that this choice is thoughtful and informed."); *Gonzales v. Carhart*, 550 U.S. 124, 159 (2007) ("The State has an interest in ensuring so grave a choice is well informed.").

Informed consent for abortion, properly circumscribed, imposes no unconstitutional impediment to abortion:

> "[W]hen the government requires [as part of the informed consent process] . . . the giving of truthful, nonmisleading information about the nature of the procedure, the attendant health risks and those of childbirth," and other information broadly relevant to the decision to have an abortion, it does not impose an undue burden on abortion rights, even if the disclosure "might cause the woman to choose childbirth over abortion."

Planned Parenthood Minn., N.D., S.D. v. Rounds, 686 F.3d 889, 893 (8th Cir. 2012) (quoting *Casey*, 505 U.S. at 882–83) (alterations in original). However, for the reasons discussed below, the Act's coerced disclosures are no part of informed consent for the provision of abortion.

B. The Act's coerced disclosure is not informed consent for any medical procedure.

The Act requires the following disclosure be posted at the pregnancy center: "California has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women. To determine whether you qualify, contact the county social services office at [insert the telephone number]." Cal. Health & Safety Code § 123472(a)(1). The notice can be disclosed in one of three ways: (1) a posted public notice; (2) a printed notice; or (3) a digital notice. *Id.* § 123472(a)(2).

This mandated disclosure is not informed consent. First, there is no requirement for patient understanding. The Act does not require a health care practitioner—or any pregnancy center staff—to ensure that the client saw the disclosure, much less has the ability to understand its contents. Second, the disclosure is not part of informed consent for a proposed medical procedure. There is no relation between the disclosure and any medical procedure the pregnancy center offers. Third, the pregnancy center is unable to present the relevant information accurately and sensitively. The Act has no flexibility of when and how the disclosure is conveyed (other than in one of three methods—posted, print, or digital). Fourth, the disclosure is not limited to clients or for patients; it is for anyone who walks into the pregnancy center waiting room or inquires about services before a patient or client relationship is

formed. Finally, the Act has no documentation requirement. In short, the coerced disclosure is not any part of proper informed consent.

C. The Act's coerced disclosure is not informed consent for the limited medical services offered by pregnancy centers.

Not only does the coerced disclosure not constitute informed consent, it has no relation to informed consent for the limited medical services that are actually provided by pregnancy centers. Informed consent requires discussion of the risks and benefits and the alternatives related specifically "to the *proposed procedure, test, or treatment.*" Guidelines for Women's Health Care, *supra*, at 125 (emphasis added). For example, in *Casey*, this Court upheld a state informed consent law that required that a woman be informed of the risks, consequences, and alternatives to abortion before the abortion procedure is performed. 505 U.S. at 881. Likewise, a state could require informed consent relating to the risks, consequences, and alternatives of the medical services offered by licensed pregnancy centers—pregnancy tests, limited ultrasounds, or STI testing. But see *Wollschlaeger v. Governor of Fla.*, 848 F.3d 1293, 1316 (11th Cir. 2017) ("[A] state's authority to regulate a profession does not extend to the entirety of a professional's existence."). But the subject matter of the Act's disclosure—contraception, prenatal care, and abortion—is not a benefit, risk, or alternative to pregnancy tests, limited ultrasounds, or STI testing. The cost or lack thereof of the government programs is, likewise, not related to a benefit, risk, or alternative to a free pregnancy test, limited

ultrasound, or STI testing. Nothing in the coerced disclosure involves informed consent relating to the medical services provided by pregnancy centers. Thus, the Act's coerced disclosure cannot pass muster as an appropriate regulation of medical informed consent.

CONCLUSION

Insofar as the California Reproductive FACT Act does not regulate the process of informed consent, it constitutes coerced speech in violation of the First Amendment. Therefore, *Amici* respectfully submit that the decision below should be reversed.

Respectfully submitted,

STEVEN H. ADEN
Counsel of Record
RACHEL N. BUSICK
DEANNA M. WALLACE
AMERICANS UNITED FOR LIFE
2101 Wilson Blvd., Suite 525
Arlington, VA 22201
Steven.Aden@aul.org
(202) 741.4917

Counsel for Amici Curiae

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In the Supreme Court of the United States

NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES, dba NIFLA, et al.,
Petitioners,

v.

XAVIER BECERRA, Attorney General of the State of California, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

AMICI CURIAE BRIEF OF THE AMERICAN CENTER FOR LAW & JUSTICE, LIVINGWELL MEDICAL CLINIC, INC., PREGNANCY CARE CENTER OF THE NORTH COAST, INC., AND CONFIDENCE PREGNANCY CENTER, INC. IN SUPPORT OF PETITIONERS

FRANCIS J. MANION
GEOFFREY R. SURTEES
American Center for Law & Justice
P.O. Box 60
New Hope, KY 40052
(502) 549-7020

EDWARD L. WHITE III
ERIK M. ZIMMERMAN
American Center for Law & Justice
3001 Plymouth Road
Suite 203
Ann Arbor, MI 48105
(734) 680-8007

JAY ALAN SEKULOW
Counsel of Record
STUART J. ROTH
ANDREW J. EKONOMOU
JORDAN SEKULOW
WALTER M. WEBER
American Center for Law & Justice
201 Maryland Ave., N.E.
Washington, D.C. 20002
(202) 546-8890
sekulow@aclj.org

Counsel for Amici Curiae

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

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INTEREST OF *AMICI CURIAE*[1]

The American Center for Law & Justice ("ACLJ") is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys have appeared before this Court as counsel for a party, *e.g.*, *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009); *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993), or for *amici*, *e.g.*, *Matal v. Tam*, 137 S. Ct. 1744 (2017); *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015).

The ACLJ represents three California pro-life, licensed medical centers (*amici* here) that are subject to one of the two compelled-speech provisions challenged in this case: LivingWell Medical Clinic, Inc. ("LivingWell"), Pregnancy Care Center of the North Coast, Inc. ("PCC"), and Confidence Pregnancy Center, Inc. ("CPC"). These centers are the petitioners in *LivingWell Medical Center, Inc. v. Becerra*, U.S. No. 16-1153. That petition for certiorari is pending before this Court.

Amicus LivingWell, located in Grass Valley, California, is a non-profit corporation, licensed by the California Department of Public Health as a Free Clinic. The primary purpose of LivingWell is to offer pregnancy-related services to its clients free of charge and consistent with its religious values and mission.

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[1] No counsel for a party authored this brief in whole or in part. No person or entity aside from *amici curiae*, their members, and their counsel made a monetary contribution to the preparation or submission of this brief. Petitioners' blanket consent to *amicus* briefs is on file with this Court and Respondents have consented to the filing of this brief.

LivingWell's services include pregnancy options education and consultation; pregnancy testing and verification; limited obstetrical ultrasounds; STI/STD testing, education, and treatment; past abortion healing retreats; community education presentations; and material support. And since pregnancy may directly or indirectly affect others, LivingWell's services extend to partners and family members as well. LivingWell personnel provide support both during and after pregnancy, helping to ensure the comfort of all who are involved.

Based on its religious tenets and principles, LivingWell has never referred a client for abortion, nor will it ever do so. LivingWell discloses verbally that it does not perform or refer for abortion services during any phone inquiry, as well as on the "Services Provided" document that clients sign before any services are offered.

Amicus PCC is a California non-profit corporation that owns and operates a clinic, J. Rophe Medical, licensed by the California Department of Public Health as a Free Clinic. The primary purpose of Pregnancy Care Center is to offer pregnancy-related services to its clients free of charge and consistent with its religious values and mission.

PCC, which is morally and religiously opposed to abortion, encourages, through education and outreach, the recognition of human life from the moment of conception. It ministers in the name of Jesus Christ to women and men facing unplanned pregnancies by providing support and medical services to them that will empower them to make healthy life choices.

Like LivingWell, PCC never charges fees or asks its clients for donations. And, also like LivingWell, based on its religious beliefs and mission, PCC does not, and will not, encourage, facilitate, or refer for abortions.

Amicus CPC, located in Salinas, California, is a California non-profit corporation, licensed by the California Department of Public Health as a Community Clinic. The mission and purpose of CPC are similar to those of the other *amici* centers: to help women deal with unplanned pregnancies by offering, free of charge, a variety of educational, medical, and material resources, including ultrasounds, counseling and emotional support, and maternity and baby items. CPC also opposes abortion and will not refer for, recommend, encourage or facilitate the provision of abortions.[2]

SUMMARY OF ARGUMENT AND INTRODUCTION

Few statements of this Court are more esteemed than Justice Jackson's words in *W. Va. State Bd. of Educ. v. Barnette*:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein.

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[2] This brief is also being submitted on behalf of more than 255,000 individuals who joined the ACLJ's Committee to Defend Pro-Life Speech and Save Lives.

319 U.S. 624, 642 (1943). Governmental compulsion of private speech on matters of public concern is repugnant to any principled understanding of human dignity, let alone the First Amendment. When the state coerces one to speak words with which he does not agree, or obliges one to utter speech that contradicts his values and beliefs, it impermissibly encroaches on that person's very autonomy. Truly, "[t]he right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'" *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (quoting *Barnette*, 319 U.S. at 637); *see also Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring) ("The very purpose of the First Amendment is to foreclose public authority from assuming guardianship of the public mind through regulating the press, speech, and religion.").

The law at issue in this case, California's Reproductive FACT Act, 2015 Cal. Stats. ch. 700, codified at Cal. Health & Safety Code §§ 123470 *et seq.* ("the Act"), has nothing to do with the regulation of a medical procedure. It is not designed to ensure that a person gives full and informed consent to a medical operation. Its purpose is not to guarantee that advertisements relating to pregnancy services are truthful or not misleading.

Rather, the law at issue in this case is the State of California's unabashed attempt to coerce pro-life pregnancy centers, such as *amici*, into communicating a message that radically undermines the nature of who they are and what they do. It forces them to advertise the free or low-cost availability of abortion—a procedure they do not provide and to which they

morally and religiously object. While the State is free to advertise its own abortion-related programs, using its own or purchased media, it has no constitutional authority to dragoon dissenting voices into disseminating the State's message.

Consistently and correctly, this Court has held that the First Amendment does not countenance state efforts to compel one to act as a ventriloquist's dummy for a government-dictated message. *See, e.g., Barnette*; *Wooley*. It has struck down efforts by the government to force unwilling speakers to act as couriers for a third party's message. *See, e.g., Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974) (invalidating statute requiring newspaper to print reply of candidate for public office whose character was the subject of criticism in published editorials); *Pac. Gas & Elec. Co. v. Pub. Util. Comm'n*, 475 U.S. 1, 16 (1986) (plurality) (invalidating statute compelling a regulated utility company to distribute political information that it opposes to its consumers, as a condition of conveying its own political views to them). It has held that the free speech rights of professional fundraisers were violated by a law compelling statements of fact relating to the percentage of contributions used for charitable purposes. *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781 (1988).

Like these laws the Court has struck down as offensive to the right of free speech, the FACT Act cannot survive judicial scrutiny. It is, on its face, a content-based compulsion of speech that requires the speaker to publicize and propagate the viewpoint of the government on a subject of enormous and ongoing controversy. Such laws trigger the most exacting level

of judicial scrutiny, and there can be no question that the Act fails that standard.

The Reproductive FACT Act's requirement that non-profit, pro-life pregnancy resource centers advertise free or low-cost abortions is unconstitutional.

ARGUMENT

I. The Act is an Impermissible Content and Viewpoint-Based Compulsion of Speech on a Matter of Public Concern.

The Act requires *amici*, *i.e.*, non-profit, pro-life medical facilities that offer alternatives to abortion, to disseminate the following message to all clients, no matter the reason for their visit:

> California has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women. To determine whether you qualify, contact the county social services office at [insert the telephone number].

§ 123472(a)(1).[3]

The Act not only dictates precisely what the centers must say, it tells them exactly how they must say it. The State's message must be communicated in one of three ways: (1) posted on the wall of a waiting room for all to see; (2) in a printed notice distributed to all clients; or (3) through "a digital notice distributed to all

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[3] Unless otherwise indicated, statutory references are to the California Health & Safety Code.

clients that can be read at the time of check-in or arrival." § 123472(a)(2).[4]

A simple examination of ***who*** must speak the Act's message (pro-life centers morally and religiously opposed to abortion); ***what*** they must say (advertising and facilitating access to a procedure that they do not provide and find morally repugnant); ***how*** they must say it (at the very outset of any communication, prior to their own speech), and ***to whom*** they must say it (all potential and actual clients, no matter the reason for their visit), yields only one conclusion: the Act is an impermissible content and viewpoint-based compulsion of speech.

A. *Who* Must Speak the State's Message

It is axiomatic that the government may not "'attempt to give one side of a debatable public question an advantage in expressing its views to the people.'" *City of Ladue v. Gilleo*, 512 U.S. 43, 51 (1994) (citation omitted); *see also Sorrell v. IMS Health Inc.*, 564 U.S. 552, 578-79 (2011) ("The State may not burden the speech of others in order to tilt public debate in a preferred direction."). The Act, which targets pro-life pregnancy centers to speak the State's message, violates that fundamental principle.

The Act does not apply to all California licensed professionals who provide pregnancy-related services to clients. In fact, the Act does not apply to medical

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[4] Unlicensed facilities must also disseminate a message crafted by the government. § 123472(b)(1). While *amici* believe this requirement is unconstitutional, this brief only addresses the speech that must be spoken by non-exempt "licensed covered facilities," such as *amici*.

professionals at all. Nor does the Act even apply to all facilities that provide pregnancy-related services. The Act only applies to entities that meet the definition of a "licensed covered facility," as set forth in the Act,[5] and are not exempt from its coverage. Exempt from the Act's coverage, and thus excused from complying with its speech mandate, are (1) clinics operated by the United States government, and (2) a "licensed primary care clinic that is enrolled as a Medi-Cal provider and a provider in the Family Planning, Access, Care, and Treatment Program [FPACT]." § 123471(c).

The latter exemption discloses the true target of the Act: pro-life pregnancy centers. Abortion is a covered benefit under Medi-Cal,[6] and FPACT "covers all FDA-approved contraceptive methods, fertility awareness methods and, sterilization procedures."[7] FPACT-

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[5] The Act defines a "licensed covered facility" as "a facility licensed under Section 1204 or an intermittent clinic operating under a primary care clinic pursuant to subdivision (h) of Section 1206, whose primary purpose is providing family planning or pregnancy-related services, and that satisfies two or more of the following: (1) The facility offers obstetric ultrasounds, obstetric sonograms, or prenatal care to pregnant women. (2) The facility provides, or offers counseling about, contraception or contraceptive methods. (3) The facility offers pregnancy testing or pregnancy diagnosis. (4) The facility advertises or solicits patrons with offers to provide prenatal sonography, pregnancy tests, or pregnancy options counseling. (5) The facility offers abortion services. (6) The facility has staff or volunteers who collect health information from clients." § 123471(a).

[6] *See* "Abortions," https://files.medi-cal.ca.gov/pubsdoco/hipaa/icd9_policy_holding_library/part2/abort_m00o03.pdf.

[7] *See* FPACT "Program Standards," http://files.medi-cal.ca.gov/pubsdoco/publications/masters-mtp/fpact/progstand_f00.doc.

enrolled clinics must "provide the full range of services covered in the program" and must be "in good standing with Medi-Cal."[8] While many FDA-approved methods of contraception work by preventing conception, "four of those methods . . . may have the effect of preventing an already fertilized egg from developing any further by inhibiting its attachment to the uterus." *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2762-63 (2014). Thus, pro-life pregnancy centers, such as *amici*, that do not, or would not, prescribe FDA-approved drugs with an abortifacient mechanism of action for moral or religious reasons cannot, by definition, be an FPACT provider. They must therefore speak the State's message, while those that agree to the terms of being a Medi-Cal and FPACT provider, such as the nation's largest abortion provider, Planned Parenthood, need not alter their expression in the manner mandated by the Act.[9]

The mission and activities of a co-sponsor of the Act, the National Abortion and Reproductive Rights Action League ("NARAL"), further reveals the true target of the Act.[10] NARAL has been a longtime political

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[8] *See* "Provider Enrollment," http://www.familypact.org/Providers/prov-enrollment.

[9] Planned Parenthood, which has described itself as "one of the largest provider of reproductive health services in the country," *Planned Parenthood Fed'n of Am., Inc. v. Ctr. for Med. Progress*, 214 F. Supp. 3d 808, 837 (N.D. Cal. 2016), does not have to comply with the Act's speech mandate because it is a Medi-Cal and FPACT provider. *See Gonzalez v. Planned Parenthood of L.A.*, 759 F.3d 1112, 1113-14 (9th Cir. 2014).

[10] NARAL is specifically identified as a co-sponsor of the Act in the legislative record. *See* J.A. at 56.

adversary of "crisis pregnancy centers."[11] For years, it has vigorously advocated for legislation designed precisely to hamper the efforts of pro-life pregnancy care centers that counsel and care for women according to their moral, religious, political, and social viewpoints.

It did so in Baltimore, where that city's ordinance compelling the speech of pro-life pregnancy centers was based, in large part, on a report of NARAL Pro-Choice Maryland.[12] That ordinance has been struck down. *Greater Balt. Ctr. for Pregnancy Concerns v. Mayor & City Council of Balt.*, No. 16-2325, 2018 U.S. App. LEXIS 297 (4th Cir. Jan. 5, 2018).

It did so in Montgomery County, Maryland, where the county council relied heavily upon the same NARAL Pro-Choice Maryland report and statements from NARAL Pro-Choice Maryland staff in enacting a resolution requiring "Limited Service Pregnancy Resource Centers" to make certain disclosures.[13] That ordinance has also been struck down. *See Centro Tepeyac v. Montgomery Cnty.*, 5 F. Supp. 3d. 745 (D. Md. 2014).

It did so, again, in Austin, Texas, where a summit held in Denver in the fall of 2009—sponsored by

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[11] "The Truth about Crisis Pregnancy Centers," NARAL Pro-Choice America, https://www.prochoiceamerica.org/report/truth-crisis-pregnancy-centers.

[12] *See* NARAL Pro-Choice Maryland Fund, *The Truth Revealed: Maryland Crisis Pregnancy Center Investigations* (2008).

[13] See Memorandum of Amanda Mihill, Legislative Analyst to County Council, Jan. 29, 2010, at 2, *Centro Tepeyac v. Montgomery Cnty.*, No. 10-1259 (D. Md. May 19, 2010), ECF No. 1-4.

NARAL Pro-Choice New York and its affiliate, The National Institute for Reproductive Health—was highly influential in the passage of an ordinance compelling the speech of "Unlicensed Pregnancy Service Centers."[14] That ordinance was struck down as unconstitutionally vague. *See Austin Lifecare, Inc. v. City of Austin*, No. 1:11-cv-00875-LY, ECF No. 145 (W.D. Tex. June 24, 2014).

It also did so in New York City, where, in passing a compelled speech ordinance for "pregnancy services centers," the city council relied heavily upon a report issued by NARAL Pro-Choice New York, which was modeled on the Maryland NARAL report and criticized all aspects of the work of pro-life centers.[15] Christine Quinn, Speaker of the New York City Council, said, "The NARAL Pro-Choice New York report was more

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[14] NARAL Pro-Choice NY, Exposing Crisis Pregnancy Centers One City at a Time, http://www.youtube.com/watch?v= Tpya05pQGAQ, at 2:45 to 3:10 (last visited May 20, 2011) (statement of Sara Cleveland, Executive Director, NARAL Pro-Choice Texas) ("At the time of the summit, Baltimore was already in the process of introducing the disclosure ordinance for crisis pregnancy centers. From that idea, our contact with the City of Austin and the political director for NARAL had the realization that this is an ordinance that could probably work in Austin as well."); *id.* at 3:10 to 3:46 (statement of Heidi Gerbracht, Policy Director, Councilmember Spelman's Office) ("The conversation at the Denver Urban Initiative was fundamental to us getting our crisis pregnancy center ordinance started and then passed.").

[15] NARAL Pro-Choice New York and the National Institute for Reproductive Health, *She Said Abortion Could Cause Breast Cancer: A Report on the Lies, Manipulations, and Privacy Violations of Crisis Pregnancy Centers in New York City* (2010), at 21.

than helpful. It was critical."[16] Four of the five compelled disclosures of that ordinance have been struck down. *See Evergreen Ass'n, Inc. v. City of New York*, 740 F.3d 233 (2d Cir. 2014).[17]

And NARAL has done so here, where it "partnered with [its] California chapter *to craft language*, organize more than 40 partners and allies, and mobilize thousands of activists to pass critical policy—the Reproductive FACT Act." IRS Form 990, NARAL Pro-Choice America Foundation (2014), at 2 (emphasis added).[18]

In fact, the target of the Act, co-sponsored and crafted, at least in part, by NARAL, is specifically identified in the Act's legislative record: "crisis pregnancy centers" in California that "aim to discourage and [*allegedly*] prevent women from seeking abortions." J.A. at 39.

Finally, the implementation of the Act places beyond doubt that pro-life centers, such as *amici*, are the principal targets of the legislation. Of the 1,379 primary clinics licensed under Section 1204 of the California Health and Safety Code, *only 67* of those clinics are required to disseminate the Act's message, and *all*, but one, of those 67 centers are *pro-life*

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[16] NARAL NY Video, *supra*, at n.14, at 4:56 to 5:08.

[17] The Second Circuit referred to three of those disclosures (relating to abortion, emergency contraception, and prenatal care) collectively as the "Services Disclosure." *Evergreen*, 740 F.3d at 238.

[18] *Available at* http://990s.foundationcenter.org/990_pdf_ archive/ 521/ 521100361/521100361_201509_990.pdf.

organizations. *See* Amicus Brief of The Scharpen Foundation, Inc.

As in *Sorrell*, "[t]he legislature designed [the Act] to target [disfavored] speakers and their messages for disfavored treatment." 564 U.S. at 565. The Act "goes even beyond mere content discrimination, to actual viewpoint discrimination." *Id.* (quotation marks and citation omitted). For this reason alone, *i.e.*, even without considering what specifically the pro-life centers must say, the Act is constitutionally invalid.

B. *What* Pro-Life Centers Must Say

The Act does not just target pro-life centers for regulation, it tells them what they must say, on a topic, no less, of enormous controversy and public concern. Such compulsion of speech conflicts with a core canon of this Court's free speech jurisprudence: the "basic First Amendment principle that 'freedom of speech prohibits the government from telling people what they must say.'" *Agency for Int'l Dev. v. Alliance for Open Society Int'l, Inc.*, 133 S. Ct. 2321, 2327 (2013) (citation omitted); *see also Hurley v. Irish-American GLB Grp.*, 515 U.S. 557, 573 (1995) ("[A] speaker has the autonomy to choose the content of his own message.").

As an initial matter, the subject matter of the mandated notice is no innocuous topic. It forcibly inserts into *amici*'s speech the subject of abortion, one of the most—if not *the most*—politically, socially, and religiously charged issues of our day. *Stenberg v. Carhart*, 530 U.S. 914, 920 (2000) ("We understand the controversial nature of the problem. Millions of Americans believe that life begins at conception and consequently that an abortion is akin to causing the

death of an innocent child"); *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 850 (1992) ("Men and women of good conscience can disagree, and we suppose some always shall disagree, about the profound moral and spiritual implications of terminating a pregnancy, even in its earliest stage.").

The Act thereby commands *amici* to address a subject of obvious public concern. *See Snyder v. Phelps*, 562 U.S. 443, 453 (2011) ("Speech deals with matters of public concern when it can 'be fairly considered as relating to any matter of political, social, or other concern to the community.'") (citation omitted). That, of course, is not without critical constitutional significance. Speech that relates to matters of public concern "occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Id.*

But the Act does more than force *amici* to *address* abortion; it requires them to affirmatively *advertise* and thereby *facilitate* it. Indeed, the Act does not require *amici* to inform their clients of what goods and services *they provide*. Rather, the Act requires them to tell their clients about particularly controversial services *the State provides*, *i.e.*, "public programs that provide immediate free or low-cost access to . . . abortion for eligible women." § 123472(a)(1). And because the State does not itself perform abortions, but reimburses abortion providers, such as Planned Parenthood, to perform them (depending on a woman's eligibility), the Act is not just an advertisement of state family planning programs, it is an advertisement for services that *abortionists provide*.

If a forced subsidy for the "generic advertising" of mushrooms—a matter "of interest to but a small segment of the population"—is impermissible under the First Amendment, *see United States v. United Foods*, 533 U.S. 405, 410 (2001), then so is the Act, under which pro-life centers are compelled to act as direct vehicles for the State's advertisement of its abortion-subsidizing programs. And if a law requiring fundraisers for charities to disclose facts and figures related to their own operation—namely, to tell solicited persons what percentage of contributions actually went to those charities—violates the First Amendment, *see Riley*, so too does the Act, which requires pro-life centers to advertise a service they do not provide and to which they strenuously object on moral and religious grounds.

It is one thing to prohibit a speaker from speaking his mind. It is another thing to require a speaker to subsidize the speech of another. But, even worse than these two, is to compel a speaker *to use his own voice* to speak an objectionable message dictated by another. For *amici*, who do not provide abortions, refer for abortions, and are morally and religiously opposed to abortion, being required to steer their clients toward abortion, per the Act, contradicts the very reason for their existence.

It is therefore erroneous to suggest, as did the lower court, that the Act involves nothing more than a mere recitation of fact, *i.e.*, informing persons of the existence of government programs (though, under *Riley*, that too would be unconstitutional). *See NIFLA v. Harris*, 839 F.3d 823, 836 (9th 2016) ("[T]he Act does not convey any opinion. . . . [T]he Licensed Notice

merely states the existence of publicly-funded family-planning services."). The utterance of a fact can be just as charged with moral and religious significance as sharing an opinion. The homeowner asked by a Gestapo officer whether he is housing any Jews understands this. A priest refusing to disclose what was said to him in the confessional realizes it. Here, a faith-based, pro-life pregnancy center forced to tell a client that she might be eligible for a free abortion, and compelled to provide a phone number that may aid that client to obtain such an abortion, knows that that message involves far more than the disclosure of mere fact.

Indeed, this Court has repeatedly stated that any distinction between "compelled statements of opinion" and "compelled statements of 'fact'" is *irrelevant* since "either form of compulsion burdens protected speech." *Riley*, 487 U.S. at 797-98; *see also Hurley*, 515 U.S. at 573-74 (citation omitted) ("[T]his general rule, that the speaker has the right to tailor the speech, applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid.").

Nor is it relevant that the notice does not use the word "encourage," or any other word of overt persuasion. *See NIFLA*, 839 F.3d at 842 (emphasizing that "the Licensed Notice does not use the word 'encourage'"). A government regulation requiring gas stations to inform their customers that they might be eligible for free or low-cost fuel elsewhere would not need to say anything further to encourage customers to pursue this offer. A mortgage company advertising its refinancing services with the words, "our customers

save an average $132 per month, call us to find out if you are eligible," would not have to include any further words of encouragement. In such circumstances, the statement of facts is itself the invitation.

Underlying the purported factual nature of the Act's compelled notice is the State's viewpoint that abortion can be a benefit[19] to, and positive good for, women—a viewpoint that pro-life centers do not share and cannot disseminate without violating their own moral and religious commitments. In fact, as stated in the legislative record, the Act is designed to advance California's "proud legacy of respecting reproductive freedom" and its "forward-thinking" programs that provide "reproductive health assistance to low income women." J.A. at 38-39. While California is free to have its own viewpoints on abortion—just as a state may also "make a value judgment favoring childbirth over abortion," and decline to fund abortion, *Maher v. Roe*, 432 U.S. 464, 474 (1977)—advancing that viewpoint through legislative action (outside the context, for example, of ensuring informed consent) is circumscribed by, at a minimum, the First Amendment. *See, e.g.*, *Agency for Int'l Dev.* (enjoining on First Amendment grounds a provision of a federal law that required participating organizations to adopt a policy explicitly opposing prostitution).

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[19] While it is commonplace among abortion supporters to assert that abortion is safer than childbirth, this assertion rests upon specious comparisons of noncomparable databases. In fact, it appears from the evidence that abortion is most definitely not safer than childbirth. *See generally* Amicus Brief of American Center for Law & Justice *et al.*, *Whole Woman's Health v. Hellerstedt*, No. 15-274 (Feb. 2, 2016). In any event, this misuse of statistics does not address the religious, moral, or psychological impacts of abortion.

Here, mandating that pro-life centers facilitate the State's "forward-thinking" ideology, by means of an advertisement for a service they do not provide, unlawfully commandeers *amici* into speaking a message contrary to their identities and viewpoints. That cannot possibly be constitutional. *See Wooley*, 430 U.S. at 717 ("[W]here the state's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message.").

In sum, even if the Act imposed its speech mandate on *all* licensed clinics involved in pregnancy-related services, it would still be void on account of the content and viewpoint of the message that must be disseminated. California "is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government." *Hurley*, 515 U.S. at 579.

C. *To Whom*, and *How*, Pro-Life Centers Must Speak

"The First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and how to say it." *Riley*, 487 U.S. at 790-91. Not according to the State of California. The Act does not allow *amici* to exercise their own judgment, based on the individual needs of a client, how, or whether, to inform clients of the State's "family planning" programs. *See Gallop & Milavetz, P.A. v. United States*, 130 S. Ct. 1324, 1341 (2010) (federal disclosure law governing debt relief agencies gave "flexibility to tailor the disclosures to its individual

circumstances"). The Act requires centers to advertise to *all clients*, speaking the *exact words* and in the *exact manner* dictated by the Act, the existence of those programs. Thus, a new mother seeking diapers for her newborn must be told about the State's public funding of abortion; a woman facing coercion to abort her child and seeking support to carry her child to term must be directed to a telephone number where she can find out if she qualifies for a free abortion; a teenage mother only seeking advice on how to nurse a baby must also be told these things.

Substituting "its judgment as to how best to speak for that of speakers and listeners" is precisely what the State has done in this case. *Riley*, 487 U.S. at 791. Instead of allowing *amici* to speak to their clients according to, and consistent with, their own principles, raising the issue of abortion—*if at all*—with a client at a time they think best, the State imposes its message *at the very beginning of a center's contact with every potential client*. In so doing, the Act clouds everything *amici* say to a client thereafter with the State's preferred message. Even worse, the State's advertisement has the prospect of driving a potential client out the door before the center can say a word, let alone engage in any meaningful discussion with that person. *Cf. id.* at 800 ("[I]f the potential donor is unhappy with the disclosed percentage, the fundraiser will not likely be given a chance to explain the figure; the disclosure will be the last words spoken as the donor closes the door or hangs up the phone.").

The Act therefore operates both *indiscriminately* (to all potential clients, whatever their needs might be) and *prophylactically* (before the center can say

anything to a client about his or her individual needs). But "prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP v. Button* 371 U.S. 415, 438 (1963) (citations omitted).

The State emphasized in the court below that nothing in the Act would prohibit *amici* from supplementing the mandated speech with its own speech. But supplementing compelled speech with one's own speech does not cure the coercion. It would not have availed the State of New Hampshire in *Wooley* to argue that the Maynards could have placed bumper stickers on their car objecting to being compelled to display the motto, "Live Free or Die," on their license plate. It would not have helped the State of California in *Pac. Gas & Elec. Co.* to argue that the utility company could have included additional information in its newsletters. The decision in *Barnette* would have been the same even if West Virginia allowed students to cross their fingers or take a knee as an expression of their disapproval while being compelled to recite the Pledge.

A law that "forces speakers to alter their speech to conform with an agenda they do not set" is unconstitutional even if that law does not restrict other speech on that same topic, or even if the speaker is permitted to contradict himself. *Pac. Gas & Elec. Co.*, 475 U.S. at 9. Cognitive dissonance is no cure for compelled speech.

The Act compels speech in an impermissibly broad and indiscriminate fashion to further the State's

message while, at the same time, undermining the message of pro-life pregnancy centers.

II. The Act Does Not Regulate Professional Speech.

The State will argue, as it argued in the courts below, that the Act is a permissible regulation of "professional speech," subject to only a moderate level of scrutiny. The Court should reject any such contention. This Court has not formally articulated a "professional speech doctrine," and there is no need for it to do so here, since the Act does not regulate any reasonable understanding of "professional speech."

First, the Act's compelled speech requirement does not apply to a *professional*. A professional is "[s]omeone who belongs to a learned profession or whose occupation requires a high level of training and proficiency." Black's Law Dictionary, 1403 (10th ed. 2009). Professionals are typically individuals licensed by the state to practice a particular profession. *See, e.g., Fla. Bar v. Went for It, Inc.*, 515 U.S. 618 (1995) (lawyers); *Edenfield v. Fane*, 507 U.S. 761 (1993) (accountants); *Riley* (fundraising professionals).

The Act, however, does not impose any speech requirements on licensed *professionals*; it only imposes speech requirements on licensed *facilities*. Indeed, the Act's legislative history makes no mention of licensed professionals failing in their professional duties, creating the need to regulate their professional speech. Instead, it is clear that the target of the Act is the "nearly 200 licensed and unlicensed clinics known as crisis pregnancy centers (CPCs) in California." J.A. at 39. Indeed, no professional who works for, or

volunteers at, a licensed facility governed by the Act will face civil penalties under that statute for failing to utter the State's message.

Moreover, even if a professional speech doctrine could be applied to licensed *entities*, as opposed to licensed *professionals*, the nature of the speech at issue here, and the context in which that speech must be spoken, cannot be categorized as professional.

According to Justice White's concurrence in *Lowe v. SEC*, the *fons et origo* of the so-called professional speech doctrine:

> [T]he principle that the government may restrict entry into professions and vocations through licensing schemes has never been extended to encompass the licensing of speech per se. . . . *At some point, a measure is no longer a regulation of a profession but a regulation of speech.*

472 U.S. 181, 229-30 (1985) (White, J., concurring in result) (emphasis added).

Professional speech arises when a speaker "takes the affairs of a client personally in hand and purports to exercise judgment on behalf of the client in the light of the client's individual needs and circumstances." *Id.* at 232. But the prophylactic nature of the speech compelled by the Act, indiscriminately spoken to all clients no matter their needs and before the circumstances of any particular individual can be discovered, precludes any suggestion that the Act regulates professional speech.

> Where the personal nexus between professional and client *does not exist*, and a speaker *does not*

> *purport* to be exercising judgment on behalf of any particular individual with whose circumstances he is directly acquainted, government regulation ceases to function as legitimate regulation of professional practice with only incidental impact on speech; *it becomes regulation of speaking or publishing as such*. . .

Id. at 232 (emphasis added).

That is the case here, where the Act compels speech without regard to "the client's individual needs and circumstances"; whether there is any "personal nexus between professional and client"; and without any regard to the circumstances of any one individual. Accordingly, the Act is not the regulation of a professional/client relationship, but the regulation (in fact, *compulsion*) of speech *as such*.

The outcome in *Wooley v. Maynard* would not have been different if New Hampshire had limited its requirement to display "Live Free or Die" to the waiting rooms of offices of state-licensed civil liberties attorneys. *Cf. Fla. Bar*, 515 U.S. at 634 ("[s]peech by professionals obviously has many dimensions. There are circumstances in which we will accord speech by [professionals] the strongest protection our Constitution has to offer."). Similarly, the State of California should not be permitted to coerce the speech of dissenting voices on a subject of public concern under the guise of regulating "professional speech." The "State cannot foreclose the exercise of constitutional rights by mere labels." *Button*, 371 U.S. at 429.

III. The Act is Unrelated to Ensuring Informed Consent.

This Court's observation in *Casey*, that "the physician's First Amendment rights not to speak" in that particular case were "implicated . . . but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State," is beside the point here. 505 U.S. at 884. Pennsylvania's mandated disclosures, including information regarding "the assistance available should [the woman] decide to carry the pregnancy to full term," were *specifically* related to an *individual* client contemplating a *particular choice*, *i.e.*, abortion. *Id.* at 883. They were designed to ensure an informed choice about the procedure the woman was to undergo. *Id.* This Court upheld the disclosures because they provided "truthful, nonmisleading information *about the nature of the procedure*." *Id.* at 882 (emphasis added).

As previously discussed, however, and unlike the disclosures upheld in *Casey*, the Act compels speech in a wholly indiscriminate and prophylactic fashion: to all potential clients, no matter the reason for their visit, and regardless of whether the compelled speaker provides the procedure at issue. A generic advertisement for a government-sponsored program has nothing to do with ensuring informed consent. A mother visiting one of the *amici* centers for baby clothes, but who is not told about California's abortion-funding program, will not "discover later, with devastating psychological consequences, that her decision was not fully informed." *Casey*, 505 U.S. at 882.

Indeed, there is a profound factual and legal difference between (1) a law requiring professionals to inform patients of all the risks associated with *a proposed medical procedure* in order to allow the patient to provide full and informed consent (even if the doctor's own reading of the medical literature leads him to hold a different opinion about those risks), and (2) a law requiring a medical center to inform all clients, no matter the reason for their visit, how they can go *elsewhere* to obtain medical procedures that the center doesn't offer, won't offer, and are morally opposed to offering or facilitating.

A decision in favor of Petitioners in this case would therefore not disturb lower court decisions that have upheld state abortion-related informed consent provisions. *See, e.g., Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570 (5th Cir. 2012); *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724 (8th Cir. 2008) (en banc). The statutes in those cases, unlike the Act, directly related to a particular patient being informed about the realities and consequences of a specific procedure *offered by the physician* that was being considered by the client. In *Rounds*, the law required "the performing physician to provide certain information to the patient as part of obtaining informed consent prior to an abortion procedure." 530 F.3d at 726. In *Lakey*, the law required "the physician 'who is to perform an abortion' to perform and display a sonogram of the fetus, make audible the heart auscultation of the fetus for the woman to hear, and explain to her the results of each procedure." 667 F.3d at 573.

In addition, businesses that offer abortion-related surgery or medication do so as part of a commercial transaction. Laws that impact their free speech rights (including compelled speech) are therefore subject to a lower level of First Amendment scrutiny than *amici*, who provide pregnancy-related services free of charge and pursuant to their non-commercial, religious, and social mission. *Compare In re Primus*, 436 U.S. 412 (1978) (invalidating state anti-solicitation rule as applied to an ACLU attorney) *with Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978) (upholding state anti-solicitation rule as applied to a lawyer seeking clients injured in an auto accident); *also compare Riley* (canvassing for a cause) *with United States v. Edge Broad. Co.*, 509 U.S. 418 (1993) (*ban* on certain commercial advertising in certain locales).

Even an abortionist who practices his trade as a "charity," pursuant to non-commercial, ideological values, would still be subject to malpractice liability and ethics board review if informed consent is not obtained. In addition to common law, state laws such as those challenged in *Rounds* and *Lakey* define the substance of informed consent in the abortion context and the manner in which that consent is to be delivered. As this Court has said:

> [Abortion] is an act fraught with consequences for others: for the woman who must live with the implications of her decision; for the persons who perform and assist in the procedure; for the spouse, family, and society which must confront the knowledge that these procedures exist, procedures some deem nothing short of violence against innocent human life; and, depending on

> one's beliefs, for the life or potential life that is aborted.

Casey, 505 U.S. at 852. Here, however, the Act cannot be justified as ensuring "informed consent" for a procedure that the compelled speakers *do not provide* and, in fact, morally object to providing.

IV. The Act Cannot Survive Judicial Scrutiny.

It is well-settled that "[w]hen the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions." *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 816 (2000) (citations omitted). In other words, it is *not* the burden of Petitioners in this case to demonstrate that the Act *fails* judicial scrutiny.

The law is clear: "the First Amendment, subject only to narrow and well-understood exceptions, does not countenance governmental control over the content of messages expressed by private individuals." *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 641-42 (1994). Such laws must satisfy strict scrutiny. *See, e.g.*, *McCullen v. Coakley*, 134 S. Ct. 2518, 2530 (2014) (laws that are content or viewpoint-based "must satisfy strict scrutiny") (citing *Playboy*, 529 U.S. at 813 (2000)). In fact, they "are presumptively invalid," *R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992), and "[i]t is rare that a regulation restricting speech because of its content will ever be permissible." *Playboy*, 529 U.S. at 818.

Strict scrutiny is a "searching examination," *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411, 2419 (2013), and is "the most demanding test known to constitutional law," *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). To survive such a rigorous standard, the government must

demonstrate that the challenged law is "the least restrictive means of achieving a compelling state interest." *McCullen*, 134 S. Ct. at 2530.

The Act fails this exacting test.

A. No compelling governmental interest

The State bears the heavy burden of demonstrating that the Act is one of the "rare" instances in which a law mandating or directly regulating speech meets strict scrutiny's "demanding standard." *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 799 (2011). This Court has described a compelling state interest as a "high degree of necessity," *id.* at 804, and of "the highest order," *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993). "The State must specifically identify an 'actual problem' in need of solving, and the curtailment of free speech must be *actually necessary* to the solution." *Brown*, 564 U.S. at 799 (citations omitted) (emphasis added). Indeed, "[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation" of the fundamental right to free speech. *Collins*, 323 U.S. at 530.

Accordingly, the "[m]ere speculation of harm does not constitute a compelling state interest," *Consol. Edison Co. of N.Y. v. Public Serv. Comm'n*, 447 U.S. 530, 543 (1980), and the simple invocation of "public health" as a compelling interest, without more, is insufficient to meet the demands of strict scrutiny. *See Gilardi v. U.S. Dep't of Health and Human Servs.*, 733 F.3d 1208, 1220 (D.C. Cir. 2013) ("'safeguarding the public health' is such a capacious formula that it requires close scrutiny of the asserted harm."). In other

words, the government has the burden of compiling a compelling evidentiary record in order to justify the regulation of speech as a means to combat a threat to public health. If mere invocation of "public health" were to suffice, strict scrutiny would be toothless.

The Act's stated purpose is "to ensure that California residents make their personal reproductive health care decisions knowing their rights and the health care services available to them." Assem. Bill No. 775 § 2. Merely enhancing awareness of government programs—absent some dire, immediate public health crisis like a plague—is not a compelling interest that warrants the sort of treatment reserved for the most critical of government concerns. *See Brown*, 564 U.S. at 804-05 ("Even where the protection of children is the object, the constitutional limits on governmental action apply."); *United States v. Robel*, 389 U.S. 258, 263-64 (1967) (national security "cannot be invoked as a talismanic incantation to support any [law]").

In *Riley*, the government asserted a need for potential donors to a charity to be fully informed about how the money they donate is spent. 487 U.S. at 798. But this Court recognized that providing such information was not compelling enough an interest to override the First Amendment. To illustrate this point, the Court observed:

> we would not immunize a law requiring a speaker favoring a particular government project to state at the outset of every address the average cost overruns in similar projects, or a law requiring a speaker favoring an incumbent candidate to state during every solicitation that candidate's recent travel budget. Although the

> foregoing factual information *might be relevant to the listener* . . . a law compelling its disclosure *would clearly and substantially burden the protected speech.*

Id. at 798 (emphasis added); *see also Tornillo*, 418 U.S. at 248 (a governmental interest in ensuring that "a wide variety of views reach the public" was not substantial enough to justify a "right to reply" statute). There is no reason to think that the result in *Riley* would have been different if the law required fundraisers to notify their audience about state programs that serve the blind and, therefore, do not require donor support.

Moreover, the State's proffered interests suffer from a host of flaws that render them less than "compelling." First, they are speculative: the assertion that "thousands of women remain unaware of the public programs" advertised by the Act's message does not *prove* a harm to the public health, much less a harm so significant as to generate a *compelling* governmental interest. In addition, the government cannot simply *assume* that women are truly harmed by not being aware of free or low-cost access to family planning services. "[B]ecause [the government] bears the risk of uncertainty, ambiguous proof will not suffice." *Brown*, 564 U.S. at 799-800 (citation omitted). Indeed, public knowledge of these public programs does not necessarily mean that every potentially eligible woman will avail herself of those programs, let alone that doing so would actually advance her health. *See id.* at 803, n.9 ("[T]he government does not have a compelling interest in each marginal percentage point by which its goals are advanced.").

Second, there is a mismatch between the supposed problem and the State's remedy: there is no compelling proof that the targets of the Act, *i.e.*, pro-life pregnancy centers, are the cause of the alleged "widespread unawareness" harm posited by the Act, or that compelling the speech of these facilities will eliminate that alleged harm. For the government to meet its high burden of proof under strict scrutiny, it "must present more than anecdote and supposition." *Playboy*, 529 U.S. at 822.

Finally, if the Act's interests were truly compelling, and the ignorance of women regarding the public programs so widespread, there is no reason not to apply the Act's speech mandate to *every* licensed medical professional that offers pregnancy-related services, and not just to a small group of non-exempt facilities. The under-inclusiveness of the Act in this regard "undermines the likelihood of a genuine [governmental] interest." *F.C.C. v. League of Women Voters of Cal.*, 468 U.S. 364, 396 (1984); *see also Ysursa v. Pocatello Educ. Ass'n*, 129 S. Ct. 1093, 1105 (2009) ("The statute's discriminatory purpose is further evidenced by its substantial . . . underinclusiveness with respect to the State's asserted interest in passing the legislation.").[20]

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[20] The command of the Act is not to prohibit false or misleading speech, but to make regulated centers speak a government message promoting, *inter alia*, state-funded abortions. Thus, even if *allegations* of deceptive practices by some pregnancy centers helped motivate passage of the Act, the Act itself does not pinpoint this problem as something to be remedied. Non-exempt licensed covered facilities must comply with the Act whether or not they engage in deceptive practices or have engaged in such practices in the past.

B. Not the least restrictive means

Under strict scrutiny, the government must also show that it has adopted the least restrictive means of advancing its alleged interests. That is no easy task. *See Hobby Lobby*, 134 S. Ct. at 2780 ("The least-restrictive-means standard is exceptionally demanding.") (citation omitted). Here, there can be little doubt that the State has not chosen the least restrictive means of furthering its goal of making citizens aware of government family planning programs.

One obvious way the State could advance its goals, without forcing pro-life centers to advertise government programs contrary to their religious mission, values, and purposes, is for the State to disseminate the message *itself*. *See Riley*, 487 U.S. at 800 ("[T]he State [could] itself publish the detailed financial disclosure forms it requires professional fundraisers to file."); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 507 (1996) ("It is perfectly obvious that alternative forms of regulation that would not involve any restriction on speech would be more likely to achieve the State's goal of promoting temperance .... [E]ducational campaigns focused on the problems of excessive, or even moderate, drinking might prove to be more effective."); *Linmark Assocs., Inc. v. Willingboro Twp.*, 431 U.S. 85, 97 (1977) (suggesting that a municipality, as an alternative to speech restrictions, "continue 'the process of education' it has already begun" through municipality-sponsored speech targeted at raising awareness of its views on the local housing market).

California can communicate its message through a variety of media: radio and television spots, social media and government internet sites, billboards, notices placed in printed publications, brochures in state and local governmental offices, and so forth. The State has at its disposal a plethora of means to communicate its own message without having to conscript pro-life centers to speak its message for it. *See Sorrell*, 564 U.S. at 575, 578 (noting that "the State offer[ed] no explanation why remedies other than content-based rules would be inadequate" where it "can express [its] view through its own speech"); *Anderson v. Celebrezze*, 460 U.S. 780, 806 (1983) (if the government "has open to it a less drastic way of satisfying its legitimate interests, it may not choose a [regulatory] scheme that broadly stifles the exercise of fundamental personal liberties").

If some women in California are truly ignorant of the State's pregnancy-related programs, then the fault lies principally with the state agencies that administer these programs. The State can remedy that perceived problem by raising and better allocating resources to advertise those programs itself, without having to compel the speech of anyone, let alone dissenting voices.

Even under the narrow-tailoring requirement of *intermediate* scrutiny, the State must show that "it seriously undertook to address the problem with less intrusive tools readily available to it." *McCullen*, 134 S. Ct. at 2539 (applying intermediate scrutiny to abortion buffer zone law). Nothing in the Act's findings or history, however, suggests that the State was required to compel the speech of pro-life centers

because other, more narrowly tailored, efforts have failed. *See Sorrell*, 564 U.S. at 575 ("[T]he State offers no explanation why remedies other than content-based rules would be inadequate."). As this Court has explained: "[i]f the First Amendment means anything, it means that regulation of speech must be a last—not first resort. Yet here it seems to have been the first strategy the Government thought to try." *Thompson. v. W. States Med. Ctr.*, 535 U.S. 357, 373 (2002). Even still, when "vital First Amendment interests [are] at stake, it is not enough . . . simply to say that other approaches have not worked." *McCullen*, 134 S. Ct. at 2540.

While the State might view the Act's blanket compulsion of speech as an efficient means of furthering its interests, such prophylactic measures cannot, by definition, constitute the least restrictive means of advancing the government's purpose: "we reaffirm simply and emphatically that the First Amendment does not permit the State to sacrifice speech for efficiency." *Riley*, 487 U.S. at 795. That insistence has since been repeated: "by demanding a close fit between ends and means, the tailoring requirement prevents the government from too readily 'sacrific[ing] speech for efficiency.'" *McCullen*, 134 S. Ct. at 2535-36 (quoting *Riley*). Indeed, the "prime objective of the First Amendment is not efficiency." *Id.* at 2540.

A "prophylaxis-upon-prophylaxis approach to regulating expression is not consistent with strict scrutiny." *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 479 (2007) (plurality opinion). When the government imposes requirements to speak a state-mandated

message in order to address a perceived problem, the First Amendment requires a scalpel, not a sledge hammer. *See id.* at 477-78 ("A court applying strict scrutiny must ensure that a compelling interest supports each application of a statute restricting speech.").

In sum, the most appropriate means for the State to further its purported interests is for the State to advertise *its own* programs, advising women of those programs before they have the need to visit a pregnancy-related center in the first place. The State has no greater authority to coerce pro-life centers to advertise its government programs than pro-life centers have to force the State to advertise their pro-life mission, values, and activities. The First Amendment ensures that, although the State of California (and other government entities) can participate in the marketplace of ideas as a speaker, the State cannot broadly wield its regulatory power, backed by the threat of penalties, to conscript private individuals and entities into advertising government programs against their conscience.

CONCLUSION

For the foregoing reasons, the Act's compelled speech requirement imposed upon licensed covered facilities violates the Free Speech Clause of the First Amendment. This Court should reverse.

Respectfully submitted,

JAY ALAN SEKULOW
Counsel of Record
STUART J. ROTH
ANDREW J. EKONOMOU
JORDAN SEKULOW
WALTER M. WEBER
American Center for Law & Justice
201 Maryland Ave., N.E.
Washington, D.C. 20002
(202) 546-8890
sekulow@aclj.org

FRANCIS J. MANION
GEOFFREY R. SURTEES
American Center for Law & Justice
P.O. Box 60
New Hope, Kentucky 40052
(502) 549-7020

EDWARD L. WHITE III
ERIK M. ZIMMERMAN
American Center for Law & Justice
3001 Plymouth Road, Suite 203
Ann Arbor, Michigan 48105
(734) 680-8007

Counsel for Amici Curiae

No. 16-1140

In the Supreme Court of the United States

NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES, dba NIFLA, *et al.*,
Petitioners,

v.

XAVIER BECERRA,
Attorney General of California, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMERICAN MEDICAL ASSOCIATION, *AMICUS CURIAE*, IN SUPPORT OF RESPONDENTS

Leonard A. Nelson
Counsel of Record
Erin G. Sutton
American Medical Association
Office of General Counsel
330 N. Wabash Ave.
Suite 39300
Chicago, Illinois 60611
312/464-5532
Leonard.nelson@ama-assn.org

Counsel for Amicus Curiae

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

The certified question is whether the disclosures required by the California Reproductive FACT Act violate the protections set forth in the Free Speech Clause of the First Amendment, applicable to the States through the Fourteenth Amendment.

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IDENTIFICATION AND INTEREST OF *AMICUS CURIAE*[1]

The AMA is the largest professional association of physicians, residents and medical students in the United States. Additionally, through state and specialty medical societies and other physician groups seated in its House of Delegates, substantially all US physicians, residents and medical students are represented in the AMA's policy making process. AMA members practice in every state and in every medical specialty. The AMA was founded in 1847 to promote the art and science of medicine and the betterment of public health, and these remain its core purposes.

The interests of the AMA in this case are three-fold. First, the AMA has an interest in ensuring that physicians can care for their patients to the best of their abilities, without undue interference from governmental bodies. In this regard, the AMA seeks to impose a judicial barrier against laws which, under the pretext of patient protection, seek to advance the government's political objectives at the expense of unfettered communications between physicians and patients. Second, the AMA has an interest in ensuring that physicians, like all Americans, can enjoy the right to speak—or not to speak—without government constraints arising from partisan objectives. Third, the AMA has an interest in ensuring that physicians

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[1] The parties have consented to the filing of this brief. No party's counsel authored this brief in whole or in part. No party or counsel for a party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than the AMA made a monetary contribution.

practice ethically, without misleading their patients as to their medical conditions in order to satisfy what the physicians profess to be their personal moral or religious beliefs.

SUMMARY OF ARGUMENT

Most free speech cases start, as did the courts below and does the brief of petitioners at pp. 20-46, with a determination of the level of scrutiny to be applied to the speech in question. One of the petitioners in this case, Pregnancy Care Clinic (PCC), a licensed medical facility, utilizes physicians to provide medical services. Brief for Petitioners at 5-6. In somewhat perfunctory fashion, this brief begins by agreeing with petitioners that PCC is entitled to strict scrutiny of the Reproductive FACT Act.

Then the brief moves to the heart of the matter. The Court's decision should not be cabined within the confines of these specific parties and this specific statute. Too much is at stake – for legislatures and the lower courts, for physicians, and most importantly for patients. This Court should adopt a " rule of thumb" to clarify the law for the cases (at least the most difficult cases) involving physician speech: *viz.*, any law that restricts or compels physician speech and is targeted toward a matter of general public debate should be subjected to strict scrutiny. This proposed rule will protect Freedom of Speech without unduly infringing on governments' interest in properly regulating health care. Laws that regulate physician speech but do not target matters of general public debate would simply fall outside the rule of thumb and would be addressed by other aspects of Free Speech jurisprudence.

Finally, the brief concludes, based on the statements made on the PCC website and in its Brief to this Court, that the physicians at PCC appear to be practicing medicine unethically – thus establishing a compelling reason for the State of California to require PCC's adherence to the Reproductive FACT Act.

Accordingly, the lower courts here should be affirmed, albeit that the AMA believes some of their reasoning was faulty and should be disapproved.

As for the petitioners other than PCC, this brief takes no position.

ARGUMENT

I. As Applied to Pregnancy Care Clinic, the Reproductive FACT Act Should be Subjected to Strict Scrutiny.

At pp. 20-46 of their brief, petitioners, including PCC, argue that, as applied to them, the Reproductive FACT Act should be subjected to strict scrutiny. The AMA does not necessarily agree with petitioners' full chain of reasoning, but the AMA does agree with the conclusion. Nothing would be gained by a detailed critique of that reasoning, as it would not change the end result.

II. Any Law that Restricts or Compels Physician Speech and is Targeted Toward a Matter of General Public Debate Should be Subjected to Strict Scrutiny.

The AMA now moves to the heart of the matter – from the AMA viewpoint. We urge this Court to adopt the following rule: any law that restricts or compels

physician speech and is targeted toward a matter of general public debate should be subjected to strict scrutiny.

As used here, a matter of general public debate is one in which members of the general public commonly take positions. The prime example of a publicly debated issue leading to regulation of physician speech is whether abortions should be legal and, since they are, to what extent should the state weigh in to support either "right to life" or "freedom of choice." But government laws and policies have affected (and may in the future affect) physician speech in publicly debated areas that are divorced from the abortion context.

Thus, laws have restricted physicians from advising patients about the use of contraceptives, *Poe v. Ullman*, 367 U.S. 497 (1961), penalized physicians if they have discussed possible medicinal benefits of marijuana with their patients, *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002), and restricted pediatricians from making routine inquiries of parents about possession of unsecured firearms in their homes, *Wollschlaeger v. Governor of the State of Florida*, 848 F.3d 1293 (11th Cir. 2017) (*en banc*) (*Wollschlaeger IV*).[2] It is

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[2] An Eleventh Circuit panel issued multiple decisions in the same case and on the same issue. *Wollschlaeger v. Governor, Florida*, 760 F.3d 1165 (11th Cir. 2014) (vacated and superseded) ("*Wollschlaeger I*"), *Wollschlaeger v. Governor, Florida*, 797 F.3d 859 (11th Cir. 2015) (vacated and superseded) ("*Wollschlaeger II*"), and *Wollschlaeger v. Governor, Florida*, 814 F.3d 1159 (11th Cir. 2015) ("*Wollschlaeger III*"), before the court, sitting *en banc*, finally held three provisions of the Florida Firearm Owners' Privacy Act to be a violation of physicians' Free Speech. *Wollschlaeger v.*

conceivable, too, that a law might require or forbid physicians who examine junior high school students to expound or refrain from expounding on the advantages and disadvantages of playing football. *See Wollschlaeger IV*, 848 F.3d at 1329 (Pryor, J., concurring) (commenting on "the number of highly controversial topics that doctors [might] discuss as a direct part of their medical responsibilities").

By contrast, the general public, as a rule, would be unlikely to take a position regarding a law that requires an emergency room physician to notify the police department (or forbids such notification) if a patient presented with a gunshot wound. Likewise, the general public would be unlikely to take a position on a law that requires physicians to maintain the confidentiality of patients' medical records, 38 U.S.C. § 7332, or that fines physicians who neglect to notify their patients if a mammogram has been performed improperly, 42 U.S.C.A. § 263b(h)(2). While it is certainly possible that such matters could, in some unusual circumstance, rise to the level of a public debate, in general they would not. These run-of-the-mill laws might or might not, depending on the specifics, violate Freedom of Speech. At least superficially, though, these laws would not suggest government co-opting of physician/patient communications, and they would fall outside this proposed rule of decision.

Governor, Florida, 848 F.3d 1293 (11th Cir. 2017) (*en banc*) ("*Wollschlaeger IV*").

A. The Present Judicial Standards Employed to Protect Physician Speech are Confused and Often at Odds with the Values of a Free Society.

This Court has never established a general standard for First Amendment scrutiny of physician speech. *Wollschlaeger IV*, 848 F.3d at 1325 (Wilson, J., concurring). However, in *Thornburgh v. American College of Obstetricians and Gynecologists*, Justice White and Chief Justice Rehnquist opined that laws regulating physician speech should be accorded rational basis deference. 476 U.S. 747, 800-804 (1986) (White, J., dissenting). They argued that state governments, as part of their general police power, may impose such regulations on the medical profession as the legislatures may deem appropriate for the protection of the public, including restrictions on or compulsion of physician speech with patients. *Id.* To drive the point home, they stated: "[N]othing in the constitution indicates a preference for the liberty of doctors over that of lawyers, accountants, bakers, or brickmakers." *Id.* at 803.

The cases cited at pp. 10a – 12a of *Scharpen Foundation, Inc. v. Harris*, the California Superior Court opinion appended to Petitioners' Brief, illustrate the conflicting standards the courts have used to scrutinize laws that regulate physician speech, specifically on the topic of abortions. Thus, *Texas Medical Providers v. Lakey*, 667 F.3d 570 (5th Cir. 2012), and *Planned Parenthood of Minnesota, North Dakota, South Dakota v. Rounds*, 530 F.3d 724 (8th Cir. 2008), approved laws that compelled speech by abortion providers, based on a rational basis standard of review.

However, *Stuart v. Camnitz*, 774 F.3d 238 (4th Cir. 2014), invalidated a state law that compelled speech by abortion providers, based on intermediate scrutiny, and *Evergreen Association v. City of New York*, 740 F.3d 233 (2d Cir. 2014), invalidated a municipal ordinance that compelled speech by pro-life pregnancy service centers, based on either intermediate or strict scrutiny. And of course, the district court and the court of appeals disagreed on the proper level of scrutiny for this case. *See Nat'l Inst. of Family & Life Advocates v. Harris*, No. 15CV2277 JAH(DHB), 2016 WL 3627327 at *7 (S.D. Cal. Feb. 9, 2016); *Nat'l Inst. of Family & Life Advocates v. Harris*, 839 F.3d 823, 839 (9th Cir. 2016). This was not because of a misconstruction of a definitive ruling of this Court. Rather, it was because a definitive ruling does not exist.

The confusion does not end, though, with abortion cases. *Wollschlaeger I* applied rational basis scrutiny and *Wollschlaeger II-IV* applied intermediate scrutiny to evaluate the Florida Firearm Owners' Privacy Act. In a concurrence to *Wollschlaeger IV*, Judge Wilson opined that the Florida law should be examined under strict scrutiny. 848 F.3d at 1323-1325 (Wilson, J., concurring). As another example, *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002), applied strict scrutiny to invalidate a Justice Department policy that would have penalized physicians for educating their patients about the medicinal values of marijuana.

The laws at issue in these cases had a common theme: governmental bodies attempted to restrict physician speech in order to further a thinly disguised political or non-medical social agenda. These laws claim justification under a veneer that the government

– not physicians – knows what is best for patients. But such paternalism stands against the virtues of free discourse, as embodied in the First Amendment. *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781,791 (1988). Physicians should not lose their right to communicate freely with their patients because the physicians may explicitly or implicitly converse with their patients on matters contrary to a political position preferred by the government. "A society that tells its doctors under pain of criminal penalty what they may not tell their patients is not a free society. Only free exchange of ideas and information is consistent with a 'civilization of the dialogue.'" *Poe v. Ullman*, 367 U.S. 497, 515 (1961) (Douglas, J., dissenting).

B. Rather than Approach the Issue Incrementally, the Court Should Articulate a Rationale for its Decision that will Extend Beyond the Facts of this Case.

This Courts' efforts to balance individuals' abortion rights against governments' interest in protecting and encouraging potential human life have created a rich body of judicial precedent. It would serve no purpose to enumerate the extensive case law in this area, and the AMA will not attempt it. The case at bar, however decided, will add another link to this long chain.

Obviously, medical care extends far beyond the provenance of abortions. If the decision in this case is framed narrowly, then abortion jurisprudence will gain yet more weight, but broader concerns of personal liberty will go unaddressed. It is appropriate that physician communications to patients, whether or not centered on the right to obtain an abortion or on the

fetal development of potential human life, be accorded the highest level of First Amendment scrutiny when such communications concern matters of general public debate.

Communications between physicians and patients should receive "robust First Amendment protection." Rodney A. Smolla, *Professional Speech and the First Amendment,* 119 W. VA. L. REV. 67, 68 (2016). The doctor-patient relationship inherently requires complete confidence and trust. American Medical Association, Council on Ethical and Judicial Affairs, Code of Medical Ethics, *Current Opinions* (2017): Opinion 1.1.1—Patient-Physician Relationships, *available at* https://goo.gl/qKXwA6 ("Successful communication in the patient-physician relationship fosters trust and supports shared decision making") and Opinion 2.1.3—Withholding Information from Patients, *available at* https://goo.gl/q1bpt8 ("Truthful and open communication between physician and patient is essential for trust in the relationship and for respect for autonomy").[3] The role of physicians is not

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[3] The *AMA Code of Medical Ethics* is the most widely respected standard for ethical medical conduct in the United States. It has been frequently cited in this Court. *E.g. Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S.Ct. 2566, 2611 (2012) (Ginsburg, J., concurring in part and dissenting in part); *Baze v. Rees*, 553 U.S. 35, 64 (2008) (Alito, J., concurring); *Gonzales v. Oregon*, 546 U.S. 243, 286 (2003) (Thomas, J., dissenting); *Ferguson v. City of Charleston*, 532 U.S. 67 (2001); *Vacco v. Quill*, 521 U.S. 793, 801 (1997); *Washington v. Glucksberg*, 521 U.S. 702, 731 (1997); *Cruzan v. Dir., Missouri Dep't. of Health*, 497 U.S. 261 (1990); *Bates v. State Bar of Ariz.*, 433 U.S. 350, 369-370, n. 20 (1977); *Roe v. Wade*, 410 U.S. 113, 144 n. 9 (1973).

only to treat ailments; it is also to educate patients so they can be proactive in their own healthcare.

If physicians must tailor their speech to accommodate a political restriction, patients will know their doctors are no longer candid and the quality of medical care will erode, potentially with dire consequences. "[I]n the fields of medicine and public health, information can save lives." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 556 (2011).

Moreover, patients might simply forego necessary medical treatment on account of distrust of their physician. Doctor visits can be stressful and uncomfortable. Regardless of their objective needs, many people will, perhaps unconsciously, rationalize their avoidance of medical care. Government imposed barriers to an effective physician-patient relationship stifle public health. If those barriers arise from the government's political purposes, they can be just as pernicious to the social fabric as the classic Free Speech violation – a law restricting a challenge to government policy at a public forum.

The AMA recognizes that judicial restraint usually commands that the Court's rulings be limited to the facts before it. In most circumstances, the courts can develop their jurisprudence on a case by case basis, without extraordinary repercussions. This situation, though, is different, because it concerns speech between patients and physicians, a critical element of health care. As stated in *Trammel v. United States*, "a physician must know all that a patient can articulate in order to identify and to treat disease; barriers to full disclosure would temper diagnosis and treatment." 445 U.S. 40, 51 (1980). The confused legal doctrine in this

area will almost certainly disrupt necessary care, and its consequences could be even more pernicious. Physicians' jobs are hard enough without laws that force them to think twice about providing – or not providing – information that may save lives. *Wollschlaeger II*, 797 F.3d at 933 (Wilson, J., concurring).

In the viewpoint of the AMA, speech between patients and physicians fills a different role in American society than does the discourse between brickmakers and their customers.

C. The Proposed Rule of Decision is the Right One.

This Court should balance the principles of First Amendment freedoms against the state's interest in enacting routine regulations to protect public health. The "right" rule of decision should prevent governments from imposing censorship under claims of beneficence. The objective is not to suppose that government restrictions on physicians will always be used for invidious, thought-control purposes. Rather, the objective should be to root out laws that lend themselves to such purposes. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2229 (2015). At the same time, the rule should distinguish those laws that ought not to trigger First Amendment concerns.

To illustrate why the AMA believes its proposed rule of decision[4] is the right one, it may help to consider

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[4] Again, the proposed rule would be that any law which restricts or compels physician speech and is targeted toward a matter of general public debate should be subjected to strict scrutiny.

a specific issue – the need for informed consent. The general legal requirement that physicians explain the likely benefits and hazards of any significant medical procedure to their patients before providing treatment has been long recognized as a basic element of medical practice. Code of Medical Ethics *supra*, at Opinion 2.1.1—Informed Consent, *available at* https://goo.gl/i4kWwB ("Informed consent to medical treatment is fundamental in both ethics and law"). No special justification should be required for a law that articulates the basic standard for informed consent.

Furthermore, a medical board regulation that might adopt informed consent guidelines of a specialty medical society for a procedure in which that society has established expertise should, in general, raise no judicial eyebrows. Even if there were debate confined to the medical community as to whether that regulation was wise, it should not affect the constitutional analysis. The likelihood of government coopting of physician speech for partisan purposes in such a situation would be minimal, and the legal system should not be burdened by such a slim likelihood of a Free Speech encroachment.

However, a law that would require an extraordinary discussion – beyond normal medical practice – of the possible side effects associated with a measles vaccination should require strict scrutiny. What is the compelling interest in requiring such a detailed explanation to the patient? Whatever that compelling interest may be, could it be accomplished through some less intrusive means? What should send up a red flag in such a situation is that, wisely or unwisely,

vaccinations of children have become a matter of public debate.

While this Court should do nothing to stifle public debate, the proponents of a particular side in the debate should not be allowed to advance their position by burdening the communications between physicians and those patients who seek only competent medical care according to established professional standards. It is not that a law restricting physician speech in an area of general public debate is necessarily unconstitutional; it is that the likelihood of censorship is high. Speech on matters of public concern is at the heart of the First Amendment's protection, *Snyder v. Phelps*, 562 U.S. 443, 452 (2011), and in such matters patients should enjoy the full and unvarnished benefit of whatever information their physician may be able to provide them.

But what about intermediate scrutiny or some other, lower level of judicial analysis—would that do the trick? The answer is maybe, sometimes. Ultimately, the resolution depends on this Court's judgment as to the importance of protecting physician-patient speech from political hijacking. The AMA's position on this issue is clear and so, we think, is the position of Justice Douglas:

> The right of the doctor to advise his patients according to his best lights seems so obviously within First Amendment rights as to need no extended discussion ... Leveling the discourse of medical men to the morality of a particular community is a deadening influence ... These are [the doctor's] professional domains into which

the State may not intrude. *Poe*, 367 U.S. at 513-515 (Douglas, J., dissenting).

III. The State of California has a Compelling Interest in Mitigating PCC's *Prima Facie* Unethical Medical Conduct.

Even if the Reproductive FACT Act is subjected to strict scrutiny analysis, it still passes muster against PCC. While strict scrutiny erects a high barrier to validity, it does not raise an impossible obstacle. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995) ("[W]e wish to dispel the notion that strict scrutiny is "strict in theory, but fatal in fact"); *Johnson v. California*, 543 U.S. 499, 515 (2005) ("[t]he fact that strict scrutiny applies says nothing about the ultimate validity of any particular law; that determination is the job of the court applying strict scrutiny").

In order to survive strict scrutiny, the government must demonstrate that the law is narrowly tailored to serve a compelling interest. *Reed*, 135 S. Ct. at 2218. Other briefs, the AMA assumes, will discuss narrow tailoring, as well as the State's compelling interest in providing public health information to patients. Here, the AMA will focus on California's compelling interest in mitigating the *prima facie* unethical practices of PCC's physicians.

The foundations for an ethical physician-patient relationship are trust and honesty. At the core of responsible medical practice is respect for patients' ability to make informed and autonomous decisions about their own healthcare. The obligations to patients sit above the physician's own self-interest. Code of Medical Ethics, *supra*, at Opinion 1.1.1—Patient-

Physician Relationships. Whether to give birth is a critical, time sensitive healthcare decision. Pregnant women are entitled to information about their medical condition when they seek care. Code of Medical Ethics, *supra*, at Opinion 1.1.3—Patient Rights, *available at* https://goo.gl/ytrxvZ. If patients are delayed in receiving this information, they may lose the right to make a decision at all.

Thus, a physician's own moral beliefs must be balanced against the ethical duties owed to patients. Before entering into a treating relationship, the physician must have an honest conversation with the patient about limitations to the care the physician can provide. Code of Medical Ethics, *supra*, at Opinion 1.1.7—Physician Exercise of Conscience, *available at* https://goo.gl/oYFCXc; *see also* American Medical Association, Council on Ethical and Judicial Affairs, *Report of the Council on Ethical and Judicial Affairs: Physician Exercise of Conscience*, (2014), https://goo.gl/hC7dAR. If a physician is unable to provide care, the physician should refer the patient to another physician or institution that can meet the patient's needs. *Id.* When a "deeply held, well-considered personal belief" leads a physician to decline to refer a patient for services the physician will not provide, "the physician should offer impartial guidance to patients about how to inform themselves regarding access to desired services." *Id.* PCC makes no bones about its failure to do this.

At nn. 1-5 of their Brief, PCC and the other Petitioners invite a search of their websites. The AMA has accepted that invitation.

The PCC publication *Letting the Light In: The True Value of Pregnancy Care Clinic* makes the following statements, which, to a trained lawyer, might seem fair enough, but to a conflicted patient in an examination room, are likely to prove misleading:

> "Consider the following as you make your decision:
>
> ...Abortion & Breast Cancer
>
> Medical experts continue to debate the association between abortion and breast cancer. Research has shown the following:
>
> - Carrying a pregnancy to full term gives a measure of protection against breast cancer, especially a woman's first pregnancy. Terminating a pregnancy results in loss of that protection.
> - The hormones of pregnancy cause breast tissue to grow rapidly in the first 3 months, but it is not until after 32 weeks of pregnancy that breasts are relatively more cancer resistant due to the maturation that occurs."

Pregnancy Care Clinic, *Letting the Light In: The True Value of Pregnancy Care Clinic*, MOUNTAIN PRINTERS (2015), http://www.supportpcc.com/wp-content/uploads/2015/11/letting-the-light-in.pdf.

Ninety-nine people out of one hundred will read this statement and conclude, as intended, that the medical research shows that women who abort their fetus are significantly more likely to develop breast cancer than those who give birth. The meticulous lawyer, after

reading the statement several times, will focus on the disclaimer, "experts continue to debate the association" and conclude, more correctly, that the link between abortion and breast cancer is debatable, tenuous, and dependent on multiple extraneous factors. *See Reproductive History and Cancer Risk*, NAT'L CANCER INST. (Nov. 9, 2016) https://www.cancer.gov/about-cancer/causes-prevention/risk/hormones/reproductive-history-fact-sheet.

Furthermore, not only does the readers' setting matter, but the information itself is problematic. Other studies have shown that women who have recently given birth may actually have a temporary increase in breast-cancer risk, which declines after about ten years. *See* Robert B. Dickson & Marc E. Lippman, *Cancer of the breast*, *in* 1, 2 CANCER: PRINCIPLES AND PRACTICE OF ONCOLOGY 37.1 (Vincent T. Devita et al. eds., 7th ed. 2004). The reason for this temporary increase is not known, but some researchers believe it may be due to the effect of high levels of hormones on the development of cancers or to the rapid growth of breast cells during pregnancy. *Id.*

PCC's materials also state:

- "We want to demonstrate our commitment to medical professionalism, excellence, honesty, conscience and exceeding client expectations.
- At PCC, we believe a woman can and should have all options presented and discussed in a coercive-free environment.
- All services are provided with standards above and beyond regulations, best practices, and the expectations of our clients.

- It is not the mission of PCC to talk women into keeping their baby, but rather to educate them in their options so they can come to an informed choice." *Id.*

However, PCC's brief in this Court states: "Petitioners [have] the sole mission of encouraging expectant mothers to give their children the opportunity for life. ... All of their speech is designed to encourage childbirth." Brief for Petitioners at 1.

The issue is not whether these statements are out-and-out fraudulent or whether there might be some sources, somewhere, which in some measure support PCC's statements. Physicians can violate the profession's ethical standards through half-truths. The question is whether these statements are likely to mislead emotionally vulnerable and relatively uninformed pregnant women about their medical care.

PCC, of course, deserves a full hearing on whether it has, in fact, conducted itself unethically. At this stage of the case, though, it sure looks that way, at least to the AMA.

CONCLUSION

The AMA agrees with petitioners that the Reproductive FACT Act should be measured, for PCC, under a strict scrutiny standard. The AMA further believes that the Court should articulate a rationale for its decision that encompasses more than the narrow facts of this case. The AMA urges this Court to determine that any law which restricts or compels physician speech and is targeted toward a matter of general public debate should be subjected to strict scrutiny.

Finally, the AMA believes that, even under a strict scrutiny standard, the trial court properly denied the PCC motion for preliminary injunction.

Respectfully submitted,

Leonard A. Nelson
Counsel of Record
Erin G. Sutton
American Medical Association
Office of General Counsel
330 N. Wabash Ave.
Suite 39300
Chicago, Illinois 60611
312/464-5532
Leonard.nelson@ama-assn.org

Counsel for Amicus Curiae

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In The Supreme Court of the United States

NATIONAL INSTITUTE OF FAMILY & LIFE ADVOCATES, d/b/a NIFLA, et al.,

Petitioners,

v.

XAVIER BECERRA, ATTORNEY GENERAL OF CALIFORNIA, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF BLACK WOMEN FOR WELLNESS, CONSUMER ACTION, CONSUMER FEDERATION OF CALIFORNIA, PUBLIC GOOD LAW CENTER, AND PUBLIC HEALTH LAW CENTER AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

THOMAS BENNIGSON
Counsel of Record
SETH E. MERMIN
SOPHIA TONNU
PUBLIC GOOD LAW CENTER
1950 University Avenue, Suite 200
Berkeley, CA 94704
(510) 336-1899
tbennigson@publicgoodlaw.org

Counsel for Amici Curiae

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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STATEMENT OF INTEREST

Amici curiae are consumer protection and public health organizations. *Amici* submit this brief to underscore the importance of ensuring that the information received by consumers, particularly in matters involving their health, is adequate, accurate, and not misleading.

Amici are concerned that the resolution of this case not compromise the state's ability to protect the public from deceptive advertising. By providing useful information to individuals who might not otherwise receive it, the FACT Act increases the likelihood that consumers will make informed decisions and reduces the chance that they will be misled. That is a goal fully consistent with the First Amendment.[1]

Black Women for Wellness is a woman-centered, community-based, education and advocacy organization working to empower Black women and girls to attain healthy lives and families. BWW believes that access to accurate health information and freedom from external coercion are essential for women's autonomous decision-making. BWW was a co-sponsor of the FACT Act in the California legislature.

Consumer Action is a national non-profit consumer education organization that empowers low- and moderate-income and limited-English-speaking

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[1] No counsel for a party authored this brief in whole or in part, and no one other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief.

consumers to prosper, and advocates for consumers' rights in the media and before lawmakers. Every day Consumer Action sees consumers – especially those who can least afford it – suffering significant harms from deceptive marketing.

Consumer Federation of California is a non-profit advocacy organization that works to enact consumer protection laws and regulations and ensure their enforcement, and conducts education and research on consumer issues. CFC has worked to strengthen and enforce laws regulating truth in advertising, preventing fraud and deceptive marketing, ensuring food and drug safety, and protecting low-income consumers.

The **Public Good Law Center** is a public interest law firm specializing in consumer protection, public health, and First Amendment law. Public Good has authored numerous *amicus* briefs in First Amendment cases concerning disclosure requirements and regulation of false advertising, and in cases involving debt collection, credit reporting, and other contexts in which disclosure regimes protect vulnerable citizens.

The **Public Health Law Center**, located at the Mitchell Hamline School of Law, Minnesota's largest law school, is a nonprofit legal center dedicated to public health. The Center helps community leaders develop and defend public policies that protect America's health, and has filed more than fifty briefs as *amicus curiae* in the nation's highest courts, many of them addressing the impact of the First Amendment on government's ability to protect

the public from deceptive advertising and preserve consumers' ability to make informed health decisions.

SUMMARY OF ARGUMENT

"[G]overnment is vested with the responsibility of protecting the health, safety, and welfare of its citizens." *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 342 (2007). To fulfil this responsibility, "government may take broad[] action to protect the public from injury produced by false or deceptive ... product advertising. *Virginia State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 778 (1976). The principle applies perhaps even more to advertising for professional services, because of "the special possibilities for deception presented." *In re R.M.J.*, 455 U.S. 191, 203 (1982). Accepting NIFLA's contention that the First Amendment tolerates regulation of false advertising only for *paid* services would leave government unable to extend protection to low-income citizens who rely on *pro bono* professional services. The First Amendment does not require such an untenable consequence.

The modest disclosure requirements of the FACT Act are a response to an extensive and sustained history of deceptive representations. "Crisis pregnancy centers" [CPCs] routinely market themselves to women seeking abortions as neutral health care providers and pregnancy counselors, without disclosing their ideological mission to oppose abortion or that they provide neither abortions nor abortion referrals. Through their advertising, choice of names, locations, and appearance of their offices,

CPCs foster confusion between themselves and actual abortion providers. Once they get pregnant women into their offices, CPCs provide discredited misinformation about the medical and psychological dangers of abortion, and employ a variety of subterfuges to get women to delay abortion until it is too late, often even flatly lying about, for example, how advanced a pregnancy is or how long a woman may legally obtain one.

These are the hallmarks of a deceptive marketing campaign. If it concerned any other product or service, there would be no question that the state could act to dispel the deception. "Advertising that is false, deceptive, or misleading of course is subject to restraint." *Bates v. State Bar*, 433 U.S. 350, 383 (1977). In particular, California may seek to remedy the deception by requiring accurate, factual disclosures, such as those challenged here, subject only to First Amendment review only under the deferential standard that the disclosures be "reasonably related to the State's interest in preventing deception of consumers." *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985). Moreover, a pattern of deception like the one found here may justify industrywide regulation, without an individualized showing that each affected enterprise engaged in deception. *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 251 (2010).

NIFLA's efforts to distinguish the foregoing precedents on the ground that CPCs do not engage in commercial speech are not to the point. Neither the absence of fees nor their strong ideological convictions

give CPCs a right to engage in deceptive solicitations. Indeed, there is good reason to conclude that this *is* a commercial speech case: the speech burdened by the disclosures is promotional advertising intended to attract clients for services in a commercial marketplace.

But regardless of how that question is decided, the fact that CPCs do not charge for their services should not affect the standard of review. Deceptive speech is not entitled to protection when speakers enter the market as providers of services, a transacting public relies on the speech in question, and there is substantiated potential for concrete harm. The state has particular leeway to act when deceptive speech occurs in the context of *professional* services.

Petitioners' ideological mission does not change the level of review either. No one disputes Petitioners' right to advocate forcefully against abortion in the public sphere. What they may not do, however, is enter the market of health care providers, market their services under false pretenses, and dispense misinformation to clients. Petitioners may not have it both ways – disguising their advocacy by presenting themselves as health care providers and then objecting to any regulation affecting their 'professional' speech by claiming the First Amendment protections appropriate for advocacy on a matter of public concern.

NIFLA's objections are particularly misplaced, given that California has not attempted to restrict CPCs' speech in any way, but seeks only to require

CPCs to convey a neutral factual government message informing clients either of the providers' non-medical status or of the availability of other options.

ARGUMENT

I. THE FACT ACT IS A RESPONSE TO DECEPTIVE MARKETING AND THE PURVEYING OF MISINFORMATION.

The FACT Act was California's response to extensive evidence of a widespread pattern of deceptive outreach by CPCs creating the false impression that they help women seeking abortions. Women who arrive at CPCs expecting abortion assistance instead receive deceptive delaying tactics, intense pressure, and grossly inaccurate warnings about the health risks of abortion.

A. CPCs Employ Deceptive Advertising to Attract Low-Income Women Seeking Abortions.

"False and misleading advertising by clinics that do not provide abortions, emergency contraception, or referrals to providers of such services has become a problem of national importance." *First Resort, Inc. v. Herrera*, 860 F.3d 1263, 1268 (9th Cir. 2017). CPCs attract pregnant women seeking abortions with advertisements offering "accurate abortion information,"[2] or

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[2] Alice Chen, *Crisis Pregnancy Centers: Impeding the Right to Informed Decision Making*, 19 CARDOZO J.L. & GENDER 933, 951 (2013).

"pregnancy options,"[3] without disclosing that they do not perform or refer women for abortions. CPCs routinely purchase phone directory listings under "abortion services" and buy advertising that will cause their ads to show up on internet search engines when users search for "abortion" and related terms.[4] CPC staff are taught to respond with evasions when callers ask directly whether they provide abortions.[5]

CPCs "purposely locate themselves in close proximity to abortion clinics in order to confuse ...women seeking abortions," because, in the words of one CPC activist, "The best client you ever get is one that thin[ks] they're walking into an abortion clinic."[6] A worker at a CPC located near a Planned Parenthood clinic told an investigator that the locations confuse clients "all the time."[7] They often compound the confusion by choosing names similar to that of the nearby clinic, often with matching acronyms,[8] as well as choosing misleadingly neutral names "to draw in

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[3] Beth Holtzman, *Have Crisis Pregnancy Centers Finally Met Their Match: California's Reproductive Fact Act*, 12 NW. J. L. & SOC. POL'Y 78, 86 (2017).

[4] *Id.*

[5] Meaghan Winter, *"Save the Mother, Save the Baby": An Inside Look at a Pregnancy Center Conference*, COSMOPOLITAN (Apr. 6, 2015), http://www.cosmopolitan.com/politics/a38642/heartbeat-international-conference-crisis-pregnancy-centers-abortion.

[6] Meagan McElroy, *Protecting Pregnant Pennsylvanians: Public Funding of Crisis Pregnancy Centers*, 76 PITT. L. REV. 451, 453 (2015).

[7] Kirsten Gallacher, *Protecting Women from Deception: The Constitutionality of Disclosure Requirements in Pregnancy Centers*, 33 WOMEN'S RTS. L. REP. 113, 125 n.92 (2011).

[8] Holtzman, *supra* note 3, 86.

unsuspecting women."[9]

Such deceptive practices are not isolated instances. Nationally, 79% of centers that advertised on Google "indicated that they provided medical services such as abortions," though they did not.[10] A 12-month investigation of California CPCs found that 69% of CPCs advertised that they provided unbiased counseling, but only 21% disclosed that they opposed abortion.[11]

Independent scholarly studies have found similar results throughout the United States. A study of 254 CPC websites in 12 states found that 87% did not disclose that the center was not a medical facility.[12] 58% of Georgia CPCs investigated did not provide notice that they do not provide or refer for abortion services.[13] In Nebraska, "[w]omen commonly located the abortion clinic via an online search. Crisis

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[9] Chen, *supra* note 2, 951.

[10] Hayley Tsukayama, *Google Removes "Deceptive" Pregnancy Center Ads*, WASHINGTON POST (Apr. 28, 2014), https://www.washingtonpost.com/news/the-switch/wp/2014/04/28/naral-successfully-lobbies-google-to-take-down-deceptive-pregnancy-center-ads.

[11] NARAL, *Unmasking Fake Clinics: The Truth About Crisis Pregnancy Centers in California* 8 (2010), https://www.sfcityattorney.org/wp-content/uploads/2015/08/Unmasking-Fake-Clinics-The-Truth-About-Crisis-Pregnancy-Centers-in-California-.pdf.

[12] Amy Bryant *et al.*, *Crisis Pregnancy Center Websites: Information, Misinformation and Disinformation*, 90 CONTRACEPTION 601 (2014).

[13] Andrea Swartzendruber *et al.*, *Sexual and Reproductive Health Services and Related Health Information on Pregnancy Resource Center Websites: A Statewide Content Analysis*, 28 WOMEN'S HEALTH ISSUES 14 (2018).

pregnancy centers are among the top results when searching for abortion services in Nebraska .... [T]heir websites provide misinformation."[14]

Many unlicensed CPCs convey the appearance of a comprehensive health care clinic by requiring volunteers and staff to wear white lab coats or medical scrubs, among other stratagems.[15]

Deceptive advertising is a coordinated strategy. At the 2014 annual conference of Heartbeat International, the world's largest network of CPCs, speakers suggested a variety of marketing practices for "attracting 'abortion-minded' clients," including taking neutral-sounding names to disguise their mission; employing internet technology to target women searching for 'abortion' or 'abortion services'; deflecting phone inquiries about whether the center provides abortions; and making waiting rooms "feel like 'professional environments.'"[16] The Family Research Council and Care Net conducted market research to determine that innocuous names such as "Women's Resource Center" that disguised their mission would be effective in attracting women seeking abortions.[17] Concerted efforts to misrepresent

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[14] Valerie French *et al.*, *Influence of Clinician Referral on Nebraska Women's Decision-to-Abortion Time*, 93 CONTRACEPTION 236, 241 (2016).

[15] Holtzman, *supra* note 3, 83.

[16] Winter, *supra* note 5.

[17] Nat'l Abortion Fed'n, *Crisis Pregnancy Centers: An Affront to Choice*, at 3 (2006), https://www.prochoice.org/pubs_research/publications/downloads/public_policy/cpc_report.pdf.

their mission have been a hallmark of CPCs since their inception.[18]

B. CPCs Provide Discredited Misinformation and Employ Unprofessional Pressure Tactics.

Once pregnant women arrive at CPCs, they are likely to receive significant misinformation. A 2006 Congressional investigation found that 87% of clinics surveyed nationally provided medically inaccurate information about abortion.[19] Clients were told that abortion dramatically increased risks of breast cancer, infertility, and mental illness.[20] All of these contentions are contrary to medical consensus.[21] A more recent twelve-state study of 254 CPC websites found that 80% contained inaccurate or misleading information about the risks of abortion.[22] CPCs also purvey misinformation about the ineffectiveness of contraception.[23]

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[18] *Consumer Protection and Patient Safety Issues Involving Bogus Abortion Clinics: Hearing, Subcomm. on Regulation, Bus. Opportunities, & Energy*, 102d Cong., at 68-69 (Sept. 20, 1991) (quoting early CPC training manual), http://hdl.handle.net/2027/pst.000019273587.

[19] Minority Staff of H. Comm. on Gov't Reform, 109th Cong., *Report on False and Misleading Health Information Provided by Federally Funded Pregnancy Resource Centers*, at 8 (July 2006) [Waxman Report], http://www.chsourcebook.com/articles/waxman2.pdf.

[20] *Id.* at 8-14.

[21] *Id.*

[22] Bryant *et al.*, *supra* note 12, 603.

[23] Katelyn Bryant-Comstock *et al.*, *Information about Sexual Health on Crisis Pregnancy Center Web Sites: Accurate for*

CPCs employ a number of deceptive delaying tactics to keep women from getting abortions, such as misrepresenting the likelihood of a spontaneous miscarriage,[24] or scheduling follow-up appointments for ultrasounds weeks after an initial appointment.[25] To encourage delay, some CPCs lie outright to women about how advanced their pregnancy is[26] or about the timeframe for legal abortions,[27] or schedule purported abortion appointments for clients at hospitals that do not perform abortions. *Lewis v. Pearson Found.*, 908 F.2d 318, 319 (8th Cir. 1990), *aff'd on reh'g*, 917 F.2d 1077 (8th Cir. 1990). Unwitting arrivals expecting abortion referrals are subjected to high-pressure anti-abortion presentations, and sometimes physically restrained from leaving until the presentation is finished.[28]

C. Vulnerable Pregnant Women Are Harmed by CPC Deception.

Deceptive delaying tactics by CPCs have a significant impact. Abortions become less safe, more expensive, and harder to access as a pregnancy advances.[29] A woman stalled by a CPC may miss the window for legal abortions altogether in the

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Adolescents?, 29 J. PEDIATRIC & ADOLESCENT GYNECOLOGY 22, 23 (2016); Chen, *supra* note 2, 11.

[24] Holtzman, *supra* note 3, 85.

[25] Gallacher, *supra* note 7, 129; *see also* Chen, *supra* note 2, 10.

[26] Holtzman, *supra* note 3, 85.

[27] Joanne Rosen, *The Public Health Risks of Crisis Pregnancy Centers*, 44 PERSP. SEXUAL HEALTH 201, 202 (2012), http://www.jstor.org/stable/42004128.

[28] Julie Mertus, *Fake Abortion Clinics*, 16 WOMEN & HEALTH 95, 99 (1990).

[29] Holtzman, *supra* note 3, 85.

seventeen states that ban abortions after twenty weeks.[30] Women who decide against an abortion are still subject to increased health risks, since CPC clients are often discouraged from seeking medical care elsewhere, even when women report abnormal symptoms.[31]

The costs of delay are borne most by those least able to bear them. CPC clients are disproportionately young, uneducated, and low-income.[32] In fact CPCs often purposely target those constituencies, as well as women of color.[33] The costs of delaying abortion have particular impact on young and economically disadvantaged women.[34]

D. The California Legislature Had Ample Evidence of CPC Deception.

The FACT Act was passed in substantial part because California's legislature found that CPCs employed "intentionally deceptive advertising and counseling practices [that] often confuse, misinform, and even intimidate women from making fully-

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[30] Guttmacher Institute, *State Policies on Later Abortion* (2018), https://www.guttmacher.org/state-policy/explore/state-policies-later-abortions.

[31] *Id.*; *see also* Ushma Upadhyay *et al.*, *Incidence of Emergency Department Visits and Complications After Abortion*, 125 OBSTETRICS AND GYNECOLOGY 175, 181 (2015) (study of Medi-Cal recipients found that risk of abortion-related complications rose after first trimester), https://cloudfront.escholarship.org/dist/prd/content/qt523956jn/qt523956jn.pdf.

[32] Rosen, *supra* note 27, 201.

[33] Gallacher, *supra* note 7, 121-22; Chen, *supra* note 2, 951.

[34] Rosen, *supra* note 27, 202.

informed, time-sensitive decisions about critical health care." JA 39.

The Legislature had ample grounds to reach this conclusion. The Legislature commissioned an extensive study of CPC practices, and took note of a second extensive study. JA 39-41. It was familiar with California litigation against California CPCs for deceptive practices. JA 42. The Legislature heard testimony about a study finding that 91% of CPCs visited in California provided misleading information about the health risks associated with abortion;[35] testimony that Heartbeat International advises its affiliated pregnancy centers to misleadingly attract women seeking reproductive health care with a website resembling a health care clinic site, while keeping a separate website directed to donors that highlights their anti-abortion mission;[36] testimony from a physician about patients who mistook CPCs for comprehensive women's health clinics, based on online advertising, were delayed in accessing needed services, and given medically inaccurate information;[37] and testimony from another physician who treated a young woman whose baby faced lifelong

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[35] *Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act: Hearing on Assemb. B. 775 Before the Assemb. Standing Comm. on Health*, 2015 Leg., Reg. Sess. (Cal. 2015) (statement of Amy Everitt, State Dir., NARAL Pro-Choice California).

[36] *Id.*

[37] *Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act: Hearing on Assemb. B. 775 Before the Sen. Standing Comm. on Health*, 2015 Leg., Reg. Sess. (Cal. 2015) (statement of Julianna Mello, OB-GYN, Univ. of Cal., Davis).

serious health risks after the mother, in reliance on a CPC, delayed seeking medical care for her diabetes.[38]

In sum the Legislature's concerns about deception by CPCs and the consequent harms to pregnant women were far from speculative.

II. GOVERNMENT REGULATION IS AN APPROPRIATE RESPONSE TO A PATTERN OF WIDESPREAD DECEPTIVE ADVERTISING.

"[D]emonstrable falsehoods are not protected by the First Amendment in the same manner as truthful statements," *Brown v. Hartlage*, 456 U.S. 45, 60 (1982). While the First Amendment protects even some deliberately deceptive speech, *United States v. Alvarez*, 567 U.S. 709, 718-20, 722-23 (2012) (plurality op'n), that protection is reduced when, as in this case, there is "legally cognizable harm associated with a false statement." *Id.* at 719.

A. Government Has Substantial Latitude to Protect the Public from Misleading Commercial Speech.

Commercial speech that has been found "misleading ... is not protected by the First Amendment." *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 367 (2002). "Misleading advertising may be prohibited entirely." *In re R.M.J.*, 455 U.S. at 203. And even in cases of truthful advertising that is only

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[38] *Id.* (statement of Sally Greenwald, OB-GYN, Univ. of Cal. S.F.).

"potentially misleading," disclaimers may be required. *Id.* at 203.

The FACT Act should be reviewed in light of the sustained, continuing, and often coordinated, historical pattern of industrywide deception to which it is a response. If an ordinary business engaged in such practices, there would be no doubt that its deceptive advertising could be enjoined, *see, e.g., Church & Dwight Co. v. SPD Swiss Precision Diagnostics, GmBH*, 843 F.3d 48 (2d Cir. 2016) (upholding permanent injunction against false claims in advertising for home pregnancy test); provide a basis for liability, *see, e.g., Fanning v. F.T.C.*, 821 F.3d 164 (1st Cir. 2016), *cert. denied*, 137 S. Ct. 627 (2017) (upholding finding that operator was personally liable for misrepresentations on website); or, as in this case, mitigated through factual disclosures. *See, e.g., ECM BioFilms, Inc. v. F.T.C.*, 851 F.3d 599 (6th Cir. 2017) (upholding order requiring that disclaimer accompany claims that certain plastics were biodegradable); *Removatron Int'l Corp. v. F.T.C.*, 884 F.2d 1489 (1st Cir. 1989) (upholding required disclosure in hair removal advertisements that effect is temporary). Two cases involved scenarios strikingly reminiscent of CPC tactics. *See Encyclopaedia Britannica, Inc. v. F.T.C.*, 605 F.2d 964 (7th Cir. 1979) (upholding required notification that home visits were sales calls, after finding that salespeople gained access to homes through deceptive ploys such as fake research questionnaires; *Nat'l Comm'n on Egg Nutrition v. F.T.C.*, 570 F.2d 157 (7th Cir. 1977) (upholding order requiring trade group to identify itself as such in advertising, to avert confusion caused by its misleading name).

When accurate factual disclosures are imposed, "an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers." *Zauderer*, 471 U.S. at 651; *accord Milavetz*, 559 U.S. at 250.[39] *Zauderer* provides the standard for reviewing the disclosures required here.

B. Government May Regulate False or Misleading Speech Within an Industry Without a Particularized Showing That Each Affected Enterprise Has Engaged in Deceptive Speech.

NIFLA's objection that the Act applies "prophylactically" to all CPCs without a particularized showing that a given CPC "speaks anything 'misleading,'" NIFLA Br. at 7, is unavailing. "[W]here the record indicates that a particular form or method of advertising has in fact been deceptive ... or when experience has proved that in fact such

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[39] The Court has not made clear whether such deferential review is appropriate for factual disclosure requirements serving interests other than preventing deception. But, noting that the advertiser's "constitutionally protected interest in *not* providing any particular factual information ... is minimal," *Zauderer*, 471 U.S. at 651, every court of appeals that has considered the issue has applied deferential review to disclosures serving other state interests as well. *See, e.g., CTIA-The Wireless Ass'n v. City of Berkeley*, 854 F.3d 1105, 1117 (9th Cir. 2017); *Am. Meat Inst. v. U.S.D.A.*, 760 F.3d 218 (D.C. Cir. 2014) (en banc) (reversing contrary holdings); *Disc. Tobacco City & Lottery, Inc. v. U.S.*, 674 F.3d 509, 556 (6th Cir. 2012); *Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 316 (1st Cir. 2005); *Nat. Electrical Manufacturers Ass'n v. Sorrell*, 272 F.3d 104, 115 (2d Cir. 2001); *see also Beeman v. Anthem Prescription Mgmt.*, 315 P.3d 71, 90 (Cal. 2013).

advertising is subject to abuse, the States may impose appropriate restrictions." *In re R.M.J.*, 455 U.S. at 202-03; *see also Friedman v. Rogers*, 440 U.S. 1, 15 (1979) (noting that even if a particular party's advertising of its trade name was "not in fact misleading," it could still be prohibited, because it exemplified a trend "which enhances the opportunity for misleading practices"); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 464 (1978) (upholding prohibitions on attorney solicitation as "prophylactic measures," not requiring "proof that [petitioner's] conduct constituted actual overreaching").

Factual disclosure requirements, which "trench much more narrowly on [First Amendment] interests than do flat prohibitions on speech," *Zauderer*, 471 U.S. at 651, may *a fortiori* be applied industrywide when there is evidence of a pattern of misleading advertising. "Evidence in the congressional record demonstrating a [misleading] pattern of advertisements" is sufficient to establish the likelihood of deception. *Milavetz*, 559 U.S. at 251 (upholding requirement that all debt relief advertising include specified disclosures, and dismissing objection that "the Government ... has adduced no evidence that [Petitioner's] advertisements are misleading"); *see also Nationwide Biweekly Admin., Inc. v. Owen*, 873 F.3d 716, 735 (9th Cir. 2017) ("It is not necessary to show that any particular solicitation is actually deceptive.... [T]he state may reasonably decide to require disclosure for a class of solicitations that it determines pose a risk of deception"); *Pub. Citizen, Inc. v. Louisiana Attorney Disciplinary Bd.*, 632 F.3d 212, 218 (5th Cir. 2011) (*Zauderer* review applies to disclosures targeting

advertising that is only *potentially* misleading); *Int'l Dairy Foods Ass'n v. Boggs*, 622 F.3d 628, 641 (6th Cir. 2010) (same).

Indeed, the law is replete with disclosure requirements aimed at preventing consumer deception imposed on whole industries or general types of advertising, without requiring a showing that a particular business has been deceptive. *See, e.g.*, 12 C.F.R. §§ 226.6 and 226.18 (offerors of consumer credit must make written, detailed disclosures of all finance charges, expressed as an annual percentage rate); N.M. Stat. § 59A-57-4(B)(1) (marketers of managed health care plans must disclose benefits, exclusions, responsibilities, and rights); Haw. Rev. Stat. § 431:10H-216 (long-term care insurance providers must disclose the tax consequences of purchasing such insurance).

Required disclosures may include referrals to other resources. *See, e.g.*, 15 U.S.C. § 2686(a) (sellers and leasers of target housing must provide referrals to state and local agencies for information about available government and private assistance and funding for lead hazard abatement, and advice on obtaining a list of contractors); Cal. Civ. Code § 2982(h) (car dealers and repair facilities must inform consumers about where to lodge complaints).

In passing the FACT Act, the California legislature had evidence of an extensive pattern of misleading advertising by CPCs. Accordingly, it may impose an industrywide disclosure requirement, provided it is reasonably related to preventing deception.

III. THE FACT THAT CPCs OFFER SERVICES WITHOUT PAYMENT DOES NOT CHANGE THE STANDARD OF REVIEW.

The foregoing precedents govern this case. Regardless of whether CPC speech is deemed commercial, the considerations justifying deferential review of factual disclosures and industrywide regulation apply equally here.

A. The FACT Act Can Plausibly Be Taken to Regulate Commercial Speech.

Neither the fact the disclosures are presented in clinics rather than attached to advertising, nor the fact that the advertising is for free services, provide good reason to conclude that the disclosures required by the FACT Act concern commercial speech less than do those upheld in *Milavetz* and *Zauderer*.

1. The location of the disclosures is not dispositive of whether the Act regulates commercial speech.

The court of appeals misapplied commercial speech doctrine in reasoning that the FACT Act "primarily regulates the speech that occurs within the clinic, and thus is not commercial speech." Pet.App. 19a n.5 (presumably referring to fact that the disclosures are posted or distributed at CPC facilities). But, as the D.C. Circuit explained with respect to disclosures aimed at correcting deceptive cigarette marketing, the argument "that the stand-alone corrective statements do not fall within the commercial speech doctrine because they are not

attached to advertisements, is a red herring. The context of the corrective statements does not dictate the level of scrutiny; rather, the level of scrutiny depends on the nature of the speech that the corrective statements burden." *United States v. Philip Morris USA Inc.*, 566 F.3d 1095, 1143 (D.C. Cir. 2009) (applying *Zauderer* review to "'freestanding' corrective statements ... not connected to existing advertising"). Because the disclosure requirements of the FACT Act were a legislative response to CPCs' misleading solicitation of clients for services, those solicitations are the speech burdened in this case, and it is their nature that dictates the appropriate level of scrutiny.

Accordingly, courts apply "reasonable relationship" review under *Zauderer* to requirements to publish disclosures apart from advertising or sales. *See, e.g., Test Masters Educ. Servs., Inc. v. Robin Singh Educ. Servs., Inc.*, 799 F.3d 437, 453 (5th Cir. 2015) (reviewing under *Zauderer* required posting of remedial statement on third party website); *Greater Baltimore Ctr. for Pregnancy Concerns v. Mayor & City Council*, 721 F.3d 264, 284-87 (4th Cir. 2013) (en banc) (holding that more factfinding was required to determine whether required sign postings – not attached to advertising – at pregnancy center were commercial speech).

Even if the FACT Act was in part a response to misleading representations made by CPCs *after* clients were enrolled, that would be no reason for less deferential review. When providers of professional services mislead – or just misinform – actual clients, their speech receives no more protection than does

false advertising. *See, e.g., Pickup v. Brown*, 740 F.3d 1208, 1228 (9th Cir. 2014) ("doctors are routinely held liable for giving negligent medical advice to their patients, without serious suggestion that the First Amendment protects their right to give advice that is not consistent with the accepted standard of care").

Moreover, required informational postings entirely unrelated to advertising are commonplace at places of business, whether they warn of safety risks, notify consumers or employees of their rights, announce that cigarettes may not be sold to minors, or simply inform patrons of maximum occupancy or the location of an Exit. To hold that such postings are subject to scrutiny more exacting than "reasonable relationship" review would upend countless legal regimes.[40]

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[40] Indeed, the latter sort of posting in practice receives – and perhaps ought to receive – *less* protection than that accorded commercial speech. *See* Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. Rev. 1, 4 (2000) ("the category of commercial speech ought to be distinguished from the innumerable kinds of commercial communications, ranging from professional speech to product safety warnings, that do not receive the First Amendment protections even of 'commercial speech'").

2. Advertising by service providers seeking to attract clients may be commercial speech, even if no money is charged.

Several courts have reasoned persuasively that solicitation of non-paying clients by non-profit CPCs may be commercial speech.

North Dakota's high court considered a pregnancy clinic's "deceptive advertising ... [that] misleads persons into believing that abortions are conducted at the clinic with the intent of deceptively luring those persons to the clinic to unwittingly receive anti-abortion propaganda." *Fargo Women's Health Organization, Inc. v. Larson*, 381 N.W.2d 176, 177 (N.D. 1986). The court reasoned that whether the clinic received money from its clients was not dispositive of whether its speech was commercial. *Id.* at 180-81. What *was* dispositive was that the clinic's advertisements were placed in a commercial context, and were directed toward soliciting clients for services "rather than toward an exchange of ideas," making them "classic examples of commercial speech." *Id.* at 181.

Other courts have agreed that CPC advertising could be commercial speech even in the absence of economic motivation. *See First Resort*, 860 F.3d at 1274 (concluding that "advertising designed to attract a patient base in a competitive marketplace for commercially valuable services" was commercial speech, regardless of whether there was an economic motivation); *Greater Baltimore Ctr.*, 721 F.3d at 285-86 (holding that the absence of economic motivation

did not preclude classifying speech as commercial), citing *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 67 n.14 (1983) (although a speaker's economic motivation is one of the characteristics of commercial speech, it is not necessary that each characteristic be present for speech to be commercial).

There is a strong case that the disclosures required by the FACT Act burden commercial speech.

B. Deceptive Marketing of Services Does Not Receive Greater Protection When the Services are Free of Charge.

In any event, regardless of how CPCs' speech is labeled, NIFLA's contention that CPCs' speech in the course of marketing and providing professional services is entitled to a higher level of First Amendment protection than speech in the course of marketing and providing otherwise similar services for payment is supported by neither precedent nor reason. There was no indication in *Milavetz*, 559 U.S. 229, that the Court intended to exempt attorneys acting *pro bono* from the disclosure requirements upheld there. To hold that the state has less authority – or indeed less duty – to protect recipients of *pro bono* services from deceptive marketing or advice, or simply from misinformation, than to protect recipients of paid services, would be to fail the most vulnerable members of society. Professional rules of conduct prohibiting deceptive or misleading representations, *e.g.* Cal. Bus. & Prof. Code § 651 (doctors); Wash. Admin. Code § 4-30-142 (accountants), do not include exemptions for *pro bono* services.

In re Primus, 436 U.S. 412 (1978), which held that the First Amendment protects the right to join together in litigation to advance political goals, *id.* at 426 (citations omitted), does not stand for the proposition that the level of scrutiny for regulations affecting service provider speech depends on whether the services are paid for. The Court did not hold that solicitations for free professional services could not constitute commercial speech.

A crucial distinction from this case is that there were no allegations that the solicitation at issue in *In re Primus* involved deception. To the contrary, the Court explicitly stated that findings of deceptive solicitation would alter the analysis: "The State's special interest in regulating members whose profession it licenses ... amply justifies the application of narrowly drawn rules to proscribe solicitation that in fact is misleading ... or involves other features of deception." *Id.* at 438. In noting that it did not decide whether the state could permissibly regulate if "an innocent or merely negligent misstatement were made by a lawyer on behalf of an organization engaged in furthering associational or political interests," *id.* at 438 n.33, the Court clearly implied that protection would in any event *not* extend to deliberately deceptive solicitation by such an organization.

Moreover, the Court also distinguished the solicitation protected in *In re Primus* from the less protected solicitation in *Ohralik*, 436 U.S. 447, on the ground that the solicitation in the former case was by letter, rather than in person, and therefore, afforded less "opportunity for overreaching or coercion." *In re*

Primus, 436 U.S. at 435. When fearful, pregnant young women seek advice from professional health care providers, by contrast, there is great opportunity for overreaching and coercion.

Finally, *In re* Primus struck down a speech *restriction*. The present case involves only factual disclosures, a significantly lesser encroachment on First Amendment freedoms.

C. The Reasons for Deferential Review of Commercial Disclosures Apply Equally in the Context of Professional Speech.

Regardless of whether the speech at issue is classified as commercial, the reasons justifying deferential review of factual disclosures apply equally when professional services are offered free of charge. *See King v. Governor of New Jersey*, 767 F.3d 216, 234-36 (3d Cir. 2014) (concluding that "professional speech should receive the same level of First Amendment protection as that afforded commercial speech," because "commercial and professional speech share important qualities").

Like commercial contexts, professional contexts present particular dangers of harm to the public. Commercial speech receives reduced protection in large part because of "the government's legitimate interest in protecting consumers from 'commercial harms.'" *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 579 (2011) (citation omitted). But the state's interest in protecting the public from harm is not limited to commercial harms. First Amendment protection for false statements is generally reduced

where "legally cognizable harm [is] associated with a false statement." *Alvarez*, 567 U.S. at 719. For example, the First Amendment permits liability for defamation, even when there is no evidence of any monetary harm. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 346 (1974). Potential harm to the public from health services – whether paid for or free of charge – may be more consequential than most commercial harms. As noted, CPC deception may lead to serious harm to health, and in fact monetary harm as well, *e.g.*, the increased cost of a delayed abortion.

Consequently, just as commerce is "an area traditionally subject to government regulation," *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 499 (1996) (plurality op'n), so is professional conduct. *See, e.g., Goldfarb v. Va. State Bar*, 421 U.S. 773, 792 (1975) ("as part of their power to protect the public health, safety, and other valid interests," states have "broad power to establish standards for ... regulating the practice of professions"). This is particularly true of the provision of health services. *See, e.g., Gonzales v. Carhart*, 550 U.S. 124, 157 (2007) ("it is clear the State has a significant role to play in regulating the medical profession"). Just as "the State's power to regulate commercial transactions justifies its concomitant power to regulate commercial speech that is 'linked inextricably' to those transactions," *44 Liquormart*, 517 U.S. at 499 (citation omitted), so too does the state's power to regulate the professions justify its power to regulate speech in the conduct of a profession.

Like commercial speech, professional speech is protected and regulated principally in support of the

listener's (client's) interest in receiving reliable information, rather than for the speaker's interest in self-expression or advocacy on public issues. *See Moore-King v. Cty. of Chesterfield*, 708 F.3d 560, 569 (4th Cir. 2013) (contrasting permissible listener-centered regulation of commercial and professional speech with protection of speaker autonomy in public discourse). Because "First Amendment protection for commercial speech is justified in large part by the information's value to consumers," *Milavetz*, 559 U.S. at 249, when government "requires the disclosure of beneficial consumer information, the purpose of its regulation is consistent with the reasons for according constitutional protection to commercial speech and therefore justifies less than strict review." *44 Liquormart*, 517 U.S. at 501. Similarly, both the lead and concurring opinions in *Lowe v. SEC*, 472 U.S. 181 (1985) "emphasize the importance of the relationship to a client for whose benefit the State may regulate [professional] communication[s]. This is not far from the Court's examination of commercial communications with the interests of the listener in mind."[41] *See also Pickup*, 740 F.3d at 1228 (more regulation of speech is tolerated in the professional-client relationship, because "the purpose of [professional] relationships is to advance the welfare of the clients, rather than to contribute to public debate").

Finally, much as listeners are often less able to assess the accuracy of commercial speech than are its disseminators, *Virginia Bd. of Pharmacy*, 425 U.S. at

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[41] Daniel Halberstam, *Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions*, 147 U. PA. L. REV. 771, 844 (1999).

771 n.24 (justifying regulating commercial speech for accuracy), so are listeners reliant on professional expertise. *Cf. In re R.M.J.*, 455 U.S. at 202 ("The public's comparative lack of knowledge ... renders advertising for professional services especially susceptible to abuses").

The significant harms associated with misleading professional speech, the recognized authority of the state to regulate the professions, the primacy of listener interests in receiving accurate information, and the asymmetry in relevant knowledge between professionals and clients all support the conclusion that misleading professional speech should not be protected any more than is misleading commercial speech, and that the deferential standard of review applied to accurate, factual disclosures in commercial contexts is applicable to professional contexts as well.

D. The Disclosures Are Subject to Deferential Review Because They Occur in the Context of Professional Speech.

Because the factual disclosures required by the FACT Act occur in the context of professional speech, they should be reviewed under the deferential "reasonable relationship" standard applied to commercial disclosures in *Zauderer*, 471 U.S. 626.

Courts of Appeals that have considered the question have generally agreed that regulations of speech by professionals within the context of providing services to their clients are subject to reduced First Amendment scrutiny. *See King*, 767

F.3d. at 224 ("Because Plaintiffs are speaking as state-licensed professionals within the confines of a professional relationship, ... th[e] level of protection is diminished"); *Pickup*, 740 F.3d at 1228 ("the First Amendment tolerates a substantial amount of speech regulation within the professional-client relationship that it would not tolerate outside of it").

Factual disclosures in the context of professional speech should be accorded "reasonable relationship" review under *Zauderer*. *See King*, 767 F.3d at 236 (contrasting standard of review for professional speech restrictions with the *Zauderer* standard appropriate for review of "a compulsion of truthful factual information"). When courts have applied a higher level of scrutiny than *Zauderer* review in professional speech contexts, it has been either when (1) reviewing speech restrictions, rather than disclosures, *see Wollschlaeger v. Governor, Fla.*, 848 F.3d 1293 (11th Cir. 2017) (en banc) (statute limiting physicians' authority to ask patients about firearms in their homes and keep records); *King*, 767 F.3d 216 (statute prohibiting licensed counselors from engaging in sexual orientation change therapy on minors);[42] *Conant v. Walters*, 309 F.3d 629, 637 (9th Cir. 2002) (disciplining physicians for recommending medical marijuana); or (2) when reviewing compelled speech far more intrusive than a mere printed factual disclosure. *See Stuart v. Camnitz*, 774 F.3d 238 (4th Cir. 2014) (requirement that physicians show sonogram and describe fetus in real time to women seeking abortions).

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[42] The *King* court explicitly noted that disclosures are reviewed more deferentially. 767 F.3d at 236.

Staff of CPCs – whether licensed or unlicensed – are engaged in professional speech when they advise and refer clients, and schedule and perform tests. "Professional speech analysis applies ... where a speaker 'takes the affairs of a client personally in hand and purports to exercise judgment on behalf of the client.'" *Moore-King*, 798 F.3d at 569 (citations omitted); *see also King*, 767 F.3d at 232 ("a professional's speech warrants lesser protection ... when it is used to provide personalized services to a client based on the professional's expert knowledge and judgment").[43]

Because the present case concerns unintrusive factual disclosures in a context of professional speech, reasonable relationship review is appropriate.

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[43] The Fourth Circuit's conclusion that similar disclosure requirements do *not* regulate professional speech, because pregnancy centers are not state-regulated or required to be licensed, and clients do not pay for services, *Greater Baltimore Ctr. for Pregnancy Concerns v. Mayor & City Council*, 879 F.3d 101, 109 (4th Cir. 2018), is unpersuasive. But the court did not explain why the First Amendment should allow government less authority to protect recipients of *pro bono* professional services from deception or other malpractice. And authority to regulate or require licensing for pregnancy centers, even if not fully exercised, surely includes the authority to require unlicensed providers to make clear that they do not offer licensed professional services, particularly when providers dress in medical scrubs and otherwise seek to create the impression that they are medical professionals.

E. CPCs' Deceptive Professional and Commercial Speech Are Not "Inextricably Intertwined" With Fully Protected Speech.

CPC solicitations of and communications to clients are neither public advocacy nor "inextricably intertwined with otherwise fully protected speech." *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 796 (1988).

Of course, health care providers and other professionals do not surrender their full rights to advocate for their beliefs outside the professional relationship. "There is a difference, for First Amendment purposes, between regulating professionals' speech to the public at large versus their direct, personalized speech with clients." *Locke v. Shore*, 634 F.3d 1185, 1191 (11th Cir. 2011).

The FACT Act affects CPCs' personalized speech with clients, *not* speech to the public at large. It is the CPCs who have chosen to mask their advocacy behind offers of services; they remain free to engage in fully protected public advocacy for their beliefs. And nothing in the Act interferes with them advocating for their beliefs even to clients. But their ideological motivations, no matter how sincere, do not immunize their misrepresentations to clients and potential clients once they have entered the marketplace of service providers.

Hidden advocacy disguised as the offering of health services is not an instance of "inextricably intertwined speech." *Riley*, 487 U.S. at 796. It is an instance of deception in solicitation and in the offering

of professional services. By contrast, there were no allegations that the regulated fund-raisers in *Riley* engaged in any deception. And the *Riley* Court made clear that the First Amendment does not prevent government from "prohibit[ing] professional fundraisers from obtaining money on false pretenses or by making false statements." *Id.* at 800.

The context of professionals offering pregnancy-related services further distinguishes the present case from *Riley*. The combination of highly vulnerable clients and the likelihood of deferring to presumed professional expertise increase the need to protect against deceptive communications. *Cf. Ohralik*, 436 U.S. at 465 ("the potential for overreaching is significantly greater when ... a professional trained in the art of persuasion, personally solicits a[] distressed lay person").

In sum, whether CPC advertising and communications to clients are classified as commercial or professional speech or analyzed apart from a categorical approach, the considerations justifying relatively deferential review of regulation aimed at misleading communications are equally applicable here. The fact that CPCs offer services without charge provides no reason to review factual disclosures, or industrywide regulations aimed at preventing deception, more stringently here than in commercial contexts.

IV. THE FACT THAT THE DISCLOSURES CONCERN A TOPIC ABOUT WHICH THERE ARE STRONG FEELINGS AND CONVICTIONS DOES NOT AFFECT THE STANDARD OF REVIEW.

NIFLA's contentions that the disclosures here are ideological or viewpoint-based, concern a "controversial" topic, or compel CPCs to engage in speech against conscience, likewise fail to justify more stringent scrutiny here than that accorded commercial speech disclosures under *Zauderer*.

A. That the Factual Disclosures Relate to an Issue About Which There Is Controversy Does Not Change the Analysis.

That the required postings may concern "a deeply divisive ideological matter," NIFLA Br. at 30, does not affect the standard of review. "[W]hether a disclosure is scrutinized under *Zauderer* turns on whether the disclosure conveys factual information ..., not on whether the disclosure ... incites controversy." *Disc. Tobacco City & Lottery, Inc. v. U.S.*, 674 F.3d 509, 569 (6th Cir. 2012). The requirement that automobile manufacturers disclose mileage ratings, 49 U.S.C. § 32908, is not subject to heightened scrutiny because of public controversies about climate change, nor do disputes about mandatory vaccination necessitate heightened scrutiny of requirements that schools report immunization rates. *E.g.* Va. Code § 22.1-271.2; N.C. G.S. 130A-155(c). The FACT Act requires only straightforward statements of uncontroversially true facts.

B. That the Disclosures Concern a Topic About Which Members of the Regulated Enterprises Have Strong Convictions Does Change the Analysis.

NIFLA's contention that the licensed facility disclosure offends the First Amendment by compelling speech against its members' convictions, NIFLA Br. at 17, 24-26, is misplaced. As noted, speakers' interest in autonomy is of secondary concern in the context of commercial and professional speech, and that is the discourse in which NIFLA and its allies have chosen to place themselves.

Even in a case with no commercial elements, *Rumsfeld v. Forum for Academic and Institutional Rights, Inc. [FAIR]*, 547 U.S. 47 (2006), the Court rejected an argument much like NIFLA's. Because of their opposition to discriminatory military policies, law schools contended that required notices facilitating military recruiting constituted compelled speech against their convictions, arguing that "treat[ing] military and nonmilitary recruiters alike in order to comply ..., could be viewed as sending the message that they see nothing wrong with the military's policies, when they do." *Id.* at 64-65.[44] The Court rejected the law schools' argument, reasoning that the schools remained free to criticize military policies, and that onlookers could understand the difference between speech the school agrees with and

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[44] Although *FAIR* concerned a condition on funding, the Court explicitly decided the case on the basis that the requirements would withstand First Amendment review even if they were directly compelled. 547 U.S. at 60.

"speech the school permits because legally required to do so." *Id.* at 65.

Similar reasoning is apposite here. Like the Solomon Amendment challenged in *FAIR*, the FACT Act imposes "nothing ... approaching a Government-mandated pledge or motto" that CPCs "must endorse." *Id.* at 62. Like the law schools, CPCs are required only to post neutral factual messages informing of an available option. CPCs remain free to speak against abortion and to distance themselves from any implicit message that they see nothing wrong with abortion. No reasonable observer would think that posted information about available services including abortion was the speech of an organization dedicated to opposing abortion, any more than a posting notifying employees of their rights under labor law, *see* 29 C.F.R. pt. 471(A), App. A, represents the views of the owner of the workplace. *Cf. R.J. Reynolds Tobacco Co. v. Shewry*, 423 F.3d 906, 925 (9th Cir. 2005) (no reasonable observer could believe that anti-tobacco industry ads funded by tax on cigarette sales were the tobacco industry's speech). If there is any confusion in this case, it is attributable to the CPCs' disingenuousness in presenting themselves as something other than ideological advocates. Their own misrepresentations do not transform an ordinary disclosure requirement into a violation of their First Amendment rights.

If the Solomon Amendment – where there were no concerns about deceptive speech, and which had no relation to commercial speech or solicitation of clients for services – did not call for heightened scrutiny, still less so does the FACT Act.

C. The Disclosures Are Viewpoint-Neutral.

NIFLA's contention that the FACT Act targets viewpoint is baseless. To begin, the Act does not force anyone to advance a "viewpoint-biased message." NIFLA Br. at 18. Like the Solomon Act, the FACT Act requires only the provision of neutral information about available options.

If CPCs are targeted, it is not out of opposition to their viewpoint, NIFLA Br. at 7, 18, but because of their extensive record of harmful deception.[45] Much as "a State may choose to regulate ... advertising in one industry but not in others, because the risk of fraud ... is in its view greater there," *IMS Health*, 564 U.S. at 579, California is entitled to focus its deception-remedying efforts where there is evidence of widespread harmful deception. If there were a widespread pattern of anti-overpopulation zealots advertising 'adoption counseling centers,' and credible evidence that pregnant mothers seeking adoption resources at those centers were pressured into obtaining abortions and inundated with misinformation about the psychological harms of giving a child up for abortion, California would presumably require disclosures from those 'adoption centers' as well. If California did not, CPCs could reasonably complain that they were targeted for their

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[45] NIFLA misleadingly quotes a legislative summary's use of "unfortunately" as evidence of animus against CPCs' viewpoint. *See* NIFLA Br. at 34. It is clear in context that "unfortunately" refers not to CPCs' discouraging abortions, but to CPCs' deceptive advertising and counseling. *See* JA 84-85.

viewpoint. But in the actual world, such a complaint is unfounded.

D. Content Neutrality Cannot Distinguish Compelled Speech Offensive to the First Amendment From Compelled Disclosures Subject to Deferential Review.

NIFLA's arguments that the disclosures here are subject to heightened scrutiny because they are content-based is little more than a smokescreen – the concept of content neutrality is inapplicable to compelled disclosures. "By definition, all mandatory disclosures require some defined class to say something rather than something else." Amanda Shanor, *The New Lochner*, 2016 WIS. L. REV. 133, 178 (2016). Therefore, unless *all* disclosure requirements are to be subject to strict scrutiny, content discrimination cannot serve as a useful distinction in this context.

Even if only disclosures *triggered* by certain speech content are considered "content-based," it would not make sense, for example, to subject warnings of the hazards of smoking to a higher level of scrutiny if they are required only in cigarette advertising (content-triggered) than if they were required in advertising for *all* products (not content-triggered). *See Am. Meat Inst. v. United States Dept. of Agriculture*, 760 F.3d 18, 33 n.1 (D.C. Cir. 2014) (Kavanaugh, J., concurring in judgment) ("The First Amendment does not tolerate ... compel[led] disclosures unrelated to the product or service – for example, a compelled disclosure on all food packages

(not just cigarette packages) that cigarette smoking causes cancer").

The Court has repeatedly applied a lenient standard of review in upholding required disclosures of specific content triggered by specific speech content. *See Milavetz*, 559 U.S. at 233 (requiring specific content – "We are a debt relief agency," triggered by specific speech content – offers of debt relief); *Zauderer*, 471 U.S. at 650 (requiring specific content – that legal clients might be liable for litigation costs, triggered by specific content – offers of legal representation on contingency). The dubious supposition that this Court intended, in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), to overturn decades of precedent *sub silentio* was definitively refuted when the Court subsequently issued a remand to determine whether a state statute could "be upheld as a valid disclosure requirement under *Zauderer*." *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144, 1151 (2017).

V. THE CHALLENGED DISCLOSURES ARE THE SORT OF SPEECH REGULATION LEAST OFFENSIVE TO THE FIRST AMENDMENT.

The protective measures of the FACT Act infringe minimally on First Amendment freedoms, in several respects.

First, "the First Amendment interests implicated by disclosure requirements are substantially weaker than those at stake when speech is actually suppressed." *Zauderer*, 471 U.S. at 651 n.14. When the Court has struck down speech

srestrictions, it has often suggested that required disclosures would offer a less problematic alternative. *See, e.g., Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 571 (1980) (instead of banning electricity advertising, state could "further its policy of conservation" by "requir[ing] that ... advertisements include information about ... relative efficiency and expense").

The principle is not limited to commercial contexts, extending even to core political speech. *See Meese v. Keene*, 481 U.S. 465, 480 (1987) (upholding labeling requirement, because "Congress did not prohibit, edit, or restrain the distribution of advocacy materials.... Congress simply required the disseminators ... to make additional disclosures that would better enable the public to evaluate [their] import"). Required disclosures of political campaign spending similarly receive less stringent scrutiny than do restrictions on political spending, because disclosure requirements "do not prevent anyone from speaking," and because of the public's "informational interest." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 366, 369 (2010).

Second, requiring a private speaker to convey a message is least offensive to the First Amendment when an observer is unlikely to attribute the message to the private speaker. *See Pleasant Grove City v. Summum*, 555 U.S. 460, 471 (2009) (finding monuments on government land constitutional in part because "there is little chance that observers will fail to appreciate the [governmental] identity of the speaker"); *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 87 (1980) (finding no violation of First

Amendment rights in part because mall owners "could disclaim any sponsorship of the message and could explain" that the message was posted "by virtue of state law"). CPCs can likewise easily dissociate themselves from the offending disclaimers. Nothing here "effectively restricts the ability of doctors to distance themselves from" a required statement. *Planned Parenthood v. Rounds*, 530 F.3d 724, 746 (8th Cir. 2008). The physician need not even deliver the disclosures herself.

Finally, the disclosures required here do not intrude unduly on vulnerable clients who may be unwilling listeners. *Cf. Stuart*, 774 F.3d at 255 (striking down requirement that a woman seeking an abortion view in real time a sonogram of her fetus while the doctor describes the fetus, "irrespective of the needs or wants of the patient, in direct contravention of ... the principle of patient autonomy"); *Rounds*, 530 F.3d at 746-47 (striking down as coercive pre-abortion requirements that woman sign each page of a written disclosure to certify that she has read and understood it).

Because the FACT Act infringes minimally on First Amendment freedoms, it is subject to a lenient standard of review.

CONCLUSION

Because California may remedy deceptive speech by service providers, and has chosen a remedy that minimally burdens the First Amendment, the proper standard with which to examine the challenged disclosures is "reasonable relationship" review under *Zauderer*.

Respectfully submitted,

Thomas Bennigson
Counsel of Record
Seth E. Mermin
Sophia TonNu
PUBLIC GOOD LAW CENTER
1950 University Avenue, Suite 200
Berkeley, CA 94704
(510) 336-1899
tbennigson@publicgoodlaw.org

Counsel for Amici Curiae

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In the Supreme Court of the United States

NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES, DBA NIFLA, ET AL., PETITIONERS

v.

XAVIER BECERRA, ATTORNEY GENERAL OF CALIFORNIA, ET AL., RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* DAVID BOYLE IN SUPPORT OF PETITIONERS

David Boyle
Counsel of Record
P.O. Box 15143
Long Beach, CA 90815
dbo@boyleslaw.org
(734) 904-6132

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AMICUS CURIAE STATEMENT OF INTEREST

The present *amicus curiae*, David Boyle (hereinafter, "Amicus"),[1] lives in California and is not overly happy to see his own State force pro-life pregnancy clinics to advertise abortion services. However, he sees little reason to exempt the clinics from having to admit whether they are licensed medical providers or not. So, presenting a relatively "balanced" point of view which may help the Court, he submits this brief. (However, seeing the odiousness of compelled referral of abortion services by anti-abortion persons, which issue may be more important than the "unlicensed medical provider disclosure" issue, this brief supports Petitioners, even if Amicus disagrees with some of their ideas.)

Incidentally, Amicus is not much going to address the minutiae of "levels of scrutiny" or "professional speech" here, but shall just briefly note that the "professional speech" issue could be handled various ways; e.g., even if the Court does not formally approve a "professional speech" category, the Court could, say, note that in professional situations, it is usually easier to ascribe a compelling state interest, and/or narrow tailoring, to whatever strictures the State places on speech.

SUMMARY OF ARGUMENT

It appears rather outrageous for California to make pro-life pregnancy clinics distribute anti-life

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[1] No party or its counsel wrote or helped write this brief, or gave money for the brief, *see* S. Ct. R. 37. Blanket permission by Petitioners to write briefs is filed with the Court, and all Respondents have e-mailed Amicus letters of permission.

information or referrals, especially when the State could disseminate such things itself.

Nevertheless, the Court should not "overcompensate" by *per se* banning all viewpoint discrimination, since some unusual circumstance might come up requiring somesuch temporary "discrimination" to prevent disaster, e.g., in circumstances related to "fighting words" or "shouting 'Fire' in a crowded theater".

And mandatory disclosures re pro-life clinics' being unlicensed as medical facilities, or not having licensed medical providers, are good things, since women have a right to know.

There are useful comparisons to make with the "gay wedding cake" case, *Masterpiece Cakeshop v. Colo. C.R. Comm'n*, No. 16-111, 370 P.3d 272 (Colo. App. 2015), *cert. granted* (U.S. June 26, 2017), re the need for mandatory disclosures by businesses or other institutions to clients or potential clients.

The State could amend current law, or make new laws, to mandate, instead of abortion referral, clinics offering referrals for measures purely for promoting the life and health of the unborn and mothers. Petitioners and Respondents could even cooperate on this issue.

In this troubled age, the spirit of Martin Luther King may be of inspiration to the Court in finding the good on both sides in the instant case.

ARGUMENT

I. Commandeering Anti-Abortion Clinics

to Advertise Abortion Services Is of Questionable Legitimacy

Amicus is not going to repeat all the various cogent arguments already made by other people against California's using the Reproductive FACT (Freedom, Accountability, Comprehensive Care, and Transparency) Act (2015 Cal. Stats. ch. 700, codified at Cal. Health & Safety Code §§ 123470 et seq.) to make pro-life pregnancy clinics post information about access to abortion. That Act, *supra*, has some fine aspirations in its full name ("accountability", etc.), but one Orwellian aspect of the Act is that, *pace* the full name of the Act, there is not much "freedom" for the clinics, who are obliged, under pain of punishment, to post the word "abortion", along with a phone number for clinic visitors to access abortion services.

This kind of coercion is unseemly. If one may reference our popular culture, in particular, the currently-in-theaters *Star Wars Episode VIII — The Last Jedi* (Walt Disney Studios Mot. Pictures 2017): pro-life clinics may feel somewhat like the Act is forcing them to give the phone number to the Death Star, a large device which brutally kills innocent people, which is what the clinics feel abortion does to preborn infants. (Oddly enough, the film, *see id.*, does feature a sort of "crank call" from Rebel fighter Poe to fascistic enemy general Hux; but it was a *voluntary* phone call, not a State-mandated one.) In addition, the film's main female protagonist, Rey, is an individual who tends to do what she wants and follow her conscience against opposition, *see id.*; this is in line with our American ethos of freedom, and

thus in favor of Petitioners, who don't want to be the puppet of the State and recite information which promotes abortion access.

Amicus is tempted to ask, is the State of California aware that the clinics are *pro-life* clinics? Is it even good manners to do something so innately offensive as commandeering, even hijacking, humanitarian institutions to spread a message they despise, a message of death by abortion instead of life for the unborn? *See, e.g.*, David Boyle, *Religious (or Non-Religious) Hypocrisy and the Contraceptive, Cake, & "Pro-Life Clinic" Cases, Among Others*, Casetext, Dec. 25, 2017, https://casetext.com/posts/religious-or-non-religious-hypocrisy-and-the-contraceptive-cake-pro-life-clinic-cases-among-others-2, noting that "it [is] bewildering that the State would force *anti*-abortion facilities to post, effectively, advertisements for abortion. This sounds not completely unlike mandating that Native American history museums post ads for a 'Let's Create Another Painful Trail of Tears for the Cherokees Right Now Action Fund'." *Id.*

Too, even contraceptives which the clinics feel may have abortifacient properties, should not have to be advertised, or given referrals to, by the clinics.

Thus, it would not be enough for the Court merely to let the clinics have the right to omit the words "abortion" or "contraception" from the required notices. Even if those offending words and concepts are gone from the notices, the required phone number the clinics must post under the Act still leads to the services the clinics find morally offensive. So the clinics should be exempted from having to post the phone number, period.

After all, the State can just advertise those sorts of services themselves. instead of making the clinics do it. The State has a right to regulate medical clinics, but there are limits. Not just the First Amendment, but also common sense and good taste, militate against letting the Act force the pro-life clinics to provide information abetting abortion access.

However, common sense may provide limits on some of Petitioners' proposals as well.

II. A *Per Se*, Unconditional Prohibition on Viewpoint Discrimination Could Throw Out the Baby with the Bathwater

Petitioners, while legitimately concerned about free-speech issues, set out in their merits brief, *id.* at 57, Section III-C, the shocking proposition, "The Court should adopt a per se rule that viewpoint discrimination against private speech is unconstitutional." This may be well-meant but is overenthusiastic.

True, there should be very few instances in which the State should interfere with individuals' private viewpoints. Free speech and thought are the American way. But, from an abundance of caution, the Court should not make the foolish error of assuming that it is *always and everywhere* an *automatic* violation of the First Amendment to "discriminate against" people for expressing a viewpoint.

Sometimes, if extremely rarely, there may be an exigent public need which allows no other practical solution at the time than "viewpoint discrimination".

Naturally, when the need is over, the State should cease its prosecution of a citizen for his or her expression of a viewpoint, no matter how odious or ugly that viewpoint might be to most people.

Even if Petitioners claimed that other categories such as "fighting words", etc., are easily differentiable from "viewpoint discrimination", are they? These days, things are so strange that *Matal v. Tam*, 582 U.S. ___ (2017), allows people to do something as vile as trademarking racial or sexual slurs for profit, it would seem. So, what gets counted as "free speech" is becoming somewhat fluid these days.

Hence, for example, the "fighting words" doctrine could be overturned if there can never be any "viewpoint discrimination". Amicus has always wondered about the "fighting words" doctrine: "damned fascist/racketeer" sounds a little tame these days, *pace Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). Still, there might be "fighting words" in some circumstances, and if someone argues that he always has a right to the "viewpoint" of calling someone any kind of insult at any time without being suppressed by the State, even in circumstances that could likely cause a deadly riot, then there might be no more "fighting words" doctrine, or at least not much of an effective one.

Moreover, if someone either yells "Fire!" in a crowded theater, or offers a more elaborate version, "If there's a fire over where the screen's glowing red, you sons of b's should RUN LIKE THE WIND OUT OF THIS THEATER RIGHT NOW!!!": both of those could be considered "viewpoints", and the second

one, with the disclaimer "if", might not even be fraudulent, technically speaking. But either formulation could incite gullible people to stampede out of the theater and get trampled to death. Hence, Amicus believes the State (including the Federal "State") may very much disfavor and even punish such a private incitement to dangerous behavior (fleeing headlong from a crowded theater without need to do so), instead of coddling it the way that Petitioners' desired "ban on viewpoint discrimination" might allow.

That theater scenario *supra* would be an "abortion", indeed: a bunch of innocent theatergoers trampling each other to death, and with Joe Prankster being immune from prosecution (if Petitioners' theories are taken to their logical endpoint) for the government "discriminating" against his "private viewpoint" that people should flee from the theater, or that he claimed to think there was a fire. But he should not be immune from prosecution, since if such pranksters are immune, then the rest of us are not safe in crowded theaters.

(And what if some deranged President tried to start a riot by saying to some foreign visitors, "You people come from s--thole countries, why don't you crawl back there?" in circumstances obviously ripe for a violent riot? Should the President be above the law and above arrest, despite his violent, or even careless-about-violence, intentions? Maybe not.)

Arguably, one form of really dangerous "viewpoint discrimination" in our age, if one is looking for such discrimination, is the "Muslim-immigration ban" the Trump Administration is foisting on the Nation. That is worth overturning (and, sadly, there are

plenty of self-labeled "Christian" groups who have not come out in favor of overturning that burden on religious freedom), but it is not worth it to make some paranoid decision to outlaw all "viewpoint discrimination" under all circumstances, even if it kills us. *Cf. Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963): "[W]hile the Constitution protects against invasions of individual rights, it is not a suicide pact." (Goldberg, J.)

And the present abortion-related case should not make the Court throw out the baby with the bathwater (so to speak) *vis-à-vis* viewpoint discrimination. Strict scrutiny (compelling state interest, least-restrictive means, etc.), and the Court's famed distaste for viewpoint discrimination, give quite enough protection for free speech already without adopting some absurdly rigid *per se* rule against viewpoint discrimination.

III. Unlicensed Clinics Have Little Reason to Complain about Having Publicly to State the Truth of Their Medically Unlicensed Status

Speaking of absurdity: while Petitioners are right to complain about forced referrals of abortion services, they are not right to complain about mandated common-sense disclosures re unlicensed clinics' being unlicensed as medical facilities or not having licensed medical providers. What is the problem with telling the truth here?

Indeed, a prime rationale for these clinics is to let women know what is going on. This may not legitimate forcing clinics to be billboards for State-recommended abortion services, but at the least, the

clinics should have the candor to say what they are, which facts the FACT Act justifiably makes them reveal. "Those who seek equity must do equity."

But Petitioners present a much darker picture of the State's motivations:

> [T]he Act's Compelled Disclaimer requir[es] a message in large font, and in multiple languages, potentially amounting to hundreds of words, that effectively obscures any other message.
>
> . . . .
>
> . . . the Act deters women from ever seeking *any* information from pro-life pregnancy centers in the first place.
>
> . . . .
>
> . . . [T]he Act . . . . interferes with the free exchange of ideas . . . .
>
> This, of course, is the State's goal in mandating messages in super-sized font to divert Petitioners' potential audience and inhibit Petitioners' opportunity to advocate for their pro-life perspective.

Pet'rs' Merits Br. at 27 n.12, 44, 45. But Petitioners protest too much. They make the State sound like devils, or close to that. To Amicus, such allegations about his residential State of California seem almost borderline-paranoid and highly unsupportable, maybe even slanderous. Maybe the State just wants clinic visitors not to be defrauded?

E.g., what if the anti-abortion clinic personnel "enthusiastically" make up some nonsense about abortion automatically causing breast cancer, or

suicidal tendencies? Frankly, some clinic personnel may have rationalized to themselves that it's okay to lie, or grossly exaggerate, if it may save a life, an unborn life, from abortion. But how far can the law protect such lies or exaggerations? Snake oil is a bad thing, even if the peddlers somehow mean well.

Moreover, once people are caught lying or exaggerating, might that not boomerang on the pro-life movement at some point? (Maybe it already has...) So, it actually does the clinics a favor of sorts, to remind them to state truthfully who they really are, which promotes the accountability of the clinics, per the "A" in the name of the FACT Act, *id.*

Women have a right to know what is going on. *See, e.g., The Last Jedi, supra* at 3, in which orphan Rey wants to find out, from Jedi Master Luke Skywalker or anyone else, what her parentage is, and also what is going on inside her with the Force.

In the real world, we may not have the Force, but real-life women often want to know what is going on inside them with their bodies. Amicus has no fondness for abortion, but he has no fondness for treating women like second-class citizens who don't deserve the truth, either.

Therefore, it is wrong—even if Petitioners have the purest intentions, which may be the case—that Petitioners want to remove the mandate that clinic visitors receive the information that the clinic is medically unlicensed or lacks licensed medical providers. Simply put, Petitioners almost seem comfortable keeping clinic visitors in the dark.

Risks being on the "dark side", this does.

In part, Petitioners complain about 48-point type, Merits Br. at 12 (citation omitted); if the Court wants to bother to prescribe a smaller typeface, it can. In any case, the presumption of severability has its uses, and the Court should leave as much as possible of the "unlicensed-clinic mandate", hopefully the whole thing; or if anything must be excised or changed, as little excising or change as possible. If 48-point type is easy to see for people with poor vision, maybe it is best to keep the type that large, so that everyone may easily know what is going on.

As the Nazarene said: "the truth will set you free." (*John* 8:32)

IV. Apposite Comparisons to *Masterpiece Cakeshop*: The Need for Institutions' Public Disclosure of *Prima Facie* Questionable Behavior

On the note of "truth", one should briefly mention the controversial "same-sex wedding cake" case, *Masterpiece Cakeshop*, *supra* at 2. That case is another case in which disclosure is important, as even those who support the baker's right to refuse service to same-sex weddings without going to jail or paying enormous fines should admit.

Indeed, it is *prima facie* outrageous for a business to deny someone service because what of some would claim is a protected-characteristic (religion, gender, orientation, etc.) issue. In context, of course, Jack Phillips' denial of service to Charlie Craig and David Mullins may not be truly outrageous: he does not deny all service to gays, but apparently just denies

marriage-related services, since he doesn't want to burn in Hell for eternity.

But because of the *prima facie* offensiveness of the idea of service-denial, it is a good idea to report the service-denial to the State, lest people be allowed to get away with service-denial, without even having to explain in detail precisely why they are daring to deny service to people in protected categories.

Further, maybe the baker, if allowed to refuse service, should be required to post publicly as much information as reasonably possible about his intention to refuse service. (If State law currently prevents such posting, maybe such law should be overruled, in part or whole.) To "sucker-punch" gay clients by not letting them know, until a private conversation with the baker, that they can't get a wedding cake, almost sounds like "dirty pool", even if that was not intended by a particular baker.

(The same would apply to a gay baker who refused to make a wedding cake for a Christian wedding.)

As well, on the note of "explanation", it may not be fascism to require the baker to explain Colorado's relevant laws to his employees. (It must be made clear that the employees do not have to endorse what the laws endorse, but, rather, they must merely understand what the laws are, and the reasons for them.) This does not mean there must be a huge fine if the baker refuses to tell his employees about the laws in detail, though.

(*See generally* Religious Hypocrisy Article, *supra* at 4, for similar but more extended discussion of *Masterpiece Cakeshop* by itself and also *vis-à-vis* the

instant case, not to mention issues of how to show fairness to both sides in "religious refusal of contraception services" cases.)

And after all the baker's explanation, to the State about his refusal to serve clients and why, to potential clients about his intention to refuse service, and to his employees about the law, Phillips or similarly-situated bakers then might be allowed to refuse service, without being arrested or paying a huge fine. This is similar to the instant case, where, under Amicus' theories, Petitioners would not have to put up information about abortion (which could abet abortion), but would at least have to tell clients about the lack of medical licensing or of licensed medical provider.

No decent person wants a "Jim Crow" situation where any class of people, by race, gender, orientation, religion, etc., gets treated as second-class citizens just for who they are. In many religion- or conscience-related cases, fortunately, there may be workable "compromises" that respect the dignity of both sides, *see* once more Religious Hypocrisy Article, *supra* at 4 (noting opportunities for principled compromise and fair accommodation to both sides). Amicus looks forward to the Court respecting the dignity of both sides in the instant case and others.

V. The State May Amend the FACT Act, or Pass New Laws, to Offer Referrals Which Nurture Fetuses Instead of Destroying Them

One way to respect both Petitioners and Respondents is not to overrule the Act facially, but to allow the mandated disclosures about medically unlicensed status, and also to allow the State to amend the Act, or pass new laws, in ways that would further shared goals of both sides. Petitioners want to save the lives of fetuses/embryos/blastocysts/ zygotes, and Respondents are not *per se* averse to that, but also want to provide clinic visitors information about abortion and contraception. So, there is some healthy overlap of goals.

Therefore, what if the State mandated the clinics to provide information without any mention of abortion or contraception, but only mentioning State (or other) programs which nurture pre-born and born infant life, and/or nurture mothers? For example, a program designed to provide adequate nutrition to pregnant mothers. Or a program aimed at the prevention of miscarriages or other disasters threatening pre-born children. Why would the clinics want to refuse such aids to the health of mothers and children?

(Actually, there are some "contraceptives", in the broad sense of the term, which even religious clinics might not be reasonably able to object to, e.g., information about various computer software or "apps" which help track women's fertility cycles, re what is popularly called the "rhythm method" for avoiding unwanted pregnancies.)

Of course, such programs would have to be accessed at a different phone number (and maybe a different address) than the one the State currently mandates, since that number could be used to

promote abortion services as well. If the State is really interested in the welfare of women and children, it could even confer with Petitioners about what kinds of programs Petitioners might recommend, or at least tolerate, the State mandating pro-life pregnancy clinics to provide information about. The truism that "People should work together instead of working against each other" may be more than a cliché in this case: it might be truly helpful to all, a sentiment appropriate to the current Rev. Dr. Martin Luther King, Jr. holiday (officially "Birthday of Martin Luther King, Jr.").

* * *

Since Amicus is finishing this brief on Martin Luther King Jr. Day, it is especially apposite to ask what MLK might think about the instant case. We cannot know for sure. (Supposedly King supported Planned Parenthood, *see, e.g.*, Larry O'Connor, *Planned Parenthood Honors Martin Luther King Jr.*, The Weekly Standard, 12:42 p.m., Jan. 16, 2017, http://www.weeklystandard.com/planned-parenthood-honors-martin-luther-king-jr./article/2006327; but that does not necessarily mean King would have supported *abortifacient* contraceptives.) Amicus suspects King might well have supported a solution like Amicus', since King was an authentic man who wanted to speak his own message courageously, instead of having his message hijacked by others; but at the same time, King was a true speaker, a man of integrity, so would likely not have objected to having to disclose relevant truth about himself (e.g., not being a licensed medical provider).

On a broader level, Dr. King might be aghast about the polarization of the Nation these days. How can people practically at each other's throats on religion, abortion, and other issues, find common ground? One way is that the Court can help out finding that common ground: not in some sappy or Kumbaya-singing way, but by looking carefully, thoughtfully, at each side's rights, duties, and dignities. In that vein, while writing largely in support of Petitioners, Amicus wishes a friendly "May the Court be with you" to both sides, Petitioners and Respondents, and he has a dream that the Court will use its intellectual and moral force to wield well the enlightening saber of justice in this case, to peaceful end as MLK might like.

CONCLUSION

The Court should overrule the court below, re mandatory abortion-service referral, but uphold the court below, as for mandated disclosure of being unlicensed as a medical facility or not having a licensed medical provider, the Court doing all the above in ways and degrees that seem reasonable; and Amicus humbly thanks the Court for its time and consideration.

January 15, 2018 Respectfully submitted,

David Boyle
Counsel of Record
P.O. Box 15143
Long Beach, CA 90815
dbo@boyleslaw.org
(734) 904-6132

No. 16-1140

In the
Supreme Court of the United States

NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES, D/B/A NIFLA, ET AL.,
Petitioners,

v.

XAVIER BECERRA, ATTORNEY GENERAL, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* C12 GROUP, CEO FORUM, INC., CHRISTIAN EMPLOYERS ALLIANCE, MARKETPLACE LEADERS IN SUPPORT OF PETITIONERS

MICHAEL LEE FRANCISCO
Counsel of Record
MRD LAW
620 N. Tejon St., Suite 101
Colorado Springs, CO 80903
(303) 325-7843
michael.francisco@mrd.law

Counsel for Amici Curiae

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INTERESTS OF AMICI CURIAE[1]

The four amici curiae joining in this brief are all organizations advancing the biblical principle that Christians must conduct themselves and their businesses in ways that honor and glorify Jesus. Like the Petitioners, NIFLA, these organizations and their members believe that their Christian faith is not limited to traditional, ceremonial rites but includes all of one's life. They do not compartmentalize their life into "secular" and "religious" endeavors. Rather, they see their Christian faith as all-encompassing. Their businesses or vocations are no exception to the biblical command that they are to do everything "as for the Lord." Colossians 3:23 (ESV).

The C12 Group ("C12") is the largest network of Christian CEOs, business owners, and executives in the United States. At its roundtables, business leaders from multiple industries convene monthly to incorporate best practices through the foundation of biblical principles by sharing ideas, holding each other accountable, and encouraging one another to uphold the core values of a Christian business leader. In so doing, C12 groups seek to build great businesses for a greater purpose. Its members include more than 2,000 CEOs, business owners and executives representing nearly 1,500 businesses, many of which are closely-held. They span all industry sectors and

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[1] In accordance with Rule 37.6, no counsel for a party authored this brief in whole or in part, nor did any person or entity, other than amici and their counsel, make a monetary contribution to the preparation or submission of this brief. The parties consented to this filing. Their letters of consent are on file with the Clerk as required by Rule 37.2(a).

represent businesses with as few as five and as many as over 15,000 employees from markets across 37 states. Collectively, these individuals represent hundreds of thousands of US employees, billions of dollars of US revenues, and tremendous supply chain networks. These entrepreneurs share deeply held religious beliefs and view their business and vocation as undeniable expressions of their faith. Many of these businesses give exponentially greater sums of profits to aid in community relief efforts annually, provide exceptional care and services to their employee families, and embrace a faith-based duty to bring goodness and transformation to the communities within which they operate.

The CEO Forum, Inc., supports Christian CEOs and senior executives of major corporations by equipping them to be Christ-following leaders who develop their businesses and employees. Its mission is to develop spiritual statesmen among senior executives of major corporations and, through them, advance the Kingdom of God and improve the business and social cultures of America.

The Christian Employers Alliance ("CEA") is a business trade association advocating on behalf of its members who desire to operate their businesses in accordance with their faith. Its mission is to unite and equip Christian employers with guidance, unified legal strategies, and practical resources for the well-being of employees, organizations, and communities for God's glory. CEA was formed by Christian leaders from many sectors, including business owners, pastors, and non-profit leaders, who decided to unite their organizations, including businesses, schools, colleges, nursing homes, hospitals, churches, and non-

profit ministries, to protect their right to run their organizations in a manner consistent with their Christian beliefs and deeply held convictions and to create a Christ-centered culture in the workplace.

Marketplace Leaders serves to equip Christians who work in business to see the transformation of the workplace, city, and the nation. The organization serves thousands by teaching on ways to live out the Christian faith in the workplace. Students are given the tools and training to engage in the work of the ministry in a vast array of fields and industries often considered secular. With a religious conviction that work is ministry, Marketplace Leaders seeks to break down the wall of secular and sacred. The ministry helps business people see their work as their calling and ministry.

The amici curiae's members are diverse and some may not hold a religious objection to abortion in all circumstances. The amici are united, however, on Petitioners having the right to operate consistent with their sincere religious convictions about life, without the heavy hand of the government compelling a compromising message. The amici's voice will assist the Court in the evaluation of the free speech implications raised by this case for people of faith working in the business world writ large.

SUMMARY OF ARGUMENT

Many people of faith understand that worship is the *raison dêtre* of all work. For these religious believers, the activity of work is not merely a means of providing income or putting food on the plate; rather, it is a means of living out faith. Business thus takes place as fundamentally religious activity

regardless of whether society views the activity as secular. According to this view, it is not just the clergy that engage in religious work; all Christians working in the world have the opportunity to live out faith.

Amici curiae represent thousands of men and women who view their businesses and work as something more than just an honest way to make a living. Workers of religious faith thus see work as divine callings in which they are to use their God-given skills to accomplish God-ordained purposes. This view of work and vocation as a religious calling has been consistently espoused as a precept of religion for many faiths throughout history.

Amici curiae also represent Christian businesses operating in industries and fields far removed from the crisis pregnancy centers operated by Petitioners. And while the California Reproductive FACT Act would not directly apply to any amici, the businesses know they may be next to feel the weight of government compelled speech on issues of religious conviction. These businesses and the religious executives who are seeking to live out their faith in life value the freedom from being targeted by the government for holding an unpopular or minority viewpoint.

In addition, nearly all of the businesses represented by amici curiae are traditional for-profit operations. If Petitioners can be compelled to speak a government message directly at odds with their religious convictions, then all businesses operated consistent with religious convictions are at risk. Without the bulwark of Free Speech, the government, and not individual businesses, will be the ultimate

arbiter of orthodox business practices and the gatekeeper for who work in any given field.

The First Amendment's guarantee of Free Speech has long protected against being forced to express a message that violates ones' conscience. As this Court has repeatedly held, however, nobody should be forced to choose between being in the marketplace or following their religious convictions.

The Christian businesses and leaders of amici curiae highlight the many thousands of Americans working in fields outside pregnancy centers who may nevertheless be forced some day to abandon their religiously motivated business activity on pain of government prosecution and penalty.

ARGUMENT

I. As an Outworking of Faith, Many Christians Conduct Business According to Sincerely Held Religious Beliefs.

Work can be imbued with religious conviction irrespective of the industry or end product. In fact, the most prominent religions in America have long taught that their adherents' whole lives—especially their work—should reflect and bear witness to the values and truth claims of their religion. Their work is a matter of faithful living.

In Christianity, believers are told to conduct themselves and work in a manner fully pleasing to God. *See* Colossians 1:9. Indeed, "work has dignity because it is something that God does and because we do it in God's place, as his representatives ... all *kinds* of work have dignity." Timothy Keller, Every Good

Endeavor: Connecting Your Work to God's Work 36 (2014). Theologically, work was part of creation before the fall. Genesis 2:15 ("The Lord God took the man and put him in the garden of Eden to work it and keep it.").

The call to work writ large extends to the New Testament where believers are told how work is a calling from God. 1 Corinthians 7:17: "Only let each person lead the life that the Lord has assigned to him, and to which God has called him." Likewise, Jesus taught that one day God will ask everyone to give an account for what they did with the business and resources with which they were entrusted. Luke 12:13–21.

As evidenced by the broad memberships and missions of the amici curiae, one need not be preaching or performing sacraments to be engaged in faithful work. Many in business are motivated by religious beliefs and values, even if the service or product itself is not classified as religious. Consider the case of an Amish furniture maker. The work itself is an act of faithful adherence to the higher truth claims of his religion, with even the choice of tools (or lack thereof) being a matter of religious adherence The bedroom set offered for sale serves the same purpose as one from any other company. Yet the religious convictions and the calling of the Amish furniture maker are no less sincere just because the workplace was in manufacturing. Religion can be found in the workplace nearly anywhere.

Amici curiae represent members and religious workers in many spheres, including finance,

education, the arts, medicine, science, architecture, and technology. As a theological matter, these spheres are to be engaged a manner that honors God and acknowledges the created order.

Both Catholic and Protestant teaching speak of work as vocation. A vocational calling for a Christian means that someone is called to work in a manner consistent with God's will. Accordingly, the Catechism of the Catholic Church instructs that "[b]y reason of their special vocation it belongs to the laity to seek the kingdom of God by engaging in temporal affairs and directing them according to God's will." Catechism of the Catholic Church, ¶ 898 (1997). Likewise, the Catholic Church teaches that Christians are:

> ... as citizens of two cities, to strive to discharge their earthly duties conscientiously and in response to the Gospel spirit. ... This split between the faith which many profess and their daily lives deserves to be counted among the more serious errors of our age....
>
> Therefore, let there be no false opposition between professional and social activities on the one part, and religious life on the other. The Christian who neglects his temporal duties, neglects his duties toward his neighbor and even God, and jeopardizes his eternal salvation.

Pope Paul VI, *Gaudium et Spes*, ¶ 43 (Dec. 7, 1965), *available at* https://goo.gl/7cRZv4.

Protestants also have a history of teaching Christians to live out faith in work. For example, John Calvin's seminal Institutes of the Christian Religion state:

> [T]he Lord enjoins every one of us, in all the actions of life, to have respect to our own calling.... Every man's mode of life, therefore, is a kind of station assigned him by the Lord, that he may not be always driven about at random.... [I]t is enough to know that in everything the call of the Lord is the foundation and beginning of right action. He who does not act with reference to it will never, in the discharge of duty, keep the right path.

John Calvin, Institutes of the Christian Religion, Book 3, Chapter 10, Part 6, 2034–2035 (Beveridge trans., Edinburgh, Calvin Translation Society 1845) (1537), *available at* https://goo.gl/jHfTrj. The divide between secular work and sacred work is therefore foreign to most historic teaching of Christianity. Thus, Christianity "calls for transforming our understanding of work from a troublesome toil to a God-given vocation ... work is a thread running from creation straight to the cross." Jeff Myers, Understanding the Faith 229 (2016). As a matter of religious conviction, believers are to integrate faith with all of life, not compartmentalize between church and work.

It is not just the individual at work who lives out faith; businesses also seek to act consistent with the religious convictions of the leaders of the company.

"Business *in itself*—not just the ways business can contribute to the work of the church" glorifies God. Wayne Grudem, Business for the Glory of God: The Bible's Teaching on the Moral Goodness of Business 12 (2003).

The freedom to operate in business according to religious beliefs has been under attack. Recently the attacks have come against businesses that prominently feature creative expression, or which communicate a message for a client as the primary service. In this case California has passed a law targeting and burdening a limited set of religiously operated non-profit businesses in the pregnancy counseling sphere. The Petitioners are burdened with government regulations that require the businesses to express a message that is diametrically opposed to the primary message and viewpoint of the centers. This is a highly burdensome form of compelled government speech.

Like Petitioners, the faith of the amici curiae and its members may prohibit them from conveying every possible message the government may require. The First Amendment secures their right to refrain from giving voice to a message considered morally objectionable. Furthermore, businesses operated consistent with religious precepts should not be targeted or singled out for their religious convictions, as has happed to Petitioners.

As a general matter, businesses working in fields beyond the crisis pregnancy centers may be subject to laws which compel conformance with a disfavored message or bowing to standards which are contrary to

well-established religious values. Potential laws that would burden other Christians in the business world:

- Laws requiring businesses to communicate about religiously objectionable health services, such as abortion or assisted suicide.
- Laws requiring workers to use certain gender pronouns, even when using pronouns in conflict with biological sex would be religiously objectionable.
- Laws requiring affirmation of marriage forms different than religiously defined marriage.
- Laws compelling employers to adopt employment practices that violate religious convictions of the company.
- Laws prohibiting speech regardless of the sincerity of religious conviction compelling the speech in question.

Religious citizens of all stripes value the freedom of religion and concomitant freedom of speech that is sufficiently robust to protect living out faith in work, including the public and commercial spheres. Government compulsion, including compelled speech, threaten these constitutional protections. And with continuing proliferation of business regulations on business, the risks increase that these freedoms will be chilled and suppressed.

II. Free Speech Protects Petitioners Against Compelled Speech Espousing the Government's Antithetical Views.

The First Amendment's cherished rights to the freedom of speech sits at the core of the American

system of government. The California Reproductive FACT Act imperils Free Speech rights in this case. Amici recognize the threat to these Constitutional rights will chill other Christians beyond the parties in this case from engaging in businesses subject to government regulation. Often, the Free Speech Clause protects politically disfavored speakers, as in this case, including cases where the speech is religiously motivated. A failure to correct the court's opinion below will put a dint in the Free Speech protections at the core of individual liberty.

A. The Free Speech Clause protects against government efforts to compel someone to express a deeply objectionable message.

The First Amendment protects Petitioner from being compelled to tell the world something that is directly opposed to the core convictions of the Crisis Pregnancy Centers. "The right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'" *Wooley v. Maynard*, 430 U.S. 705, 717 (1977) (quoting *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943)); *see also Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2253 (2015) ("[T]he First Amendment stringently limits a State's authority to compel a private party to express a view with which the private party disagrees.").

In *Wooley*, the Court examined New Hampshire's law compelling citizens to express the state motto, "Live Free or Die" on license plates. The Court held that requiring this expression made the citizens "an instrument for fostering public adherence to an

ideological point of view [they] find[] unacceptable," and this violated the First Amendment. 430 U.S. at 715. This was so because "[t]he First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster ... an idea they find morally objectionable." *Id.*

This Court has consistently shielded private citizens from governmental efforts to compel them to speak against their will. *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (government may not compel a newspaper to print an unwanted editorial); *see also Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 566 (1995) (finding that a parade was protected under the First Amendment and that the public accommodations law could not compel the parade organizers to accept a group expressing an objectionable message).

B. Compelled speech diminishes the value of the speech and harms both the speaker and hearer.

This case is *West Virginia Board of Education v. Barnett* for the twenty-first century. Just as then, those in control of the levers of power have deemed some high value as justification to coerce unity in society. The question is not the end to be achieved, but "whether under our Constitution compulsion as here employed is a permissible means for its achievement." *Barnette*, 319 U.S. at 640. For better or worse, government control is often used to try and win an ideological battle. That battle here involves the ever-contentious issue of abortion. But it may well be any other ideological battle in the future. Those in the

majority will be wont to use the coercive power of government to try and tip the scales in favor of one side of the argument.

> Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men.

Barnette, 319 U.S. at 640. Persuasion by government coercion, however, falls short of the American Constitutional ideal. Just as in *Wooley*, where the government forced expression of an objectionable message on license plates, in the circumstances of this case the government seeks to compel speech that is objectionable to the speaker.

In the end, attempts to achieve unity by compulsion will never succeed. The faux unity of a compelled opinion comes from the cheapened nature of agreement at the force of the majority. As the Court in Barnett recognized,

> Ultimate futility of such attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity as a disturber of its pagan unity, the Inquisition, as a means to religious and dynastic unity, the Siberian exiles as a means to Russian unity, down to the fast failing efforts of our present totalitarian enemies. Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.

Id. at 641. The compulsion of an objectional message diminishes the dignity of the speaker. As even a

schoolboy knows, forced speech, such as an apology, is both insincere and hurtful to the speaker. This Court should protect the Free Speech rights of those who are the target of an ideological dispute where one side attempts to use government coercion of speech against the dissenting viewpoint.

CONCLUSION

For the foregoing reasons, this Court should reverse and remand the opinion of the Ninth Circuit Court of Appeals.

Respectfully submitted,

MICHAEL LEE FRANCISCO
Counsel of Record
MRD LAW
620 N. Tejon St., Suite 101
Colorado Springs, CO 80903
(303) 325-7843
michael.francisco@mrd.law

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No. 16-1140

IN THE

Supreme Court of the United States

NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES, D/B/A NIFLA, *et al.*,

Petitioners,

v.

XAVIER BECERRA, ATTORNEY GENERAL, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR *AMICI CURIAE* CALIFORNIA WOMEN'S LAW CENTER, GENDER JUSTICE, LEGAL VOICE, AND SOUTHWEST WOMEN'S LAW CENTER IN SUPPORT OF RESPONDENTS

AMY POYER
Senior Staff Attorney
CALIFORNIA WOMEN'S LAW CENTER
360 North Sepulveda Boulevard, Suite 2070
El Segundo, CA 90245
(323) 951-1041

LOIS D. THOMPSON
Counsel of Record
SIMONA WEIL
Attorney at Law
ELISA CARIÑO
Law Clerk
PROSKAUER ROSE LLP
2049 Century Park East
Los Angeles, CA 90067
(310) 557-2900
lthompson@proskauer.com

Counsel for Amici Curiae

278243

QUESTION PRESENTED

Whether the disclosures required by California's Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act ("FACT Act") violate the protections set forth in the Free Speech Clause of the First Amendment, which is applicable to the states through the Fourteenth Amendment.

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INTEREST OF *AMICI CURIAE*[1]

Amicus Curiae **California Women's Law Center** ("CWLC") is a statewide nonprofit law and policy center dedicated to breaking down barriers and advancing the potential of women and girls through impact litigation, advocacy and education. A vital part of CWLC's mission is fighting for reproductive health, rights, and justice by ensuring women have access to the health care opportunities they need to lead healthy and productive lives. CWLC believes that women and adolescent girls deserve the right to make choices about their bodies and it is vital to ensure that the full range of reproductive health options are accessible to all women and adolescent girls regardless of their income levels or residence.

CWLC has a direct interest in this case because of the prevalence of pregnancy centers and rates of unintended pregnancies in California. In 2010, forty-eight percent of all pregnancies (393,000) in California were unintended.[2] As of 2015, at least 228 pregnancy centers existed in

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[1] All parties have consented to the filing of this brief. Pursuant to this Court's Rule 37.6, *Amici* state that no counsel for any party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief.

[2] GUTTMACHER INSTITUTE, *State Facts About Unintended Pregnancy: California* (Aug. 2017), https://www.guttmacher.org/fact-sheet/state-facts-about-unintended-pregnancy-california (last visited Feb. 23, 2018).

California.[3] CWLC therefore has an interest in the enforcement of the FACT Act ensuring that women in California are informed of the public programs available to them when they are faced with an unplanned pregnancy or seek contraception services.

Amicus Curiae **Gender Justice** is a nonprofit organization in Minnesota that acts to eliminate gender barriers—whether linked to sex, sexual orientation, gender identity, or gender expression—through impact litigation, policy advocacy, and education. The organization takes a three-pronged approach to advocacy, combining the most current science on the root causes of discrimination, strategic court cases, and lasting public policy change. Gender Justice works toward reproductive rights, autonomy, and freedom for all. Gender Justice believes all women deserve accurate information about their pregnancies, like those who are protected by California's FACT Act. The organization is particularly vested in the outcome of this case. In Minnesota, ninety pregnancy centers purport to help women with unplanned pregnancies.[4]

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[3] UC HASTINGS COLLEGE OF LAW, PUBLIC LAW RESEARCH INSTITUTE, *Pregnancy Resource Centers: Ensuring Access and Accuracy of Information 2011* (citations reviewed and updated June 1, 2015) (citing RAMAH INTERNATIONAL, *CA-California Pregnancy Resource Centers*, https://www.helpinyourarea.com/california/ (last visited Feb. 23, 2018) (formerly http://ramahinternational.org/california.html)).

[4] HELP IN YOUR AREA: PREGNANCY RESOURCE CENTER DIRECTORY, *Minnesota – MN Pregnancy Resource Centers*,

Amicus Curiae **Legal Voice**, formerly known as the Northwest Women's Law Center, is a regional nonprofit public interest organization based in Seattle that works to advance women's and LGBTQ legal rights in the five Northwest states (Washington, Oregon, Idaho, Montana, and Alaska) through public impact litigation, legislation, and legal rights education. Since its founding in 1978, Legal Voice has been dedicated to protecting and expanding access to reproductive health care, and has long focused on the threats to access to reproductive health care posed by the deceptive practices of pregnancy centers. Legal Voice has participated as counsel and as *amicus curiae* in cases throughout the Northwest and the country to help ensure all people's rights to health care access, self-determination, and bodily autonomy. Notably, in 2010, forty-eight percent of all pregnancies (61,000) in Washington State were unintended.[5]

In 2010, Legal Voice and Planned Parenthood Votes Washington published the results of a two-year investigation into Washington State crisis pregnancy centers, available at http://www.nwwlc.org/focus/health/documents/LimitedServicePregnancyCentersReport1.2011.pdf. Based on its

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https://www.helpinyourarea.com/minnesota/ (last visited Feb. 23, 2018).

[5] GUTTMACHER INSTITUTE, *State Facts About Unintended Pregnancy: Washington* (Aug. 2017), https://www.guttmacher.org/fact-sheet/state-facts-about-unintended-pregnancy-washington (last visited Feb. 23, 2018).

investigation, Legal Voice determined that these entities undermine compelling city and state interests in regulating health care and protecting consumers. In 2017, Legal Voice testified before the Seattle-King County Board of Health in support of a proposed ordinance requiring crisis pregnancy centers to state clearly and publicly, in ten languages, that they are not health care providers, much like the FACT Act at issue in this case. As of February 2018, there are approximately fifty-five crisis pregnancy centers in Washington State.[6]

Amicus Curiae **Southwest Women's Law Center** is a nonprofit policy and advocacy law center that was founded in 2005 with a focus on advancing economic opportunities and protecting access to reproductive health for women and girls in the state of New Mexico. The Law Center works to ensure that women have access to quality, affordable healthcare, including access to contraceptives and abortion services. Through its policy and advocacy work, the Law Center helps to ensure that women have access to a full range of information regarding reproductive healthcare to make informed decisions about the healthcare services they choose. New Mexico has the highest rate of adolescent pregnancy in the entire country. And, over half of the

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[6] HELP IN YOUR AREA: PREGNANCY RESOURCE CENTER DIRECTORY, *Washington – WA Pregnancy Resource Centers*, https://www.helpinyourarea.com/washington/ (last visited Feb. 23, 2018).

pregnancies in the state are unintended.[7] Accordingly, the Southwest Women's Law Center is uniquely qualified to present argument concerning *National Institute of Family & Life Advocates, dba NIFLA v. Becerra*, particularly as it relates to the purposes and state interest in enacting the California FACT Act.

SUMMARY OF ARGUMENT

Seeking to "ensure that California residents make their personal reproductive health care decisions knowing their rights and the health care services available to them,"[8] California adopted the Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act ("the FACT Act" or "the Act") in 2015. Petitioners now challenge the Act.

The FACT Act is very straightforward. It requires (a) pregnancy care centers that are licensed medical providers to post a notice that the State has public programs that can provide, at no or low cost,

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[7] Kathryn Kost et al., GUTTMACHER INSTITUTE, *Pregnancies, Births and Abortions Among Adolescents and Young Women in the United States, 2013: National and State Trends by Age, Race and Ethnicity* (Sept. 2017), https://www.guttmacher.org/report/us-adolescent-pregnancy-trends-2013 (last visited Feb. 23, 2018); GUTTMACHER INSTITUTE, *State Facts About Unintended Pregnancy: New Mexico* (Aug. 2017), https://www.guttmacher.org/fact-sheet/state-facts-about-unintended-pregnancy-new-mexico (last visited Feb. 23, 2018).

[8] Assem. Bill 775, § 2, California FACT Act, 2015–2016 Reg. Sess. (Cal. 2015).

comprehensive family planning services including all FDA-approved methods of contraception, prenatal care, and abortion and (b) pregnancy centers that are not licensed as medical facilities to disclose that fact.

Amici submit this brief to counter Petitioners' assertion that the State of California does not have sufficient interest in protecting a woman's right to be informed that California has public programs that provide immediate and free or low cost comprehensive family planning services or to be informed that the facility she has entered is not a licensed medical provider to require the challenged notices.

California adopted the FACT Act knowing that low income women—those most likely to respond to pregnancy centers' offers of free services and most in need of information about the full range of free or low cost options available to them—are significantly more likely to have an unintended pregnancy than more affluent women. Significant, too, in relation to where pregnancy centers are located and how they are marketed, women of color, who are more likely than white women to be low-income, are more than twice as likely to experience an unintended pregnancy. Further, while it is estimated that just under half of all pregnancies in California are unintended, that percentage is closer to seventy-five percent for pregnant adolescents between the ages of fifteen and nineteen.

When it enacted the FACT Act, California also recognized that at the time they believe they may be pregnant, many women and adolescent girls are not

aware of the full range of low cost or free options available to them, including options for avoiding unintended pregnancies in the future. California also understood that pregnancy decisions are time sensitive and that it therefore was imperative to ensure that women and adolescent girls who believed they were pregnant and sought pregnancy-related services would be able to obtain information they required to make an informed decision about their situations as expeditiously as possible.

There is no violation of the First Amendment in California's law requiring that pregnancy care providers that do not offer abortions and do not provide information on all FDA-approved forms of contraception post a notice stating that there are public programs that do offer those alternatives at no or low cost and requiring unlicensed pregnancy centers that meet certain express criteria relating to the health and pregnancy services that they do provide to inform those seeking their services that they are not licensed medical facilities.

ARGUMENT

I. CALIFORNIA HAS AN INTEREST THAT IS SUFFICIENT TO WITHSTAND ANY LEVEL OF SCRUTINY IN ENSURING THAT WOMEN WHO HAVE UNPLANNED PREGNANCIES KNOW THAT THE STATE HAS PROGRAMS TO PROVIDE FREE OR LOW COST COMPREHENSIVE FAMILY PLANNING SERVICES TO THEM

A. Pregnancy Centers Target People Who Are Most in Need of Truthful Information about Where to Access Low Cost or Free Reproductive Health Care

California's Reproductive Privacy Act provides that every individual has the fundamental right to choose to bear a child or to choose to obtain an abortion prior to the viability of the fetus and that every individual has the fundamental right to choose or refuse birth control.[9] Because the people of California have determined that they should have access to the means to exercise these fundamental rights regardless of ability to pay, California provides state-funded health insurance coverage of both abortion and contraception.[10] And to

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[9] Sen. Bill 1301, Reproductive Privacy Act, 2001-2002 Reg. Sess. (Cal. 2002) (codified at CAL. HEALTH & SAFETY CODE § 123462 (a) and (b)).

[10] *Id.; see also* NATIONAL HEALTH LAW PROGRAM, *California Abortion Coverage in Medi-Cal and Private Insurance*, http://accesswhj.org/sites/default/files/docs/NHeLP-CAAbortionCoverageFactSheet-Web.pdf; CAL. DEP'T OF HEALTH

ensure that the people of the state know of these programs and how to access them, California enacted the FACT Act. The express purpose of the Act is to "ensure that California residents make their personal reproductive health care decisions knowing their rights and the health care services available to them."[11]

Petitioner pregnancy centers do not include abortion among the options that they offer women who have unplanned pregnancies and they do not dispense "contraceptives, abortifacients, and IUDs."[12] They contest the provisions of the FACT Act that require pregnancy centers that are licensed primary care facilities to post a notice informing their clients that California has public programs that do provide free or low cost access to comprehensive family planning services, including all FDA-approved methods of contraception and abortion, and that require centers that provide pregnancy-related services but are not licensed by the state and do not have a licensed medical officer on staff to so inform their clients.

CARE SRVS., *Medi-Cal Provider Manual Ch. Abortions*, at 1; CAL. DEP'T OF HEALTH CARE SRVS., *Medi Cal Provider Manual Ch. Family Planning*, at 2, 7–12; CAL. HEALTH & SAFETY CODE § 1367.25.

[11] Assem. Bill 775, § 2, California FACT Act, 2015–2016 Reg. Sess. (Cal. 2015).

[12] Brief for Petitioners ("Pet. Br.") at 14, *Nat'l Inst. of Family & Life Advocates v. Becerra* (2018) (No. 16-1140).

These notices are of particular importance because both licensed and unlicensed pregnancy centers target pregnant women and adolescents most in need of information about the full range of publicly funded options available to them.

The NARAL Pro-Choice California Foundation ("NARAL") undertook an investigation of pregnancy centers in California in 2010, visiting fourteen and contacting eighteen others, and then issued a report on its findings.[13] Petitioners dismiss NARAL as "partisan"[14] but fail to challenge the substance of its findings. These include that pregnancy centers "increasingly target groups that are the most underserved by the current health-care system...These groups include women of color, young women, women living in rural locations, and low-income women."[15] [16]

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[13] NARAL PRO-CHOICE CALIFORNIA FOUNDATION, *Unmasking Fake Clinics: The Truth About Crisis Pregnancy Centers in California* (2010), at 13, https://www.sfcityattorney.org/wp-content/uploads/2015/08/Unmasking-Fake-Clinics-The-Truth-About-Crisis-Pregnancy-Centers-in-California-.pdf [hereinafter "NARAL REPORT"].

[14] Pet. Br. at 52, n.17.

[15] NARAL REPORT at 6.

[16] *Amici* show below that these groups also experience relatively high rates of unintended pregnancies. *Amici* located outside California have observed, documented, and sought to correct the same activities by pregnancy centers in their states that NARAL reported on in California because they have had the same negative impact on access to reproductive health care that is described in the text with respect to California.

Amici compared the list of 228 pregnancy centers in California with 2010 census data and determined that almost twenty-eight percent of the pregnancy centers in California are located in what the United States Census defines as a rural community (that is, an area outside an Urban Area which is itself defined as having 50,000 or more inhabitants). These centers also are located in areas in which the median household income is below the national average.[17] The NARAL California Report found that ninety-three percent of the counties in California, many of which are rural, have one or more pregnancy centers.[18]

Citing to information that was then posted on the website of Care Net, an association of approximately 1100 pregnancy centers, including centers in California,[19] NARAL reported that the network had created an initiative to increase the number of African American women who came to its centers by constructing new

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[17] *Compare* UC HASTINGS COLLEGE OF LAW, PUBLIC LAW RESEARCH INSTITUTE, *Pregnancy Resource Centers: Ensuring Access and Accuracy of Information 2011* (citations reviewed and updated June 1, 2015) *with* CALIFORNIA PROLIFE COUNCIL, *List of Crisis Pregnancy Centers*, https://www.californiaprolife.org/crisis-pregnancy-centers/ (last visited Feb. 23, 2018). *Amici* then collected the relevant data from the United States Census Bureau for the cities in California where crisis pregnancy centers are located.

[18] NARAL REPORT at 6.

[19] For example, Care Net of Northern California in Redding, California, as well as Care Net designated facilities in Santa Maria, Lancaster, Lompoc, Paradise, and Red Bluff, California.

locations in neighborhoods with large populations of African Americans, affiliating with local institutions such as churches in those neighborhoods, and buying advertisements on outlets like Black Entertainment Television that compared abortion to slavery.[20] NARAL also reported that Care Net advertised in bus shelters to attract women who might be homeless or low-income.[21]

Further, NARAL found that some pregnancy centers had opened near comprehensive women's health clinics with the expectation that unsuspecting people seeking pregnancy-related services might enter the centers in the mistaken belief that they were entering the comprehensive women's health clinic. Of the fourteen California pregnancy centers that NARAL reported visiting, two were located within one hundred yards of a Planned Parenthood clinic.[22]

In a separate report, the National Abortion Federation found that pregnancy centers targeted young people by offering free pregnancy tests, advertising in school newspapers, and opening in close proximity to colleges and universities.[23]

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[20] NARAL REPORT at 6, nn. 45–46.

[21] *Id.*

[22] *Id.*

[23] NATIONAL ABORTION FEDERATION, *Crisis Pregnancy Centers: An Affront to Choice*, at 5 https://www.prochoice.org/pubs_research/publications/downloads/public_policy/cpc_report.pdf (2006).

The people targeted by pregnancy centers also are those who experience relatively high rates of unplanned pregnancy and, because they are most likely to lack private insurance coverage for reproductive care, are most in need of information disclosing that all FDA-approved methods of contraception, including abortion, are available through public programs in California for free or at low cost.

B. The Groups Targeted by Pregnancy Centers Are Those Who Most Need to Be Informed that Public Programs in California Provide Free or Low Cost Comprehensive Family Planning Services

By virtue of the size and relatively young age of its population, California accounts for one in eight of all births in the United States. Over half a million babies were born in California in 2014, and having a baby was the number one reason for hospital admissions in the state.[24] The State therefore has great interest in and concern for the medical services and options available to its pregnant population.

Further, when California adopted the FACT Act in 2015, it was well known that almost one-half of the pregnancies in California were unplanned,[25] and that

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[24] Jen Joynt, CALIFORNIA HEALTH CARE FOUNDATION, *Maternity Care in California: Delivering the Data*, CALIFORNIA HEALTH CARE FOUNDATION (June 28, 2016), http://www.chcf.org/publications/2016/06/maternity-care-california (last visited Feb. 23, 2018).

[25] *Id.*

"[u]nintended pregnancy can have significant, negative consequences for individual women [and] their families...An extensive body of research links births resulting from unintended or closely spaced pregnancies to adverse maternal and child health outcomes and myriad social and economic challenges."[26]

Moreover, when California adopted the FACT Act it also was well known that the groups being targeted by pregnancy centers were those with the highest incidence of unplanned pregnancies. For example, "[l]ow-income women [were] more likely than more affluent women to have an unintended pregnancy. The unintended pregnancy rate among women with an income below the federal poverty level ($18,530 for a family of three in 2011) was more than five times that among women with an income at or above 200% of poverty in 2011."[27] And, "[w]omen of color are also much more likely than white women to experience unintended pregnancy. In 2011, black and Hispanic women had an unintended pregnancy rate of seventy-nine and fifty-eight per 1,000 women,

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[26] As reported by the Guttmacher Institute, in 2010, forty-eight percent of all pregnancies (393,000) in California were unintended. GUTTMACHER INSTITUTE, *State Facts About Unintended Pregnancy: California* (Aug. 2017), https://www.guttmacher.org/fact-sheet/state-facts-about-unintended-pregnancy-california (last visited Feb. 23, 2018) (citing studies).

[27] Lawrence B. Finer & Mia R. Zolna, *Declines in Unintended Pregnancy in the United States, 2008-2011*, 374 NEW ENG. J. OF MED. 843–52 (March 3, 2016), http://www.nejm.org/doi/full/10.1056/NEJMsa1506575.

respectively, compared with thirty-three per 1,000 among white women."[28]

Additionally, there is a high rate of unintended pregnancy among adolescent girls: "The majority (75%) of adolescent pregnancies in the United States are unintended,"[29] and there is no reason to believe the percentage in California is materially different.[30]

The Kaiser Family Foundation reports that the pregnancy rates for African American, Hispanic, and Native American adolescent girls are over twice the rates for White and Asian American adolescent girls, and that adolescent pregnancy rates are higher in rural than in suburban and urban areas.[31] Additional studies

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[28] GUTTMACHER INSTITUTE, *Medicaid Funding of Abortion* (Dec. 2016), https://www.guttmacher.org/evidence-you-can-use/medicaid-funding-abortion (last visited Feb. 23, 2018).

[29] GUTTMACHER INSTITUTE, *State Facts About Unintended Pregnancy: California* (Aug. 2017), https://www.guttmacher.org/fact-sheet/state-facts-about-unintended-pregnancy-california (last visited Feb. 23, 2018).

[30] The earlier findings of the Kaiser Family Foundation are to the same effect: "The overwhelming majority-78 percent-of pregnancies to 15-19 year old teen girls are not planned. Among younger teens, 15-17 year olds, 83 percent of pregnancies are unplanned." KAISER FAMILY FOUNDATION, *Teen Pregnancy: Key Statistics* (Jan. 31, 1998), https://www.kff.org/hivaids/teen-pregnancy-key-statistics/ (last visited Feb. 23, 2018). "More than four in 10 young women become pregnant at least once before they reach the age of 20 – nearly one million a year." *Id.*

[31] KAISER FAMILY FOUNDATION, *Sexual Health of Adolescents and Young Adults in the United States* (Aug. 20, 2014),

of pregnancies among African American adolescent girls have found that fifty-one percent of African-American girls will become pregnant at least once before they turn twenty. In comparison, nineteen percent of non-Latina white adolescent girls will become pregnant before that same age.[32]

C. Women and Adolescent Girls Experiencing Unplanned Pregnancies Require Timely Information About the Availability of Abortion Services

The decision about whether to have an abortion is time sensitive. Abortions cannot legally be performed in California once the fetus is viable. Further, the medical risks, while not great, increase with the length of the pregnancy.[33]

i. Delayed Recognition of Pregnancy

Receiving timely information about the availability of free or low cost comprehensive family planning services,

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https://www.kff.org/womens-health-policy/fact-sheet/sexual-health-of-adolescents-and-young-adults-in-the-united-states/ (last visited Feb. 23, 2018).

[32] NATIONAL CAMPAIGN TO PREVENT TEEN AND UNPLANNED PREGNANCY, *Policy Brief: Racial and Ethnic Disparities in Teen Pregnancy* (June 2010), http://www.amchp.org/AboutAMCHP/Newsletters/Pulse/Archive/2011/May2011/Pages/Resources.aspx.

[33] *See, e.g.*, Linda Bartlett et al., *Risk Factors for Legal Induced Abortion-Related Mortality in the United States*, 103 OBSTETRICS & GYNECOLOGY 729–37 (April 2004).

including abortion, is particularly important for those experiencing their first pregnancy and for young women because delay in recognition of pregnancy is associated with young age and a first pregnancy.[34] [35]

ii. Pregnancies Resulting from Rape or Coercion

Receiving timely information—and the opportunity to act on it—is also of enormous importance to women and adolescent girls who have been raped[36] or become

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[34] *See, e.g.*, Diana Greene Foster et al., *Socioeconomic Outcomes of Women Who Receive and Women Who Are Denied Wanted Abortions in the United States*, 108 AM. J. OF PUBLIC HEALTH 407–13 (March 1, 2018), http://ajph.aphapublications.org/doi/10.2105/AJPH.2017.304247, and studies cited therein, at 6, nn. 18–20.

[35] The importance of timely information about all options including abortion is underscored by the additional health risks present when an adolescent as compared to an adult woman is pregnant. "Among adolescents, low birth rate and preterm deliveries are more than twice as common as in adult pregnancies and the neonatal mortality rate is almost 3 times higher...Pregnant adolescents under the age of 15 years also are at higher risk for maternal complications than are adult mothers. Some of the most common problems are abnormally high maternal weight gains, pregnancy-induced hypertension, anemia, and renal disease." Janet C. King, *The Risk of Maternal Nutritional Depletion and Poor Outcomes Increases in Early or Closely Spaced Pregnancies*, 133 THE JOURNAL OF NUTRITION 1732S–1736S (May 2003).

[36] According to the California Attorney General, there were 13,695 instances of rape reported to law enforcement authorities in the state in 2016. ATTORNEY GENERAL, CALIFORNIA DEPARTMENT OF JUSTICE, *Crime in California*, at 5 (2016),

pregnant as a consequence of intimate partner violence. As this Court recognized in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, intimate partner violence is all too common in the United States: "[I]n an average 12-month period in this country, approximately two million women are the victims of severe assaults by their male partners."[37] Approximately one in four women who have been raped by their intimate partners becomes pregnant.[38] In addition, many men in violent relationships exercise what has become known as reproductive or pregnancy coercion, refusing to use condoms and sabotaging their partners' efforts to use birth control.[39]

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https://openjustice.doj.ca.gov/resources/publications. This number greatly understates the number of rapes actually committed because rape is notoriously under-reported. *See, e.g.*, CALLIE MARIE RENNISON, U. S. DEP'T OF JUSTICE BUREAU OF JUSTICE STATISTICS, *Rape and Sexual Assault: Reporting to Police and Medical Attention, 1992-2000*, at 2 (Aug. 2002), https://www.bjs.gov/content/pub/pdf/rsarp00.pdf (noting that only thirty-six percent of victims of completed rapes reported these crimes to the police).

[37] 505 U.S. 833, 891 (1992).

[38] Judith McFarlene, *Pregnancy Following Partner Rape: What We Know and What We Need to Know*, 8 TRAUMA, VIOLENCE, & ABUSE 127, 128 (2007).

[39] *See, e.g.*, Elizabeth Miller et al, *Pregnancy Coercion, Intimate Partner Violence, and Unintended Pregnancy*, 81 CONTRACEPTION 316 (2010); Anne M. Moore et al., *Male Reproductive Control of Women Who Have Experienced Intimate Partner Violence in the United States*, 70 SOC. SCI. & MED. 1737 (2010).

The unintended pregnancies of adolescent girls correlate highly with abuse and reproductive coercion.[40] Reproductive coercion involving adolescents may include rape, coerced sex, and pressure to get pregnant as a means of proving loyalty to the abusive partner.[41]

Research has found that almost fifty percent of women who become pregnant as a result of rape obtain abortions. [42] Women and adolescent girls who experience forced pregnancies therefore have a particular need for timely information about the availability of abortion and how to access providers who will perform an abortion.

iii. Lack of the Means to Support a Child

"When women are asked why they want to end a pregnancy, the most common reasons are financial—in particular not having enough money to raise a child or support another child."[43] Consistent with that finding, in

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[40] Elizabeth Miller et al., *Male Partner Pregnancy – Promoting Behaviors and Adolescent Partner Violence: Findings from a Qualitative Study with Adolescent Females*, 7 AMBULATORY PEDIATRICS 360, 364–65 (2007).

[41] *Id.* at 363–64; Anne M. Moore et al., *Male Reproductive Control of Women Who Have Experienced Intimate Partner Violence in the United States*, 70 SOC. SCI. & MED. 1740 (2010).

[42] Melissa M. Holmes et al., *Rape-Related Pregnancy: Estimates and Descriptive Characteristics from a National Sample of Women*, 175 AM. J. OBSTETRICS & GYNECOLOGY 320, 322 (1966).

[43] Janet C. King, *The Risk of Maternal Nutritional Depletion and Poor Outcomes Increases in Early or Closely Spaced Pregnancies*, 133 THE JOURNAL OF NUTRITION 1732S–1736S (May, 2003).

2014, seventy-five percent of abortions were among poor and low-income women; forty-nine percent of those women had a family income less than 100 percent of the federal poverty level.[44] [45] It therefore is essential that low income women visiting pregnancy centers receive timely information about their reproductive health care options so that they can reach an informed decision about whether to seek an abortion.

A recently completed five-year longitudinal study comparing the lives of otherwise similarly situated women who carried an unwanted pregnancy to term and those who had an abortion found "a close link between obtaining abortion care and subsequent poverty."[46] The "majority of women in the study were living in poverty at baseline, and carrying the unwanted pregnancy to term led to almost a 4-fold increase in the odds that a woman's household income was below the FPL [federal poverty level]. [Failure to obtain a desired abortion] may result

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[44] As a point of reference, according to the United States Census, 15.4% of the total population and 16.4% of the California population had incomes below the poverty level in 2014. LEGISLATIVE ANALYST'S OFFICE, *Census Bureau's Updated Poverty Statistics* (Sept. 24, 2015), http://www.lao.ca.gov/LAOEconTax/Article/Detail/136.

[45] GUTTMACHER INSTITUTE, *Medicaid Funding of Abortion* (Dec. 2016), https://www.guttmacher.org/evidence-you-can-use/medicaid-funding-abortion (last visited Feb. 23, 2018).

[46] Janet C. King, *The Risk of Maternal Nutritional Depletion and Poor Outcomes Increases in Early or Closely Spaced Pregnancies*, 133 THE JOURNAL OF NUTRITION 1732S–1736S (May 2003).

in reductions in full-time employment, increased incidence of poverty, more women raising children alone, and greater reliance on public assistance."[47]

iv. The FACT Act Ensures Timely, Complete Information

Recognizing that pregnancy-related decisions are time sensitive, in adopting the FACT Act, California sought to ensure that a woman or adolescent girl who knew or feared she was experiencing an unplanned pregnancy and visited a pregnancy center was given the opportunity to learn about all of her low or no cost options, including abortion.

In *Whole Woman's Health*, this Court considered the constitutionality of provisions of a Texas law requiring that (1) a physician performing an abortion must have active admitting privileges at a hospital not more than thirty miles away and (2) that an abortion facility must have the same minimum standards as a surgical facility.[48] After determining that neither provision conferred medical benefits sufficient to justify the substantial burden these obstacles placed on the right to abortion access, this Court struck down both provisions.[49] Here, California's FACT Act sought to address and mitigate the substantial obstacles pregnancy centers were

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[47] *Id.*

[48] *Whole Woman's Health v. Hellerstedt*, 579 U.S. ___, 136 S. Ct. 2300 (2016) (citing *Casey*, 505 U.S. at 878).

[49] *Id.*

creating that resulted in an undue burden on access to reproductive health services, including abortion.[50]

For these reasons, California has an interest that survives any level of First Amendment scrutiny in requiring that women and adolescent girls in California who are experiencing unplanned pregnancies and are visiting pregnancy centers that do not offer abortions be given notice regarding the availability in California of public programs that provide comprehensive family planning services, including abortion, at low cost or for free.

II. CALIFORNIA HAS AN INTEREST IN ENSURING THAT WOMEN AND ADOLESCENT GIRLS VISITING PREGNANCY CENTERS LEARN THAT CALIFORNIA PROVIDES IMMEDIATE ACCESS TO ALL FDA-APPROVED METHODS OF CONTRACEPTION AT NO OR LOW COST

Petitioners label the disclosure required of licensed pregnancy centers as the "Compelled Abortion Referral"[51] and direct their argument to their objection

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[50] *See* Assem. Bill 775, § 1a, California FACT Act, 2015-2016 Reg. Sess. (Cal. 2015) ("All California women, regardless of income, should have ***access to reproductive health services***.") (emphasis added); *id.* at § 2 ("The purpose of this act is to ensure that California residents make their personal reproductive health care decisions knowing their rights and the health care services available to them.")

[51] It bears repeating that the challenged disclosure is not a "referral." It is a notice stating that California has programs that provide family planning services, including abortion, and that if a

to providing notice that California provides opportunities to obtain low or no cost abortions. In doing so, they all but ignore the portion of the challenged notice that states that California has public programs that provide free or low cost access to all FDA-approved methods of contraception. Yet, California has an independent interest in ensuring that information relating to access to contraception is provided to all people who visit pregnancy centers.

Such information—and access to effective, safe contraception—is essential if the number of unplanned pregnancies is to be reduced, particularly for adolescent girls and for women and girls who are seeking to avoid additional pregnancies when their health or financial pressures cause them to conclude that they should not add additional children to their households.

A. The Importance of Contraception

Amici referenced above in footnote thirty-five the particular health risks of pregnancy to adolescents that support California's interest in ensuring that adolescents who seek the services of a pregnancy center are provided the opportunity to learn of all the methods of contraception that are available to them at free or no cost in California. There also are significant health risks to women of all ages that are associated with closely spaced pregnancies that further support California's interest in requiring that pregnancy centers provide

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woman is interested in learning if she qualifies for those services, she may contact the local social services office.

notice that the state has public programs to provide all FDA-approved methods of contraception at low cost or for free.

In the United States, women with interpregnancy intervals of under eight months are fourteen to forty-seven percent more likely to have very premature to moderately premature infants than are women with intervals of eighteen to fifty-nine months.[52] And, notwithstanding advancements in neonatal health techniques, more than 15,000 babies in the United States die each year within one month of birth —with one-quarter or more of these deaths directly related to premature birth.[53] Citing academic studies, the Mayo Clinic identifies the following risks in addition to premature births associated with closely spaced pregnancies (within six months of a live birth): low birth weight and the placenta partially or completely peeling away from the inner wall of the uterus before delivery (placental abruption).[54]

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[52] Janet C. King, *The Risk of Maternal Nutritional Depletion and Poor Outcomes Increases in Early or Closely Spaced Pregnancies*, 133 THE JOURNAL OF NUTRITION 1732S–1736S (May, 2003) (citing studies).

[53] *See, e.g.*, U.S. DEP'T OF HEALTH & HUMAN SERVICES, MATERNAL AND CHILD HEALTH BUREAU, *Child Health USA 2013*, https://mchb.hrsa.gov/chusa13/perinatal-health-status-indicators/perinatal-health-status-indicators.html.

[54] Low birthweight babies are at an increased risk of lifelong health problems or even dying before age one. Jen Joynt, CALIFORNIA HEALTH CARE FOUNDATION, *Quality of Care: Maternal and*

Reduction of unintended pregnancy is a national public health goal, because, in addition to pre-term birth and low birth weight, the consequences include delayed prenatal care, and negative health effects for the children born of unplanned pregnancies.[55] In the U.S. and indeed, around the world, contraception use, especially contraception use that allows for birth spacing, also is associated with a reduction in maternal mortality.[56]

B. The Need for and California's Interest in Publicly Supported Contraception

According to the Guttmacher Institute, in 2014, 2,643,580 women in California were in need of publicly supported contraceptive services and supplies.[57] Women are considered to be in need of publicly supported

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Childbirth Health Metrics, CALIFORNIA HEALTH CARE FOUNDATION (Nov. 3, 2017), http://www.chcf.org/publications/2017/11/quality-maternity-care (last visited Feb. 23, 2018).

[55] GUTTMACHER INSTITUTE, *Unintended Pregnancy in the United States* (Sept. 2016), https://www.guttmacher.org/fact-sheet/unintended-pregnancy-united-states, (last visited Feb. 23, 2018)

[56] Amy O. Tsui et al., *Family Planning and the Burden of Unintended Pregnancies*, 32 EPIDEMIOLOGIC REVIEW 152, 165 (2010).

[57] GUTTMACHER INSTITUTE, *State Facts on Publicly Funded Family Planning Services: California* (Sept. 2016), https://www.guttmacher.org/fact-sheet/state-facts-publicly-funded-family-planning-services-california (last visited Feb. 23, 2018).

contraceptive services and supplies if they ever have had sex, are aged thirteen to forty-four, are able to become pregnant, are not pregnant or postpartum nor are they trying to become pregnant, and either have a family income below 250% of the federal poverty level or are younger than age twenty.[58] Large proportions of these women are young, people of color, low income, or uninsured.[59]

Most states use some of their own money (in addition to funds required to match federal grants) for family planning services. In 2010, California contributed $68.7 million to this effort.[60] According to the Guttmacher Institute, in 2014, publicly funded family planning centers in California helped avert 321,100 unintended pregnancies which, the Institute found, would have resulted in 156,100 unplanned births and 115,800 abortions.[61]

Further confirming California's interest in the challenged disclosure relating to public programs providing low cost or free contraceptive services, the Guttmacher Institute also found that by averting unintended pregnancies and other negative reproductive

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[58] *Id.*

[59] *Id.*

[60] GUTTMACHER INSTITUTE, *State Facts About Unintended Pregnancy: California* (Aug. 2017), https://www.guttmacher.org/fact-sheet/state-facts-about-unintended-pregnancy-california (last visited Feb. 23, 2018).

[61] *Id.*

health outcomes, publicly funded family planning services provided by safety-net health centers in California helped save the federal and state governments almost $1.8 billion in 2010.[62]

III. PETITIONERS' BRIEF DEMONSTRATES WHY CALIFORNIA HAS AN INTEREST IN REQUIRING THAT FACILITIES LIKE PETITIONER FALLBROOK PREGNANCY RESOURCE CENTER DISCLOSE THAT THEY ARE NOT LICENSED MEDICAL FACILITIES

The FACT Act furthers an additional state interest: that of ensuring that people in California seeking health care are not misled by the organizations to which they turn.[63] Petitioners' own brief demonstrates why such regulation is necessary.

Petitioners assert that Fallbrook Pregnancy Resources Center ("Fallbrook") is an "unlicensed center that offers non-medical pregnancy-related information and services for free" and cites to the Fallbrook website for a description of the services it provides.[64] Petitioners then argue that there is "no basis to conclude disclosure

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[62] *Id.*

[63] *Amici* do not here repeat the discussions in other briefs (*see, e.g.*, Brief for the State Respondents at 6–7) relating to the misleading or deceptive statements and actions of pregnancy centers that the FACT Act was intended to counter. Here they focus on a particular instance to further illustrate the problem the Act was intended to address.

[64] Pet. Br. at 6–7.

[like that required by the FACT Act] is needed to clarify anything at all because the centers are not purporting to provide medical services."[65] Significantly, however, even the most cursory review of the Fallbrook website demonstrates why California has an interest in requiring the challenged notice.

Citing to the Fallbrook webpage entitled "Our Services,"[66] Petitioners state that Fallbrook provides "pregnancy test kits that women administer and diagnose themselves, maternity clothing, baby clothes, baby food and formula, baby bottles, diapers, strollers, high chairs, baby toys, nursery furniture, play yards, educational programs, resources on maternal and prenatal health, emotional support, spiritual resources, preparation for parenting, and community referrals [that support a healthy pregnancy, parenting and early childhood care]."[67] Tellingly, however, the long description presented in the brief omits reference to ultrasounds. Yet, the very same webpage to which Petitioners cite also says: "Free ultrasound scan: If you are facing an unplanned pregnancy, a limited OB ultrasound will tell you if your pregnancy is viable and how far along you are. This information may determine

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[65] Pet. Br. at 27.

[66] FALLBROOK PREGNANCY RESOURCE CENTER, *Our Services*, http://www.fallbrookprc.com/Our-Services (last visited Feb. 23, 2018).

[67] Pet. Br. at 6–7; FALLBROOK PREGNANCY RESOURCE CENTER, *Our Services*, http://www.fallbrookprc.com/Our-Services (last visited Feb. 23, 2018).

what options are available to you. *If you have a positive pregnancy test our staff may schedule a limited OB ultrasound appointment for you.*"[68] [69] Equally significant, notwithstanding Petitioners' claim that because Fallbrook provides "pregnancy test kits that women administer and diagnose themselves"[70] no one could reasonably assume that Fallbrook offers medical services, no such statement appears on the webpage. Instead, the webpage states: "Free pregnancy tests: If you are experiencing any of [the] symptoms [described above] you should make an appointment at FPRC [Fallbrook Pregnancy Resource Center] to verify pregnancy. FPRC offers free pregnancy tests performed in a confidential setting. Our pregnancy tests are laboratory quality and up to 99% accurate...."[71]

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[68] Notably absent from the services description provided to a pregnant woman who accesses the website is any suggestion that Fallbrook staff will not perform that ultrasound. Yet, to make its case before this Court, Fallbrook alleges in the complaint that "Fallbrook contracts with a *separate* organization that is a licensed medical provider of ultrasound services. Fallbrook refers women to that provider's *separate* mobile facility located nearby." Complaint at 8 ¶ 40, *National Institute of Family & Life Advocates, dba NIFLA v. Harris* (emphasis added).

[69] FALLBROOK PREGNANCY RESOURCE CENTER, *Our Services*, http://www.fallbrookprc.com/Our-Services (last visited Feb. 23, 2018) (emphasis added).

[70] Pet. Br. at 6.

[71] FALLBROOK PREGNANCY RESOURCE CENTER, *Our Services*, http://www.fallbrookprc.com/Our-Services (last visited Feb. 23, 2018).

Fallbrook's homepage, where a pregnant woman is most likely to first encounter a description of its services, underscores the need for the disclosure mandated by the FACT Act for unlicensed facilities. After posing the questions "Pregnant?" "What's next?" the webpage provides a number of options including "CONFIRM YOUR PREGNANCY" (not, as implied by Petitioners, "confirm your pregnancy with a test kit that you will be required to administer yourself") and "FREE ULTRASOUNDS" (not, as implied by Petitioners, "we do not provide ultrasounds but we can refer you to a separate organization that can").[72]

Given that Fallbrook holds itself out as a facility to confirm a pregnancy based on "[its] pregnancy tests" and that it offers free ultrasounds that its "staff" will "schedule," California plainly has an interest in ensuring that the facility also informs women accessing its website and entering its premises that it is not a licensed medical facility.

CONCLUSION

California recognizes as fundamental rights the decisions to bear a child or obtain an abortion and to choose or refuse birth control. Because those rights are fundamental, California ensures that all people, including its low-income residents, can access those services, and thus exercise those rights. Pregnancy centers, which target low income women and adolescent

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[72] FALLBROOK PREGNANCY RESOURCE CENTER, www.fallbrookprc.com (last visited Feb. 23, 2018).

girls, but do not provide abortion services and do not dispense contraceptives, interfere with the exercise of those rights. The State of California therefore adopted the FACT Act to ensure that people who visited pregnancy centers received notice that California has public programs available at no or low cost that do permit them to exercise all of their reproductive rights and to ensure they know whether they are seeking pregnancy-related services from a facility that is not a licensed medical provider. California's interest in the FACT Act can withstand any level of constitutional scrutiny. Accordingly, *Amici* urge this Court to affirm the decision below.

Respectfully submitted,

LOIS D. THOMPSON
Counsel of Record
SIMONA WEIL
Attorney at Law
ELISA CARIÑO
Law Clerk
PROSKAUER ROSE LLP

AMY POYER
Senior Staff Attorney
CALIFORNIA WOMEN'S LAW CENTER

Counsel for Amici Curiae

February 27, 2018

No. 16-1140

In the Supreme Court of the United States

NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES, D/B/A NIFLA, ET AL., PETITIONERS,

v.

XAVIER BECERRA, ATTORNEY GENERAL OF CALIFORNIA, ET AL., RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* CARE NET IN SUPPORT OF PETITIONERS

John J. Bursch
BURSCH LAW PLLC
Counsel of Record
9339 Cherry Valley Ave SE, #78
Caledonia, MI 49316
(616) 450-4235
jbursch@burschlaw.com

Counsel for *Amicus Curiae*

QUESTION PRESENTED

Whether the Free Speech Clause of the First Amendment prohibits California from compelling licensed pro-life centers to post information on how to obtain a state-funded abortion and from compelling unlicensed pro-life centers to disseminate a disclaimer to clients on site and in any print and digital advertising.

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INTEREST OF *AMICUS CURIAE*

Care Net is a national non-profit corporation and one of the largest affiliation organizations for pregnancy resource centers in North America. Care Net's mission is to promote a culture of life through the delivery of valuable, life-affirming, evangelistic ministry to people facing unplanned pregnancies and related issues. To accomplish this mission, Care Net provides education, support, and training for its more than 1,100 affiliates. Care Net also runs the nation's only real-time call center, providing pregnancy decision coaching.

Care Net is directly impacted by, and deeply concerned about, California's decision to force pregnancy resource centers in California to become spokespersons for the abortion industry. As detailed below, such compelled speech of a non-commercial, religiously-motivated entity violates the Free Speech Clause of the First Amendment.[1]

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that this brief was not authored in whole or in part by counsel for any party, and no person or entity other than Care Net and its counsel made a monetary contribution to the preparation or submission of this brief. In accordance with this Court's Rule 37.2, all counsel consented to the filing of the brief.

INTRODUCTION

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein." *West Virginia Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 642 (1943). Yet such orthodoxy is precisely what the high and petty California politicians demand here. The Reproductive FACT Act was enacted with the admitted purpose of targeting pro-life pregnancy resource centers based on the centers' viewpoint that "discourage[s] abortion." Pet. App. 7a. The Act forces the centers to be spokespersons for the abortion industry via compelled speech—specifically, the posting of notices directing women how to obtain a state-funded abortion, and forcing utterance of the obvious fact that the centers do not provide medical treatment. The second requirement is an absurd command to dissuade clients; the first is anathema to organizations whose religiously-motivated speech and conduct is to save lives, not to take them.

In *Agency for International Development* v. *Alliance for Open Society International*, 133 S. Ct. 2321 (2013), this Court said the government could not condition funding on a recipient's promise to express a message; had such a policy been enacted as a direct speech regulation, it would "plainly violate the First Amendment," *id.* at 2327, because "freedom of speech prohibits the government from telling people what they must say," *id.* Yet telling pregnancy resource centers what *they* must say is the FACT Act's entire purpose. This Court should reverse the Ninth Circuit and invalidate the Reproductive FACT Act.

STATEMENT

Care Net and its religiously-motivated speech

Care Net is a 501(c)(3) nonprofit that supports one of the largest networks of pregnancy centers in North America and runs the nation's only real-time call center providing pregnancy decision coaching. Care Net and its more than 1,100 affiliates acknowledge that every human life begins at conception and is worthy of protection. For anyone considering abortion, Care Net offers realistic alternatives and Christ-centered support. In 2015 alone, Care Net, its affiliated pregnancy resource centers, and its 30,000 volunteers helped bring more than 73,000 lives into the world.

Over the last seven years, eight of 10 women considering abortion when they entered a Care Net pregnancy center ultimately chose to foster their child's life. Those outcomes are a result of compassion and truthful communication from pregnancy center employees and volunteers. Specifically, Care Net training and best practices emphasize that:

- Everyone should be treated with compassion, unconditional love, and respect. It is important for pregnant mothers to know that someone is there for them, that they are not alone, and that the client advocate to whom they are speaking will walk through the situation with the pregnant mother. As the Bible instructs, "Carry each other's burdens, and in this way you will fulfill the law of Christ." Galatians 6:2 (NIV).

- Conversely, pregnant mothers should never be shamed or made to feel guilty for considering an abortion. An advocate's role is not to bring the conviction of sin—that comes only through the power of the Holy Spirit. Rather, an advocate must show compassion while speaking truth, reminding a pregnant mother that there is always help and hope for her situation.

- Pregnancy center client advocates use persuasion, not manipulation. Effective client advocates avoid potentially manipulative tactics like over-emphasizing abortion-procedure terms, exaggerating abortion risks, or using words like "kill," or "murder," no matter how passionate the client advocate feels about this issue. Client advocates are encouraged to pray before they speak, and to ask God what He wants to communicate to the pregnant mother. God empowers client advocates to present the truth in the most loving and compelling way possible, and it is through God's kindness that people are led to repentance. Romans 2:4b.

- Pregnancy center client advocates strive not to use confrontation negatively. While it is important for pregnant mothers to be fully informed about the impact abortion has on mothers, fathers, and babies, the goal is to speak the truth in love. Negative confrontation represents a failure to love. Client advocates trust that open and honest communication will bring others to the truth. Isaiah 55:11.

- Pregnancy center client advocates validate what pregnant mothers are thinking and feeling. Doing so opens the door to discuss those feelings. Invalidating a pregnant mother's emotions will make her feel isolated, unheard, or uncared for. Even when a client advocate does not agree with a pregnant mother's choice, the advocate can respond compassionately.

- Pregnancy center client advocates do not play the "blame game," and they do not compare pregnant mothers with others who did not get pregnant. Advocates remind mothers that they are fearfully and wonderfully made, Psalm 39:13; that God loves them unconditionally, John 3:16; and that God plans for them to prosper, with plans for a hope and a future, Jeremiah 29:11. Advocates explain that because Jesus felt that every one of us was worth dying for, the pregnant mother's life and that of her unborn child have immeasurable value and dignity.

- Pregnancy center client advocates do not tell pregnant mothers what they should and should not do. They listen well, encourage, give space, and try to present the bigger picture and the truth. True transformation can only come from the mother as God works on her heart. Cf. 2 Corinthians 3:18 ("And we all, who with unveiled faces contemplate the Lord's glory, are being transformed into his image with ever-increasing glory, which comes from the Lord, who is the Spirit.").

- Finally, pregnancy center client advocates offer non-judgmental post-abortion support. By speaking the truth in love, advocates show the love of God and respect pregnant mothers as an autonomous, capable individual. "[S]peaking the truth in love, we will grow to become in every respect the mature body of him who is the head, that is, Christ. From him the whole body, joined and held together by every supporting ligament, grows and builds itself up in love, as each part does its work." Ephesians 4:15–16.

In sum, Care Net's mission is one of love and life. But it can only pursue this mission through compassion and honest communication. When the government forces a pregnancy resource center to become a spokesperson for abortion, that compelled speech distorts the message and sows confusion.

California legislation targeting pro-life beliefs

The State of California has been a leader in pushing a pro-abortion agenda. California law gives teenagers the right to obtain contraception "without an adult's permission or knowledge."[2] In fact, clinics and healthcare providers are prohibited from giving "parents any information about their children's medical treatment, questions or prescriptions of contraception" unless the child consents.[3] California also provides funding for teenagers to obtain contraception without providing identification.[4]

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[2] NARAL California, Current Laws, https://goo.gl/Eo7PjA.

[3] *Id.*

[4] *Id.*

Unsurprisingly, minors also have the right to obtain an abortion "without notifying their parents or any other adult."[5] If a minor is unable to pay, California will provide the funding and the minor need not involve a parent or guardian.

California has enacted statutes that "protect" pregnant mothers from pro-life counselors who seek to communicate truthful information about the consequences of abortion.[6] Although there are no statewide buffer-zone laws, several major cities have enacted local laws that similarly "protect" pregnant mothers from frank and open speech.[7]

A California state law that went into effect in January 2014 dramatically expanded the supply of abortion providers in California by authorizing nurse practitioners, certified nurse midwives, and physician assistants to perform first-trimester abortions through "vacuum aspiration," [8] a procedure in which a suction catheter is inserted in utero to extract a preborn baby. In the words of the president of the National Abortion Federation, this law cements California's reputation as "the gold standard" for access to abortion.[9]

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[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *The Abortion Wars: New class of abortion providers helps expand access in California*, Los Angeles Times (Oct. 23, 2014), available at https://goo.gl/yD8dZH.

[9] *Id.*

Unlike most other states, "California does not have any of the major types of abortion restrictions—such as waiting periods, mandated parental involvement or limitations on publicly funded abortions."[10] Abortions in California represent 17.0% of all abortions conducted in the United States.[11]

In addition to the compelled-speech law at issue in this case, California's Legislature is considering legislation, AB-569, that would prohibit all employers—including religious employers—from taking an adverse employment action against employees who have an abortion.[12] And, like the compelled speech at issue here, the law requires employers to include a notice in their employee handbook notifying employees of their rights under AB-569.[13]

The subject of the present litigation is California's so-called Reproductive FACT Act. The Act requires non-medical, unlicensed pro-life organizations to provide extensive disclaimers that they are not a licensed medical organization, and it requires licensed medical centers that do not provide abortion to provide notice to all clients about how they can obtain a state-funded abortion. These obligations are not imposed on any other organizations, and are only targeted on those committed to foster life from conception to natural death.

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[10] Guttmacher Institute, *State Facts About Abortion: California*, https://goo.gl/cn3YHM.

[11] *Id.*

[12] AB-569, https://goo.gl/DNBH57.

[13] *Id.* § (b).

SUMMARY OF ARGUMENT

California's compelled-speech regulations violate the Free Speech Clause in two ways. First, the regulations force pregnancy resource centers to promote an idea—abortion—that they find morally repugnant. Second, the regulations force pregnancy resource centers to engage in unnecessary speech that dilutes the centers' own communications and message encouraging expectant mothers to give their children the opportunity for life.

These regulations are subject to strict scrutiny notwithstanding that California says it is only compelling "factual" speech; this Court has long held that compelled speech receives exacting scrutiny whether on matters of fact or opinion. And the level of scrutiny does not change based on the services that the centers provide, since those services do not require patient consent and are not commercial in nature. Moreover, California's regulations fail strict scrutiny because they compel communication of the State's orthodoxy on abortion, are underinclusive, and not narrowly tailored.

The government has no power to interfere in a pregnancy resource center's mission by distorting its message and requiring communication of the government's own orthodoxy. The Ninth Circuit should be reversed, and the Reproductive FACT Act held unconstitutional.

ARGUMENT

I. This Court should reverse the Ninth Circuit and protect the speech rights of pro-life, pregnancy resource centers.

Petitioner's merits brief explains at length why this Court's free speech precedents compel reversal of the Ninth Circuit's decision and the invalidation of California's so-called Reproductive FACT Act. Care Net submits this *amicus* brief to highlight how California's compelled-speech regulation interferes with the speech of pregnancy resource centers, including Care Net's 1,100 affiliated pregnancy resource centers.

Perhaps the most famous of this Court's decisions involving government-compelled speech is *Wooley* v. *Maynard*, 430 U.S. 705 (1977), the citizen challenge to New Hampshire's statute making it a crime to obscure the words "Live Free or Die" on the State's license plates. As it struck down the New Hampshire statute, this Court recognized that a "system which secures the right to proselytize religious, political and ideological causes must also guarantee the concomitant right to decline to foster such concepts." *Id.* at 714 (citing *W. Va. Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 633–34, 645 (1943) (Murphy, J., concurring)).

In other words, the "right to speak *and the right to refrain from speaking* are complementary components of the broader concept of 'individual freedom of mind.'" *Ibid.* (emphasis added). That is because "[g]overnment-enforced [speech] inescapably 'dampens the vigor and limits the variety of public debate.'" *Id.* (quoting *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 279 (1964)).

Describing New Hampshire's requirement, this Court noted that it had the effect of "requir[ing] [state citizens to] use their private property as a 'mobile billboard' for the State's ideological message or suffer a penalty." *Wooley*, 430 U.S. at 715. Such coercive conduct is unconstitutional: "*The First Amendment protects the right of individuals* to hold a point of view different from the majority and *to refuse to foster*, in the way New Hampshire commands, *an idea they find morally objectionable.*" *Id.* (emphasis added).

The *Wooley* Court acknowledged New Hampshire's self-professed interest in requiring the license-plate speech—promoting appreciation of history, individualism, and state pride—but did not find the interest sufficiently compelling to justify the regulation. "[W]here the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message." *Id.* at 717.

Thus, since at least the decision in *Wooley*, this Court has consistently recognized that compelled-speech laws are "subject to exacting First Amendment scrutiny." *Riley* v. *Nat'l Fed'n of Blind, Inc.*, 487 U.S. 781, 798 (1988) (government cannot "dictate the content of speech absent compelling necessity, and then, only by means precisely tailored"); *Turner Broad. Sys.* v. *FCC*, 512 U.S. 622, 642 (1994) ("laws that compel speakers to utter or distribute speech bearing a particular message are subject to the same rigorous scrutiny" as laws regulating speech based on content) (citing *Riley*, 487 U.S. at 798). Accordingly, California's forced-speech regulations are subject to strict scrutiny.

Importantly, the First Amendment does not provide any less protection simply because California's law compels purportedly factual speech. In *Riley*, this Court considered North Carolina regulations that required a professional fundraiser to disclose to a potential donor, before appealing for funds, the percentage of charitable contributions collected over the past year that were given to the charity. North Carolina argued that previous forced-speech precedents were inapplicable because the government was only requiring fundraisers to make true statements of fact. This Court rejected that distinction:

> These cases cannot be distinguished simply because they involved compelled statements of opinion while here we deal with compelled statements of "fact": *either form of compulsion burdens protected speech*. Thus, we would not immunize a law requiring a speaker favoring a particular government project to state at the outset of every address the average cost overruns in similar projects, or a law requiring a speaker favoring an incumbent candidate to state during every solicitation that candidate's recent travel budget. Although the foregoing factual information might be relevant to the listener, and, in the latter case, could encourage or discourage the listener from making a political donation, a law compelling its disclosure would clearly and substantially burden the protected speech. [*Riley*, 487 U.S. at 797–98 (emphasis added).]

There also can be no watering down of First Amendment requirements here based on decisions like *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, 505 U.S. 833, 884 (1992), or *Planned Parenthood of Minnesota, North Dakota, South Dakota* v. *Rounds*, 530 F.3d 724, 733–34 (8th Cir. 2008), cases that involved state regulation of medical professionals and patient informed consent. California's regulations do not target medical procedures that require informed consent of the patient. And this Court's precedents do not support government-required disclaimers or notices before one citizen may speak to another about healthcare issues. Pet. 27–29.

Finally, this case is not about the lesser scrutiny that applies to government regulation of commercial speech. Pregnancy resource centers are not in the business of making money; they are non-profits who do not charge for their services at all. As this Court explained in *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557 (1980), the government's power to regulate commercial speech extends only to "expression solely related to the economic interests of the speaker and its audience." *Id.* at 561. The primary message of pregnancy resource centers is not economic, it is political, social, and religious—to encourage pregnant mothers to preserve the lives of their unborn children. And under this Court's precedent, it is legally irrelevant that a pregnancy resource center is ultimately successful in depriving an abortion clinic of an economic transaction. See *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 761–62 (1976) ("[T]he speech whose content deprives it of protection cannot simply be speech *on* a commercial subject. No

one would contend that our pharmacist may be prevented from being heard on the subject of whether, in general, pharmaceutical process should be regulated or their advertisement forbidden.") (emphasis added). That is why a cigarette sale is a commercial transaction but an anti-smoking ad is not. *Id.*

On the merits, the Reproductive FACT Act fails strict scrutiny. Co-sponsored by the abortion advocacy group NARAL, the Act requires pregnancy resource centers to become couriers of California's pro-abortion ideology. Absent the Act, pregnancy resource centers would be free not to direct pregnant mothers to resources for State-funded abortions. Requiring them to do so violates the moral and religious convictions of the centers, their employees, and their volunteers. And it also dilutes the centers' message. When a center lovingly and truthfully speaks to pregnant mothers about God's will to honor the mother's life and dignity as well as that of her unborn child, the government compels the center to post signs providing advice about how to end the unborn child's life. The messages could not be more dissonant and contradictory. When a center's client advocate offers to help carry the burden of a pregnant mother as Christ commands, California requires the center to post a sign that essentially says the mother does not need to continue carrying any burden; the State will pay for an abortion. When a client advocate says that Jesus's death for us shows the immense worth and dignity of the mother and her unborn child, California requires the center to post a sign that communicates the message that there is no value or dignity in a developing fetus.

The legal result would be no different if California was instead trying to influence the other side of this emotional and highly-charged political issue. California could compel an abortion clinic to provide certain medical information so that a pregnant mother can make an informed choice before taking the life of her child. See, *e.g.*, *Casey*, *supra*. But it would violate the First Amendment for California to compel an abortion clinic to post signs informing pregnant mothers that the clinic does not provide live-birth deliveries or support for mothers choosing to continue their pregnancies, directing these women to information that could help them locate a nearby pregnancy resource center where they could reconsider their decision.

California's compelled-speech requirement is also underinclusive and not narrowly tailored to any interest California can articulate. The legislation is underinclusive because it does not regulate discussions of crucial healthcare issues when non-medical speakers discuss non-pregnancy topics, does not regulate pregnancy discussions by non-medical counselors at abortion clinics, and does not regulate pregnancy discussions by many other individuals who may be asked for advice concerning an unexpected pregnancy, such as counselors, teachers, priests, and parents.

Further, California's compelled-speech requirement is not narrowly tailored, because if California is concerned that pregnant mothers are unable to find abortion services, it can engage in public advocacy campaigns, advertise in newspapers and on the Internet, and enlist organizations that support abortion to carry that message to the public. Tellingly, California mandates licensed pregnancy resource

centers to make the abortion-services disclosure to all patients *regardless of the service they receive*, such as the provision of diapers or baby clothes, or even if there are no services being provided at all. Small wonder the Ninth Circuit's decision creates "a circuit split regarding the appropriate level of scrutiny to apply" in "abortion-related disclosure cases." Pet. App. 25a.

The Reproductive FACT Act also violates the First Amendment with respect to the extensive disclosure requirements it imposes on non-medical pregnancy resource centers, requiring such centers to include disclaimers in all advertising, in large font and in multiple languages, explaining that the centers do not offer medical services. Again, this is consequently akin to requiring an abortion clinic to include in all *its* advertising that the clinic does not perform live-birth deliveries or provide support for women who choose to bear their children. Though not as explicit as the obligation imposed on pregnancy resource centers that provide medical services, the pro-abortion message is just as ideological and offensive to pregnancy resource centers, their employees, and their volunteers.

These compelled disclaimers make advertising cost prohibitive. Pet. 32–33. Worse yet, they drown out the centers' life-affirming message. Pet. 33. And like the Act's requirement that medical centers direct clients to abortion services, the Act's compelled-disclaimer requirement supports no legitimate state interest. Neither the Ninth Circuit nor California identified any studies showing how women are harmed by unlicensed pregnancy centers, nor how the disclaimer would alleviate those harms. Pet. 34.

In sum, First Amendment supporters, whether pro-life or pro-abortion, should be able to agree that the government can never be in the business of promoting one side of an ideological battle by compelling the speech of those on the other side. In California, the target is pregnancy resource centers. In a different state, the target could be an abortion clinic. Elsewhere, it could be another controversial service entirely. Under the First Amendment, government-compelled speech is unconstitutional in all these circumstances.

California's regulation here is no different than if it forced Alcoholics Anonymous groups to post a sign at their meetings (1) informing participants that alcoholic drinks are not served, and (2) providing a listing of nearby bars and liquor stores. Buying and consuming alcohol is legal; AA encourages individuals not to engage in that legal activity. The government has no power to interfere in AA's mission by distorting its message. The same is true of California and pregnancy resource centers.

Accordingly, this Court should reverse the Ninth Circuit and invalidate California's compelled-speech regulations because they "fail[] to respect [a pregnancy resource center]'s right not to utter a state-sponsored message that offends its core moral and religious principles." *Greater Baltimore Center for Pregnancy Concerns, Inc.* v. *Mayor & City Council of Baltimore*, 721 F.3d 264, 292 (4th Cir. 2013) (Wilkinson, J., dissenting). Even "[t]hose who support most firmly a woman's right to reproductive choice should find it the most disheartening [when a] court's First Amendment jurisprudence is trampling expressive privacy." *Id.* at 294 (Wilkinson, J. dissenting).

II. In enacting the Reproductive FACT Act, California specifically targeted pregnancy resource centers for their disfavored speech.

The Reproductive FACT Act is suspect for an additional reason: California targeted specific speech. The Act's scope is defined to apply only to facilities "whose primary purpose is providing pregnancy-related services." Pet. App. 78a. A hospital or clinic that covers non-pregnancy-related services is exempt, for example, even if the hospital or clinic offers the exact same services as the pregnancy resource center.

The Act also exempts from its compelled-speech requirements clinics that are both Medi-Cal providers and Family Planning, Access, Care, and Treatment Program enrollees. Pet. App. 79a. That exemption excludes pregnancy resource centers; to participate in the Family Planning, Access, Care, and Treatment Program, a clinic must provide "family planning services," including "all FDA approved contraceptive methods and supplies." Pet. 37. The result is that the Act's compelled-speech burdens *fall exclusively on pregnancy resource centers whose religious beliefs preclude them from supplying all FDA approved contraceptive methods and supplies.*

In sum, the Act does not just compel speech, it targets speakers that California's pro-abortion lobby dislikes and does not want to speak at all. The Act requires pregnancy resource centers to advertise a service to which they are religiously opposed and therefore do not offer, just in case someone who comes into the center might want to obtain that service elsewhere. The Ninth Circuit should be reversed and the Act invalidated.

CONCLUSION

The judgment of the Ninth Circuit Court of Appeals should be reversed.

Respectfully submitted,

John J. Bursch
Counsel of Record
Bursch Law PLLC
9339 Cherry Valley
Ave SE, #78
Caledonia, Michigan 49316
jbursch@burschlaw.com
(616) 450-4235

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Attorney for *Amicus Curiae*

No. 16-1140

In the Supreme Court of the United States

NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES, dba NIFLA, *et al.*,
Petitioners,

v.

XAVIER BECERRA,
Attorney General of California, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR *AMICI CURIAE* CHARLOTTE LOZIER INSTITUTE, MARCH FOR LIFE EDUCATION FUND, AND NATIONAL PRO-LIFE WOMEN'S CAUCUS IN SUPPORT OF PETITIONERS

THOMAS M. MESSNER
CHARLOTTE LOZIER INSTITUTE
2800 Shirlington Road
Suite 1200
Arlington, VA 22206

NIKOLAS T. NIKAS
DORINDA C. BORDLEE
Counsel of Record
BIOETHICS DEFENSE FUND
3312 Cleary Avenue
Metairie, LA 70002
(504) 231-7234
dbordlee@bdfund.org

Counsel for Amici Curiae

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

Considering the well-documented evidence that Pregnancy Help Centers provide vital and highly valued services to vulnerable women and children consistent with government's unqualified interest in promoting the preservation of human life, the question presented is whether federal court approval of the California Reproductive FACT Act threatens the very existence of Pregnancy Help Centers by forcing them to refer for abortion based on a never-before-recognized government interest in promoting the destruction of innocent human life.

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INTEREST OF *AMICI CURIAE*[1]

Amicus Curiae **Charlotte Lozier Institute** ("CLI" or "Lozier Institute") is the education and research arm of the Susan B. Anthony List. Named after a 19th century feminist physician who, like Susan B. Anthony, championed women's rights without sacrificing either equal opportunity or the lives of the unborn, the Lozier Institute studies federal and state policies and their impact on women's health and on child and family well-being.

In pursuit of its mission, Lozier Institute has undertaken a variety of initiatives focused on Pregnancy Help Centers ("PHCs"). For example, Lozier Institute has conducted a variety of survey research and evaluations designed to support PHC effectiveness and best practices. This research involves online survey instruments, market research, public opinion polling, message testing, and brand enhancement. Lozier Institute shares the results of this research with individual centers and center networks, combining quantitative measurements with advice on questions from presentation of services to nomenclature and avenues of advertising. Lozier Institute has also documented the popularity and reach of PHCs, supporting their efforts to communicate the value they offer to the public through low- and no-cost services to

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[1] All parties have consented to the filing of this brief. Pursuant to this Court's Rule 37.6, Amici state that no counsel for any party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of the brief.

some of the nation's most disadvantaged populations and communities.

The success of these vital nonprofits is a core part of Lozier Institute's vision for a better America. Lozier Institute has a strong interest in working to ensure that PHCs remain free to pursue their mission and live out the principles that inspire them to serve both mothers and their children.

Amicus Curiae **March for Life Education Defense Fund** ("March for Life") is a pro-life, non-religious, nonprofit organization organized under the laws of the District of Columbia, located in Washington, D.C. March for Life is one of the oldest pro-life organizations in the nation. March for Life exists to protect, defend, and respect human life at every stage; promote the worth and dignity of all unborn children; oppose abortion in all its forms. March for Life endeavors to help all like-minded Americans to protect and advocate for the lives of unborn children. March for Life was founded in 1973, following the Supreme Court's landmark decision in *Roe v. Wade*, when a group of pro-life leaders gathered to express concern that the first anniversary of the decision would come and go with no recognition. The hallmark of March for Life is its annual march on the Supreme Court and United States Capitol, held every year on or around January 22, the anniversary of *Roe v. Wade*.

Amicus Curiae **National Pro-Life Women's Caucus** is a project of the Susan B. Anthony List. It was formed in 2013 to identify, organize, and advance women officeholders at the state level who are dedicated to ending abortion in America by passing

laws that save lives. The Caucus connects them with model legislation, allied groups, ground-breaking research, legal support, and other resources needed to introduce and defend pro-life legislation. Currently hosting over two hundred women from forty-three states, these women leaders have bravely entered the public square, debunking the myth of abortion as a great liberator, a necessity for equality, even a Constitutional right. Based on a state's unqualified interest in preserving human life, as recognized in this Court's jurisprudence cited herein, these state legislators have boldly passed pro-life legislation and passionately fought to protect women and children from the violence of abortion.

SUMMARY OF THE ARGUMENT

Amici organizations make two arguments in support of Petitioners.

First, more than 2,750 Pregnancy Help Centers ("PHCs") nationwide provide vital, highly valued services to vulnerable mothers and children on a free or low-cost basis. Amici review and set forth the findings of a major report on PHC work that demonstrates the enormous social value contributed by PHCs. For example, "In 2010, [PHCs] served over 2.3 million people with pregnancy assistance, abstinence counseling and education, community outreach programs and referrals, and public health linkages."[2] "A conservative estimate of community cost savings for

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[2] Family Research Council, *A Passion to Serve: How Pregnancy Resource Centers Empower Women, Help Families, and Strengthen Communities* iv (2d ed. 2011) [hereinafter PHC Report 2d Edition], http://downloads.frc.org/EF/EF12A47.pdf.

these services during 2010 is over $100 million."[3] "In addition to specific cost savings, pregnancy centers drew on the help of 71,000 volunteers who performed an estimated 5,705,000 uncompensated hours of work in 2010."[4]

Direct services provided by PHCs, including medical PHCs, include ultrasound and other medical services, prenatal care, education on prenatal development, parenting education classes, and material assistance to mothers and children. PHCs also "play a critical role in referring women for necessary health care and support services across the country."[5] PHCs "are embedded within almost every type of community across the country,"[6] and PHC services "are generally provided at little or no cost to clients."[7]

The public value placed on PHC work manifests in various government actions. PHCs receive referrals from state health departments. Further, although primarily supported by private funding, PHCs have received financial support from both the federal and state governments. In addition, PHCs have been

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[3] *Id.* This brief uses the term "Pregnancy Help Centers" (PHCs). Other terms that have been used include the now generally disfavored "Crisis Pregnancy Center" (CPC) designation, as well as "Pregnancy Resource Centers" (PRCs), "Pregnancy Care Centers" (PCCs), and "Pregnancy Medical Centers" (PMCs).

[4] *Id.* at 1.

[5] *Id.* at 11.

[6] *Id.*

[7] *Id.* at 7.

publicly commended or otherwise recognized by government at both the state and federal levels as well as by many individual public officials and community leaders.

In the conclusion of Section I, *Amici* explain that "[PHCs] receive an extraordinarily high approval rating from the clients they serve."[8] One national PHC affiliation organization claims that PHC satisfaction ratings it measured were higher than those of Netflix, Chipotle, and the iPhone. These findings correspond closely with the findings of a 2015 Lozier Institute report that found very high ratings on experience with PHCs and the desirability of having organizations like PHCs in local communities.

Second, Amici *argue that forcing PHCs to refer for abortion undermines their mission and threatens their existence with a never-before-recognized state interest in promoting the destruction of innocent human life.*

Governments exist to protect human life, not to promote its destruction. Forcing PHCs to refer for abortion offends basic principles of government regarding the "unqualified [government] interest in the preservation of human life." *Washington v. Glucksberg*,

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[8] Brief for Pregnancy Care Organizations Care Net, Heartbeat Int'l, Inc., Nat'l Inst. of Family and Life Advocates *et al.* as *Amici Curiae* Supporting Plaintiffs-Appellees at 2, *Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor and City Council of Balt.*, 683 F.3d 539 (4th Cir. 2012) (No. 11-1111) [hereinafter Brief for Pregnancy Care Organizations and Centers], http://www.aul.org/wp-content/uploads/2011/06/11-1111-Greater-Baltimore-Center-v-Mayor-and-City-Council-of-Baltimore-PCC-amicus-brief.pdf.

521 U.S. 702, 728 (1997) (quoting *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261, 282 (1990)). The challenged law attempts to bootstrap this Court's jurisprudence regarding an *individual* right to choose abortion into a never-before-recognized compelling interest of a *government* to promote abortion. Even if the Court recognized a governmental interest in promoting abortion, such an interest would certainly not be so compelling as to override the free speech rights of conscientiously opposed pro-life PHCs.

Abortion is a "unique act," *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 852 (1992), and is "inherently different from other medical procedures," *Harris v. McRae*, 448 U.S. 297, 325 (1980). Nowhere is the "unique" and "inherently different" nature of abortion more deeply felt than in forcing pro-life individuals and institutions to promote it. For a government to compel its citizens to speak in promotion of its program to publicly fund the taking of the innocent lives of unique and individual human beings would be contrary to the entire Western political tradition stretching back to the ancient Greeks, down to the Founding era, and up to our current Constitutional government.

The goal of PHCs to provide concrete pregnancy and parenting resources is consistent with the foundational role of government and its "unqualified interest in preserving human life." *Glucksberg*, 521 U.S. at 728. The California law and the lower court ruling upholding it turn that interest on its head, with the threatened effect, if not reversed, of running PHCs out of existence to the detriment of vulnerable women and children.

ARGUMENT

More than 2,750 Pregnancy Help Centers ("PHCs") nationwide provide vital, highly valued services to vulnerable mothers and children on a free or low-cost basis. Forcing PHCs to refer for abortion undermines their mission and threatens their existence with a never-before-recognized state interest in promoting the destruction of innocent human life.

I. More than 2,750 Pregnancy Help Centers Nationwide Provide Vital, Highly Valued Services to Vulnerable Mothers and Children on a Free or Low-Cost Basis.

More than 2,750 Pregnancy Help Centers ("PHCs") nationwide provide vital social and, in some cases, medical services to vulnerable mothers and children.[9] PHCs function as important links in community public health networks. The public value placed on PHC work manifests in various government actions including referrals, funding, and recognitions. Individual consumers also strongly value the contributions of PHCs in their local communities.

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[9] The source of the 2,750 number is discussed in Jay Hobbs, *10 Numbers You Should Know About Pregnancy Centers*, Pregnancy Help News (Dec. 20, 2017), https://pregnancyhelpnews.com/phc-10-numbers, *infra* n. 11.

A. Data from 2010 Shows that Pregnancy Help Centers Served More than 2 Million People, with Estimated Community Cost Savings of More than $100 Million.

Pregnancy Help Centers (PHCs) provide a variety of free and low-cost services to pregnant women and other consumers. A 2009 report counts "more than 2,300" PHCs nationwide;[10] a 2017 publication counted 2,752 "pregnancy help locations" nationally.[11] Major national affiliation organizations for PHCs include Petitioner National Institute of Family and Life Advocates (NIFLA), Heartbeat International, and Care Net.

"Recording the scope of pregnancy center work in the United States poses challenges due to the differences in reporting among the many agencies involved, which are collaborating with increasing frequency."[12] However, the Family Research Council ("FRC"), a Washington, D.C., think tank, published a report ("PHC Report") in 2009 on pregnancy center work that uses information including "published data from the major national affiliation groups."[13] A

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[10] Family Research Council, *A Passion to Serve, A Vision for Life* 14 (2009) [hereinafter PHC Report 1st Edition], http://downloads.frc.org/EF/EF09I51.pdf.

[11] Jay Hobbs, *10 Numbers You Should Know About Pregnancy Centers*, Pregnancy Help News (Dec. 20, 2017), https://pregnancyhelpnews.com/phc-10-numbers.

[12] PHC Report 1st Edition, *supra* note 10, at 21.

[13] *Id.*

subsequent report ("PHC Report 2d Edition") published by FRC includes updated data from 2010 "to quantify the positive impact" made by PHCs.[14]

The PHC Report 2d Edition estimated the accomplishments of nearly 2,000 PHCs "using two online surveys completed by pregnancy centers affiliated with Care Net, Heartbeat International, and NIFLA."[15] Of note, "[t]he data represent only pregnancy centers in the U.S. affiliated with one or more of these organizations."[16]

The PHC Report 2d Edition includes the following findings.

- "In 2010, [PHCs] served over 2.3 million people with pregnancy assistance, abstinence counseling and education, community outreach programs and referrals, and public health linkages."[17]
- "A conservative estimate of community cost savings for these services during 2010 is over $100 million."[18]
- "In addition to specific cost savings, pregnancy centers drew on the help of 71,000 volunteers

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[14] PHC Report 2d Edition, *supra* note 2, at iv.

[15] *Id.* at 2–3.

[16] *Id.* at 3.

[17] *Id.* at iv.

[18] *Id.*

> who performed an estimated 5,705,000 uncompensated hours of work in 2010."[19]

Findings for specific services provided and estimated cost savings for those services include the following.

- "Consulting with New Clients" – Total Number 963,000 – Estimated Cost Saving of $24,076,000.[20]
- "Ultrasounds Performed" – Total Number 230,000 – Estimated Cost Saving of $57,485,000.[21]
- "Pregnancy Tests" – Total Number 720,000 – Estimated Cost Saving of $4,323,000.[22]

According to the PHC Report 2d Edition, "[PHC] services are generally provided at little or no cost to clients."[23] This is due "in large part . . . to individual charitable donations and the high proportion of volunteers who work at the centers."[24]

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[19] *Id.* at 1.

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] *Id.* at 7.

[24] *Id.*

B. Local Pregnancy Help Centers Provide a Wide Range of Social Services.

PHCs fall into two main categories based on whether they offer direct medical services. "The growth in the number of medically oriented pregnancy centers has been impressive."[25] According to the PHC Report 2d Edition, "[i]n 2008 there were approximately 700 medical [PHCs], but by 2010 the number had grown to over 1,000."[26]

As the PHC Report 2d Edition explains, and as set forth below, direct services provided by PHCs, including medical PHCs, include ultrasound and other medical services, prenatal care, education on prenatal development, parenting education classes, and material assistance to mothers and children.[27]

i. Ultrasound and other medical services

"Medical pregnancy clinics operate today under the license of a physician-medical director and, where required, under state licensure as well."[28] According to the PHC Report 2d Edition, "[m]edical services are provided by numerous certified and licensed

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[25] *Id.* at 8.

[26] *Id.*

[27] *See id.* at 7–10, 16–18, 20–21, 24.

[28] *Id.* at 7.

professionals as well as trained specialists proficient in a wide range of maternal and child health areas."[29]

Ultrasound services compose one area of medical care provided by many PHCs. "These services provide confirmation of pregnancy, determine if the pregnancy is viable (through fetal cardiac activity), establish if it is a uterine or ectopic pregnancy (which can be life-threatening), and measure how far along the pregnancy is by verifying the developing baby's gestational age."[30]

Following the provision of ultrasound services, PHCs "refer the new mom for follow-up obstetrical care to ensure entrance into prenatal care."[31] Furthermore, "[w]hen adverse medical conditions are suspected, women are referred into specialized medical care."[32]

The number of PHCs offering ultrasound services, and the number of ultrasounds provided, demonstrate the value of this service. In 2011, the PHC Report 2d Edition reported that "approximately 1,000 medical [PHCs] . . . provide limited ultrasound,"[33] that ultrasound service was provided by "approximately 54 percent of [PHCs],"[34] and, "[i]n 2010, close to 230,000 ultrasounds were performed at pregnancy medical

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[29] *Id.* at 7–8.

[30] *Id.* at 9.

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.* at 8.

centers."[35] In 2017, a publication setting out data "gathered from national networks Heartbeat International, Care Net and NIFLA" reported that "six out of every 10 pregnancy centers in the U.S.—1,661 total—serve women with free limited obstetric ultrasounds" and that "pregnancy centers in the U.S. combined to deliver 248,832 ultrasounds in 2016."[36]

Furthermore, the PHC Report 2d Edition explains that the medical PHCs that provide limited ultrasound "deliver this service at little or no cost to women."[37]

In addition to ultrasound services, other specialty areas of medical care provided by PHCs include

- "obstetrical medical care and nursing,"
- "childbirth classes,"
- "labor coaching," and
- "midwife services."[38]

In addition, after birth, "some [PHCs] are able to offer"

- "lactation consultation,"

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[35] *Id.* at 9.

[36] Hobbs, *supra* note 11.

[37] PHC Report 2d Edition, *supra* note 2, at 9.

[38] *Id.* at 8.

- "nutrition consulting," and
- "social work."[39]

Furthermore, some PHCs also offer testing for sexually transmitted diseases ("STDs"). According to the Centers for Disease Control and Prevention, some STDs can cause infertility.[40] The PHC Report 2d Edition reports that in 2010 as many as 260 medical PHCs offered STD testing and treatment.[41] A 2017 publication of data gathered from national PHC networks finds, "[a]t the latest count, 577 pregnancy centers are offering free STD testing, including 400 of which offering on-site STD treatment."[42]

ii. Prenatal care

According to the *Eunice Kennedy Shriver* National Institute of Child Health and Human Development, "[h]aving a healthy pregnancy is one of the best ways to promote a healthy birth."[43] "[P]renatal care can help prevent complications and inform women about

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[39] *Id.*

[40] *Sexually Transmitted Diseases (STDs) – STDs & Infertility*, Ctrs. for Disease Control & Prevention, https://www.cdc.gov/std/infertility/ (last updated October 6, 2017).

[41] PHC Report 2d Edition, *supra* note 2, at 10.

[42] Hobbs, *supra* note 11.

[43] *What Is Prenatal Care and Why Is It Important?*, Nat'l Inst. Child Health & Hum. Dev., https://www.nichd.nih.gov/health/topics/pregnancy/conditioninfo/Pages/prenatal-care.aspx (last visited Jan. 2, 2018).

important steps they can take to protect their infant and ensure a healthy pregnancy."[44] "Getting early and regular prenatal care improves the chances of a healthy pregnancy."[45]

"Pregnancy medical clinics often make direct referrals to prenatal care for their patients who are pregnant. However," according to the PHC Report 2d Edition, "a growing number [of PHCs] are also providing prenatal care on-site."[46]

iii. Education on prenatal development

"Prenatal development education has been a primary method for [PHCs] to inform women about the changes taking place in early pregnancy and the dramatic development of human life inside of them."[47]

The vital importance of proper prenatal care to both maternal and fetal health is well established. Regular prenatal care can "[r]educe the risk of pregnancy complications" as well as the "infant's risk for complications."[48] "[PHC] staff/volunteers inform their clients about the importance of eating well, getting exercise, avoiding smoking and alcohol, and coping

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[44] *Id.*

[45] *Id.*

[46] PHC Report 2d Edition, *supra* note 2, at 9.

[47] *Id.* at 17.

[48] *What Is Prenatal Care and Why Is It Important?*, Nat'l Inst. Child Health & Hum. Dev., *supra* note 43.

with morning sickness or discomfort during pregnancy."[49]

iv. Parenting education classes

"Parenting education has become a core service provided [by PHCs] to equip new mothers and fathers to be stronger and more nurturing parents."[50] According to the PHC Report 2d Edition, "Nationally, over 78 percent of centers offer this specialized education either through direct services on premises or in nearby churches, schools, and other locations."[51] Further, "more than 292,000 clients attended [PHC] parenting programs" in 2010.[52]

Topics covered in parenting education include

- "child development,"
- "bonding,"
- "nutritional counseling,"
- "communication skills,"
- "finance management,"
- "safety and injury prevention,"
- "family rules," and

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[49] PHC Report 2d Edition, *supra* note 2, at 17.

[50] *Id.* at 21.

[51] *Id.*

[52] *Id.*

- "positive discipline strategies."[53]

In addition, parenting education classes "also typically cover"

- "life skills topics to strengthen the development and resilience of mothers-to-be,"
- "strategies for stress management," and
- "job skills training."[54]

v. Material assistance to mothers and children

According to the PHC Report 2d Edition, "[n]early every [PHC] provides clients with material support for pregnancy and infant care."[55] This support "may include"

- "maternity clothing,"
- "baby clothes and furniture,"
- "housing assistance," and
- "nutritional counseling and resources."[56]

Just as important as these goods themselves, PHCs provide this assistance in a warm and supporting environment.

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[53] *Id.*

[54] *Id.*

[55] *Id.*

[56] *Id.*

C. Pregnancy Help Centers Function as Important Links in Broader Community Public Health Networks.

In addition to the goods and services PHCs provide directly, PHCs also "play a critical role in referring women for necessary health care and support services across the country."[57] According to the PHC Report 2d Edition, "[r]eferrals to community agencies expose women to key education interventions spanning childbirth, breast-feeding, nutrition, sudden infant death syndrome (SIDS), unintentional and intentional injury prevention, and child safety seat instruction."[58] Examples of community referrals include:

- "Breast-feeding Classes,"
- "Social Services,"
- "State Children's Health Insurance Program (S-CHIP),"
- "Women Infants & Children (WIC),"
- "Housing Support,"
- "Maternity Homes,"
- "Childcare Programs,"
- "Prenatal Care,"
- "Nutrition Classes,"
- "Parenting Classes,"

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[57] *Id.* at 11.

[58] *Id.*

- "Community Health Centers,"
- "Financial Assistance,"
- "Food Banks and Pantries,"
- "Legal Aid/Assistance,"
- "Medicaid,"
- "Medical Services,"
- "Postpartum Depression Care," and
- "Transportation Help."[59]

PHCs "are embedded within almost every type of community across the country."[60] This reality underlies and magnifies the importance of the PHC referring role.

D. The Federal and State Governments Recognize and Value Pregnancy Help Center Contributions.

The public value placed on PHC work manifests in various government actions.

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[59] *Id.* at 12–13.

[60] *Id.* at 11.

i. State health agencies refer pregnant women to Pregnancy Help Centers.

"In 2009, 92 percent of Care Net [PHCs] reported having clients referred to them from state health departments."[61] "These referrals demonstrate widespread support and trust in [PHCs]."[62] Indeed, many state health departments provide PHC contact or other information in materials published on publicly accessible websites. *See Woman's Right to Know – Find a Service by County*, Ariz. Dep't of Health Servs. (listing resources, including PHCs, by county for women considering abortion);[63] *Directory of Helpful Services in Arkansas*, Ark. Dep't of Health (2017) (listing locations where pregnant women can receive support during pregnancy);[64] *Directory of Human Services for Delaware*, Del. Health and Social Servs. (2015) (including information for at least one PHC);[65] *Pregnancy*, Fla. Dep't of Health (including link to a

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[61] Brief for Pregnancy Care Organizations and Centers, *supra* note 8, at 4 (citing Care Net, *2009 Care Net National Pregnancy Center Statistics* (2009)).

[62] *Id.*

[63] *Available at* http://azdhs.gov/prevention/womens-childrens-health/informed-consent/index.php#find-a-service (last visited Jan. 2, 2018).

[64] *Available at* http://www.healthy.arkansas.gov/images/uploads/pdf/Directory_of_Helpful_Services_2017.pdf.

[65] *Available at* http://dhss.delaware.gov/dhss/dssc/files/2015_hsdirectory.pdf.

statewide network of PHCs);[66] *Abortion: A Woman's Right to Know*, Ga. Dep't of Pub. Health (2016) (noting availability of private organizations that "offer a variety of services to meet the needs of pregnant women" but "do not offer abortions or abortion referrals");[67] *Directory of Pregnancy and Child Health Services*, Idaho Dep't of Health & Welfare (2017) (including a directory of PHCs providing pregnancy services);[68] *If You are Pregnant: Directory of Available Services*, Kan. Dep't of Health & Env't Bureau of Family Health (2016) (providing a directory of available services for pregnant women, including PHCs);[69] *Pregnancy Resource Centers*, La. Dep't of Health (providing a link to multiple lists of PHCs);[70] *Locations Offering Free Ultrasounds, Organized by Geographic Region*, Mich. Dep't of Community Health (providing a list of locations, including many PHCs, where women

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[66] *Available at* http://www.floridahealth.gov/programs-and-services/womens-health/pregnancy/index.html#heading_1 (last visited Jan. 2, 2018).

[67] *Available at* https://dph.georgia.gov/sites/dph.georgia.gov/files/related_files/site_page/Abortion-A%20Womens%20Right%20to%20Know_2016_Eng.pdf.

[68] *Available at* http://healthandwelfare.idaho.gov/Portals/0/Health/MoreInformation/PregDirectory_WebVersion_May2017.pdf.pdf.

[69] *Available at* http://www.womansrighttoknow.org/download/Directory_of_Services_English.pdf.

[70] *Available at* http://www.dhh.louisiana.gov/index.cfm/page/2421 (last visited Jan. 2, 2018).

can procure free ultrasounds);[71] *If You Are Pregnant: A Directory of Services Available in Minnesota*, Minn. Dep't of Health (including a directory of services available to pregnant women, including PHCs);[72] *Alternatives to Abortion Program*, Mo. Dep't of Health & Senior Servs. (providing a searchable map of counties in Missouri and listing information on abortion alternatives, including PHCs);[73] *Pregnant? It's Your Decision. We're Here to Help.*, N.D. Dep't of Human Servs. (including contact information for PHCs as part of the state's abortion alternatives program);[74] *Where to Get Help With Your Pregnancy: 2011 Resource Directory*, Ohio Dep't of Health (2011) (listing service options for pregnant women, including many PHCs);[75] *A Woman's Right to Know Resource Directory*, Okla. Board of Med. Licensure & Supervision (providing a directory of resources including information about PHCs);[76] *Alternatives to Abortion Services Program*, Pa.

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[71] *Available at* http://www.michigan.gov/documents/mdch/ultrasound_196523_7.pdf (last updated Mar. 18, 2015).

[72] *Available at* http://www.health.state.mn.us/wrtk/directoryenglish2017.pdf (last updated Jan. 2017).

[73] *Available at* https://dss.mo.gov/fsd/a2a/ (last visited Jan. 2, 2018).

[74] *Available at* https://www.nd.gov/dhs/info/pubs/docs/dn-88-alternatives-to-abortion.pdf (last visited Jan. 2, 2018).

[75] *Available at* https://www.odh.ohio.gov/-/media/ODH/ASSETS/Files/dspc/complaints—nursing-homes/PregnacyResDirectory2011_updated.pdf?la=en.

[76] *Available at* http://www.awomansright.org/pdf/ResourceDirectory.pdf (last visited Jan. 2, 2018).

Dep't of Human Servs. (providing link to Real Alternatives, a network of PHCs operating in Pennsylvania);[77] *Pregnancy Help Centers*, S.D. Dep't of Health (providing contact information for PHCs);[78] *Woman's Right to Know*, Tex. Dep't of State Health Servs. (including a downloadable resource directory that provides a list of PHCs);[79] *Free Ultrasound Providers*, Va. Dep't of Health (listing providers of free ultrasounds for pregnant women in Virginia, including PHCs);[80] *Women's Right to Know Resource Directory*, W. Va. Dep't of Health & Human Resources (Nov. 13, 2015) (listing PHCs in the state);[81] *Directory of Services for Women, Children and Families*, Wis. Dep't of Health Servs. (2015–2016) (providing resources for pregnant women, including contact information for PHCs).[82]

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[77] *Available at* http://www.dhs.pa.gov/citizens/reproductivehealth/alternativestoabortionservicesprogram/ (last visited Jan. 2, 2018).

[78] *Available at* https://doh.sd.gov/family/pregnancy/helpcenters.aspx (last visited Jan. 2, 2018).

[79] *Available at* http://www.dshs.texas.gov/wrtk/ (last updated Feb. 9, 2017).

[80] *Available at* http://www.vdh.virginia.gov/pregnancy/free-ultrasound-providers/ (last visited Jan. 2, 2018).

[81] *Available at* http://www.wvdhhr.org/wrtk/wrtk_resource_directory_decembe_2015.pdf.

[82] *Available at* https://www.dhs.wisconsin.gov/publications/p4/p40073.pdf.

ii. Local Pregnancy Help Centers have received public funds.

One of the "hallmarks" of PHC operations is that "funds are raised locally and spent locally."[83] More than 80 percent of the PHCs covered by the PHC Report 2d Edition "receive[d] no public funding at all."[84]

However, PHCs have received financial support from both the federal and state governments. At the federal level, "[p]ublic . . . funding of [PHCs] began in 1996 when the federal welfare reform law allocated $50 million to Title V abstinence-only education programs, which some states made available to [PHCs]."[85] "The first direct allocation of federal grants to [PHCs] began in 2000 under the maternal and child health block grant's Special Projects of Regional Significance Program."[86] Under this program, "[c]lose to $3 million . . . was directed that year to groups that identify as [PHCs], and that amount doubled to $6 million in 2002."[87]

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[83] PHC Report 2d Edition, *supra* note 2, at 31.

[84] *Id.*

[85] Nat'l Abortion Fed'n, *Crisis Pregnancy Centers: An Affront to Choice* 11 (2006), https://www.prochoice.org/pubs_research/publications/downloads/public_policy/cpc_report.pdf [hereinafter NAF Report].

[86] *Id.* at 11–12.

[87] *Id.* at 12 (citing Vitoria Lin & Cynthia Dailard, *Crisis Pregnancy Centers Seek to Increase Political Clout, Secure Government Subsidy*, The Guttmacher Report on Public Policy, Feb. 2002, Vol. 5, No. 1.).

At the state level, "Legislators frequently attempt to fund [PHCs] . . . through state-sponsored programs, specific grants, or tax credits."[88] According to another source, "in 2009, at least eleven states provided direct taxpayer funding to [PHCs], or approved such funding."[89] More, "At least twenty-six states . . . have approved 'Choose Life' specialty license plate programs where the proceeds benefit [PHCs] and other organizations providing abortion alternatives. These plates have raised nearly $14,000,000 for [PHCs] and abortion alternatives."[90]

iii. Pregnancy Help Centers have been recognized by government at both the federal and state levels.

PHC contributions have been recognized by government at both the state and federal levels. At the federal level, 56 PHCs "were honored at a [2008] White House event" where "[t]hen-Assistant Secretary of Health Dr. Joxel Garcia conducted the ceremony commending outstanding centers. . . . The awards were bestowed in the name of the President as part of the recognition program of USA Freedom Corps."[91]

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[88] *Id.*

[89] Brief for Pregnancy Care Organizations and Centers, *supra* note 8, at 25.

[90] *Id.*

[91] PHC Report 1st Edition, *supra* note 10, at 64.

At the state level, many legislatures have passed resolutions commending or otherwise recognizing PHCs.[92] In one state a governor issued a proclamation.[93] Specific commendations include:

- "[P]regnancy resource centers provide women with compassionate and confidential peer

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[92] H.R.J. Res. 16, 2011 Leg., Reg. Sess., 2011 Ala. Laws 184; H.R. Con. Res. 2034, 50th Leg., 1st Reg. Sess. (Ariz. 2011); H.R. Res. 1019, 90th Gen. Assemb., Reg. Sess., 2015 Ark. Acts 266; S. Res. 15-003, 70th Gen. Assemb., 1st Reg. Sess., 2015 Colo. Sess. Laws 2151; S. Res. 1326, 2012 Leg., 114 Reg. Sess. (Fla. 2012); H.R. Res. 1306, 2016 Leg., Reg. Sess. (Ga. 2016); S. Res. 1706, 2017 Leg., Reg. Sess. (Kan. 2017); S. Con. Res. 72, 2016 Leg., Reg. Sess. (La. 2016); H.R. Res. 1826, 96th Gen. Assemb., 1st Reg. Sess. (Mo. 2011); H.R. Con. Res. 31, 2012 Leg., Reg. Sess. (N.H. 2012); 2010 Okla. Sess. Laws 2260; S. Con. Res. 1283, 119th Gen. Assemb., Reg. Sess. (S.C. 2012); S. Con. Res. 1, 86th Leg., Reg. Sess. (S.D. 2011); H.R. Res. 110, 107th Gen. Assemb., Reg. Sess. (Tenn. 2011); S. Res. 827, 82nd Leg., Reg. Sess. (Tex. 2011); 2012 Utah Laws 2556; 2012 Va. Acts 2326; S. Res. 40, 2011 Leg., Reg. Sess. (W. Va. 2011); S.J. Res. 28, 2011 Leg., Reg. Sess. (Wis. 2011); *see also* H.R. Con. Res. 52, 130th Gen. Assemb., Reg. Sess. (Ohio 2014) (only passed originating chamber). These resolutions have varying means of enactment and can be the product of one legislative chamber alone or both chambers, depending on the type of resolution in question. *See also* Jeanneane Maxon, *Positive Pregnancy Center Resolutions Sweep the Country*, Heartbeat International, https://www.heartbeatinternational.org/positive-pregnancy-center-resolutions-sweep-the-country (last visited Jan. 2, 2018).

[93] Gov. Dave Heineman, *State of Nebraska Proclamation* (Mar. 6, 2014), http://gallery.mailchimp.com/614d88a5ced370982c9aa65578879c/files/NE_Governor_s_Proclamation_3.6.14.pdf.

counseling in a nonjudgmental manner, regardless of their pregnancy outcomes . . . ;"[94]

- "[P]regnancy resource centers ensure that women receive prenatal information and services that lead to the birth of healthy infants . . . ;"[95] and
- "Pregnancy resource centers offer women free, confidential services, including pregnancy testing, advocacy, housing, medical referrals, counseling, and childbirth and parenting classes . . . ."[96]

Individual public officials have also recognized PHCs. This recognition is bipartisan, as evidenced by the following representative examples.

- "I strongly commend the life-affirming work of pregnancy care centers. The success rates and national expansion of these pregnancy care centers are a testament to their invaluable work in the lives of communities and individuals over the years. *These networks provide services that are often unavailable elsewhere to expectant mothers.*" – Rep. Daniel Lipinski (D-Ill.)[97]

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[94] H.R. Res. 1306, 2016 Leg., Reg. Sess. (Ga. 2016).

[95] S. Res. 1326, 2012 Leg., 114 Reg. Sess. (Fla. 2012).

[96] S. Res. 15-003, 70th Gen. Assemb., 1st Reg. Sess., 2015 Colo. Sess. Laws 2151.

[97] PHC Report 1st Edition, *supra* note 10, at 22 (formatting altered, emphasis added, and internal quotations omitted).

- "Pregnancy Resource Centers give women a safe and supportive environment to ask questions and receive the medical care and information needed to ensure healthy pregnancies and births." – Rep. Heath Shuler (D-N.C.)[98]

- "The more than 2,000 pregnancy care centers across the country are an expression of charity and genuine love for people dealing with life-changing situations. The outpouring of local support over the years shown by supporters, organizers, and staff embody the spirit of volunteerism and *truly make pregnancy care centers one of the most important grassroots movements in American history*." – Rep. John Boehner (R-Ohio)[99]

E. Individual Consumers Strongly Value the Contributions Provided by Pregnancy Help Centers.

"[PHCs] receive an extraordinarily high approval rating from the clients they serve."[100] According to one report, "98.7 percent of Care Net-affiliated center clients who completed a written exit survey in 2013

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[98] *Id.* at 68 (formatting altered and internal quotations omitted).

[99] *Id.* (formatting altered, emphasis added, and internal quotations omitted).

[100] Brief for Pregnancy Care Organizations and Centers, *supra* note 8, at 2.

indicated that their overall experience at the center was positive. This number was 97% in 2014."[101]

Putting these 2013 and 2014 results in context, Care Net claimed in 2016 that "[t]his satisfaction rating is higher than that of Netflix, Chipotle, and the iPhone."[102]

The Care Net statistics correspond very well with *Amicus* Lozier Institute's own findings. In a 2015 report called Turning Hearts Toward Life II, the Lozier Institute conducted research "via a national survey of 1,300 respondents" and found that the "reactions to the centers and their work were overwhelmingly positive."[103] At one point this research "[d]rill[ed] down with those respondents who had either been to a PHC or knew someone who had sought its services" and found that "nearly nine in 10 females and eight in 10 males described their experience as 'very positive' or 'somewhat positive.'"[104] *Remarkably, "these percentages*

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[101] Ardee Coolidge, *Care Net Pregnancy Centers Saved 70,000 Lives in 2015*, Care Net (Sept. 1, 2016), https://www.care-net.org/abundant-life-blog/care-net-pregnancy-centers-saved-70000-lives-in-2015.

[102] *Id.* (linking to sources).

[103] Chuck Donovan, *Pregnancy Centers: A Consensus Service to Women and Children*, Charlotte Lozier Inst. (Apr. 13, 2017), https://lozierinstitute.org/pregnancy-help-centers-a-consensus-service-to-women-and-children/.

[104] *Id.*

were almost the same whether the person responding self-described as pro-life or pro-choice."[105]

Given the extremely high favorability ratings PHCs enjoy, it is no surprise that people want them in their communities. The survey referenced above "went on to ask whether the respondents would desire for a PHC to be in their community and if the respondent regarded a PHC as a necessary community resource for 'free services to women with an unexpected pregnancy.'"[106] "Regarding the desirability of having a PHC in the community" and "asking only those respondents who were not sure whether there was a PHC in their community," 73 percent of women "replied that a PHC was desirable."[107] "Moreover, fully 92 percent of females participating in the poll answered that they regarded such centers as 'very necessary[']or 'fairly necessary.'"[108] Of note, "The poll question made it very plain that these pro-life centers neither offer nor even refer for abortions."[109]

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[105] *Id.* (emphasis added).

[106] *Id.*

[107] *Id.*

[108] *Id.*

[109] *Id.*

II. Forcing Pregnancy Help Centers to Refer for Abortion Undermines Their Mission and Threatens Their Existence with a Never-Before-Recognized State Interest in Promoting the Destruction of Innocent Human Life.

Governments exist to protect human life, not to promote its destruction. *See* Letter from Thomas Jefferson to the Republican Citizens of Washington County, Maryland (March 31, 1809), *in* 8 *The Writings of Thomas Jefferson* 165 (H.A. Washington ed. 1871) (stating that "[t]he care of human life and happiness, and not their destruction, is the first and only legitimate object of good government"). Forcing PHCs to refer for abortion undermines their mission and offends basic principles of government regarding the "unqualified [governmental] interest in the preservation of human life." *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997) (quoting *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261, 282 (1990)).

By forcing PHCs to refer for abortion, California attempts to bootstrap this Court's jurisprudence about the *individual* right to choose abortion into a never-before-recognized compelling *government* interest in promoting abortion. This Court's jurisprudence recognizes that a state's unique interest in the "preservation" of human life is so foundational that it may affirmatively promote that interest in regulating informed consent for abortion protocols. *See Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 883 (1992) (government may "further its legitimate goal of protecting the life of the unborn by enacting legislation aimed at ensuring a decision that is mature

and informed, even when, in so doing, the State expresses a preference for childbirth over abortion"). But this Court's jurisprudence simply does not and should not implicate a corollary unqualified interest of a government to promote the "destruction" of unborn human life.

Even if the Court chose to recognize a governmental interest in promoting abortion, that interest would not outweigh the First Amendment rights at stake here. There is a colossal distinction between, on the one hand, a constitutional right of an *individual* woman "to decide whether to terminate her pregnancy," as recognized in *Casey*, 505 U.S. at 874,[110] and, on the other hand, *government* conscripting pro-life PHCs into referring for abortion in violation of their foundational morals, commitments, and ideals. A new, constitutionally protected right of government to promote abortion – not just by its own employees and agencies, but also by means of forcing PHCs to participate in their project – would devastate the mission of pro-life organizations and offend basic principles of government in a free society.

In weighing the balance of interests presented by this case, the Court should emphasize what it has previously recognized—that abortion is a "unique act," *Casey*, 505 U.S. at 852, and is "inherently different from other medical procedures," *Harris v. McRae*, 448 U.S. 297, 325 (1980). Abortion is different from other medical procedures because in abortion "the fetus will

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[110] To be clear, *Amici* and their counsel respectfully disagree with the holding of the *Casey* decision reaffirming the essential holding of *Roe v. Wade*, 410 U.S. 113 (1973).

be killed." *Gonzalez v. Carhart*, 550 U.S. 124, 159 (2007).[111] It is also unique because of the impact of the abortion on the woman herself. *Id. at* 159 ("Whether to have an abortion requires a difficult and painful moral decision which some women come to regret."). In the words of one federal court, "[t]he rationality of distinguishing between abortion services and other medical services when regulating physicians or women's healthcare has long been acknowledged by Supreme Court precedent." *Greenville Women's Clinic v. Bryant*, 222 F.3d 157, 173 (4th Cir. 2000).

Nowhere is the "unique" and "inherently different" nature of abortion more deeply felt than in forcing pro-life individuals and institutions to promote or participate in it.

For the people who are employed by, donate to, or volunteer with local PHCs, the work is truly a labor of love. PHCs and the people who support and staff them are devoted to loving both mothers and children through practical action. In many if not most cases, this devotion springs from deeply held religious or moral commitments about the value of every human

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[111] *See also* Keith L. Moore, *Before We Are Born: Essentials of Embryology* 2 (Saunders ed., 7th ed. 2008) ("[The zygote], formed by the union of an oocyte and a sperm, is the beginning of a new human being."); ML Condic, *The Origin of Human Life at Fertilization: Quotes Compiled from Medical Textbooks and Peer-Reviewed Scientific Literature* (Nov. 2017) (compiling sixty-one short quotes from medical school textbooks and peer-reviewed scientific journals published since 2001 identifying sperm-egg fusion as the beginning of a new individual human life), *available at* http://bdfund.org/wp-content/uploads/2016/05/Condic-Sources-Embryology.pdf.

life and the obligation to serve those in society who are suffering, in crisis, or at disadvantage. *Cf. Casey*, 505 U.S. at 853 (recognizing that "reasonable people" will differ as to the morality of abortion); *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993) (stating that "there are common and respectable reasons for opposing [abortion]"). Forcing PHCs to refer for abortion would undermine their mission and unconstitutionally burden their right to express the principles that inspire them to serve vulnerable mothers and children.

Importantly, the goal of PHCs to provide concrete pregnancy and parenting resources is consistent with the foundational role of government and its "unqualified interest in preserving human life." *Glucksberg*, 521 U.S. at 728. The California law and the lower court ruling upholding it turn that interest on its head, with the threatened effect, if not reversed, of running PHCs out of existence to the detriment of vulnerable women and children.

Whatever interest California might have in providing information through its own government programs about the availability of abortion, such interest is certainly not compelling enough that it may burden Free Speech protections by forcing PHCs to refer for abortion. For a government to compel its citizens to speak in promotion of its program to publicly fund the taking of the lives of unique and individual human beings would be contrary to the entire Western political tradition stretching back to the ancient Greeks, down to the Founding era, and up to our current Constitutional government. Just as the First Amendment would prohibit government from forcing

Quaker community centers to post signs referring people to military combat positions, likewise, pro-life individuals and institutions simply cannot and should not be forced to participate in, promote, or refer for abortion.

CONCLUSION

For the foregoing reasons, *Amici* respectfully urge this Court to reverse the judgment below, rejecting its underlying premise that there is a compelling state interest in promoting abortion, and protecting the freedom of Pregnancy Help Centers to serve mothers and children in a way that is consistent with their mission and values.

Respectfully submitted,

NIKOLAS T. NIKAS
DORINDA C. BORDLEE
Counsel of Record
BIOETHICS DEFENSE FUND
3312 Cleary Avenue
Metairie, LA 70002
(504) 231-7234
dbordlee@bdfund.org

THOMAS M. MESSNER
CHARLOTTE LOZIER INSTITUTE
2800 Shirlington Road
Suite 1200
Arlington, VA 22206

Counsel for Amici Curiae

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In The Supreme Court of the United States

NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES, d/b/a NIFLA, *et al.*,

Petitioners,

v.

XAVIER BECERRA, ATTORNEY GENERAL, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICUS CURIAE COMPASSION & CHOICES IN SUPPORT OF RESPONDENTS

DARIN M. SANDS
Counsel of Record
PETER D. HAWKES
LANE POWELL PC
601 SW Second Avenue
Suite 2100
Portland, Oregon 97204
(503) 778-2100
sandsd@lanepowell.com

KEVIN DÍAZ
COMPASSION & CHOICES
4224 NE Halsey Street
Suite 335
Portland, Oregon 97213
(503) 943-6535
kdiaz@
compassionandchoices.com

Counsel for Amicus Curiae Compassion & Choices

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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INTEREST OF AMICUS CURIAE COMPASSION & CHOICES[1]

Compassion & Choices, with more than 450,000 supporters, is the nation's oldest, largest, and most active nonprofit organization committed to improving care and expanding choice at the end of life. For over thirty years, Compassion & Choices has envisioned a society where people receive state-of-the-art healthcare and a full range of choices for dying in comfort, dignity, and control. Compassion & Choices aims to ensure that individuals understand the benefits and burdens of all feasible treatment options, that treatment decisions are fully respected, and that healthcare reflects a person's values and priorities for life's final chapter.

Compassion & Choices offers free consultation, planning resources, referrals, assistance with advance directives, and support throughout the country through its End of Life Consultation Program. Advocating at the state and federal levels, Compassion & Choices pursues policies that empower individuals in relation to their healthcare decisions and, if necessary, litigates or participates as amicus to achieve better medical care and access to a full range of end-of-life options.

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution to fund the preparation or submission of this brief. No person or entity, other than amicus curiae and its counsel made a monetary contribution to the preparation or submission of this brief. Petitioners have filed a blanket consent to the filing of amicus briefs, and Respondents have consented to the filing of this brief.

Compassion & Choices believes that the First Amendment does not prohibit the states from enacting reasonable laws requiring providers of healthcare-related services, including physicians, long-term care facilities and hospices, to disclose neutral and truthful information to individuals regarding lawful healthcare alternatives. Compassion & Choices is concerned that a ruling for the petitioners could threaten the validity of such laws disclosing options at the end of life, and substantially impair patient decision-making.

SUMMARY OF ARGUMENT

Recognizing that historical "informed consent" practices and rules still left many people ill-informed regarding their end-of-life healthcare choices, both numerous states and the federal government have enacted regulations requiring disclosures regarding end-of-life treatment options, such as the right to execute advance directives, the right to refuse treatment, or information concerning options such as palliative care or, in those states that permit it, medical-aid-in-dying. Those disclosure requirements enhance the relationship of trust and confidence between patients and their healthcare providers by ensuring they can have frank, honest discussions about some of the most momentous decisions of patients' lives.

While the disclosure laws at issue in this case relate to access to reproductive healthcare, this Court's analysis of those laws' constitutionality has profound

implications for the enforceability of end-of-life disclosure rules as well. The Court should reject petitioners' invitation to use the First Amendment to narrowly cabin "informed consent" rules and enable those providing healthcare-related services to avoid disclosing the availability of treatment options they do not provide or morally oppose. Instead, the Court should hold that the First Amendment permits reasonable regulations requiring healthcare providers to provide neutral, truthful information to patients or prospective patients regarding their lawful treatment choices.

ARGUMENT

I. STATE AND FEDERAL LAW SUPPLEMENTS THE DOCTRINE OF INFORMED CONSENT BY REQUIRING HEALTHCARE PROVIDERS TO MAKE NEUTRAL AND TRUTHFUL DISCLOSURES TO PATIENTS REGARDING LAWFUL END-OF-LIFE DECISIONS.

A. The Doctrine of Informed Consent Requires Certain Disclosures Concerning an Individual's End-Of-Life Options.

Historically, physicians were obliged to disclose only that information necessary to persuade patients to do what the physician thought was best, or to try to offer hope and comfort. Sonia M. Suter, *The Politics Of Information: Informed Consent In Abortion And End-Of-Life Decision Making*, 39 Am. J.L. & Med. 7, 12

(2013). Over time, however, the focus shifted to patient consent, and whether the physician disclosed enough information for the patient's treatment decision to be a "true exercise of self-determination." *Id.* Today, the doctrine of "informed consent," which includes the right to refuse treatment, "has become firmly entrenched in American tort law." *Cruzan v. Dir., Missouri Dep't of Health*, 497 U.S. 261, 269, 110 S.Ct. 2841, 111 L.Ed.2d 224 (1990).

The scope of what constitutes informed consent varies by State, but is generally defined either by what a reasonable patient would want to know or by what the standard of care requires a reasonable physician to disclose. Suter, *supra*, at 14-15; Nadia N. Sawicki, *Mandating Disclosure of Conscience-Based Limitations on Medical Practice*, 42 Am. J.L. & Med. 85, 111 (2016). Regardless, the doctrine is limited by its tort roots. It typically applies only to physicians (or other medical professionals), requires only disclosure of medical information, and arises only in the context of a specific procedure or treatment. Sawicki, *supra*, at 111-12.

In addition, physicians may have religious or moral objections to certain forms of lawful medical treatment, including end-of-life options. Sawicki, *supra*, at 87. Even where professional ethics would dictate disclosure, statistics suggest that a large percentage of physicians and healthcare institutions do not believe they have an obligation to provide patients with information regarding treatment options to which they object on religious or moral grounds. *Id.* at 92-95, 100-01;

Suter, *supra*, at 42, 51. In short, many individuals are unaware of the end-of-life options they may have.[2]

B. States And Federal Laws Require Healthcare Providers to Disclose Additional Information to Patients Regarding Various End-Of-Life Options.

The doctrine of informed consent thus results in only *some* individuals receiving *some* information they may want to know as they approach life's final stages. Given the deeply significant personal and societal interests implicated by these decisions, which exceed almost any other kind of medical decisions, *see* Suter, *supra*, at 18-19, many States have enacted laws that require healthcare providers to disclose truthful information regarding lawful end-of-life options.

It is important to note that many of these laws entail disclosures that exceed a traditionally recognized duty of informed consent in several ways. For instance, rather than apply only to physicians or specialized medical professionals, many of these laws also apply to other healthcare providers that commonly provide care and services to the elderly, infirm or terminally ill, including hospitals, hospices, long-term care facilities (such as nursing homes and assisted living facilities), and home healthcare agencies.

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[2] As the Michigan legislature found, "patients with reduced life expectancy due to advanced illnesses . . . are often unaware of their legal rights, particularly with regard to controlling end-of-life decisions." Mich. Comp. Laws § 333.5652(1)(c) (2018).

Likewise, rather than require disclosure only in advance of or in connection with a particular medical procedure, prescribed drug, or course of treatment, many of these laws also require healthcare providers to disclose information regarding end-of-life options at different times and upon different events, such as at the time of admission to a hospital or long-term care facility, in connection with the preparation of a care plan, upon a particular diagnosis or condition, or in response to a patient request. *See, generally*, Suter, *supra*, at 29-33.

These laws typically fall into at least one of three categories. To start, many States require providers – particularly hospices, long-term care facilities, and home healthcare agencies – to inform patients or residents of their right to execute advance directives that specify what kinds of treatments, procedures or medicines should be administered if they are no longer able to make healthcare decisions for themselves, such as do-not-resuscitate orders.[3] Federal law likewise requires that facilities receiving Medicare or Medicaid funds inform residents of their rights regarding advance

[3] *See, e.g.*, Ala. Admin. Code § r. 420-5-10-.05(3)(h) (2018); Ark. Admin. Code § 007.05.4-11(F) (2018); Ark. Admin. Code § 007.05.11-10(F) (2018); Ark. Admin. Code § 016.06.35-136.000 (2018); Cal. Health & Safety Code § 1569.156(a)(3) (2018); 6 Colo. Code Regs. § 1011-1:XXVI-6.4(d)(2) (2018); Fla. Stat. § 765.110(1) (2018); Idaho Admin. Code § 16.03.09.235.01(a)(2) (2018); N.J. Stat. § 26:2H-65(a)(2) (2018); N.M. Admin. Code § 7.27.6.6-6.8 (2018); Okla. Admin. Code § 310:661-5-4.1(b)(2) (2018); Okla. Admin. Code § 317:30-3-13(a)(2) (2018); Or. Rev. Stat. § 127.649(1)(a)(A) (2018); Vt. Admin. Code § 12-4-200:3.8 (2018); Wash. Admin. Code § 388-97-0280(3)(c)(ii) (2018).

directives. *See* 42 U.S.C. § 1395cc(f)(1) (2000); 42 C.F.R. § 489.102(a)(1)(ii) (2018); 42 C.F.R. § 418.52(a)(2) (2018).

Next, some States require healthcare providers – as part of a duty of informed consent to individuals with a terminal or advanced illness, in the context of advance directives or on a stand-alone basis – to specifically inform patients or residents regarding lawful and medically appropriate alternative forms of end-of-life treatment, palliative care, and one's right to refuse potentially life-saving or life-prolonging treatment.[4]

Finally, in the handful of jurisdictions permitting individuals with terminal conditions to receive medical-aid-in-dying, often called "death with dignity" laws, upon the voluntary (and typically written) request of the patient for a prescription for medication that will provide comfort at the end of life and verification of the terminal prognosis, the States require physicians who write a prescription to fully inform the patient of the risks and probable fatal results if and when the patient

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[4] *See, e.g.*, Ala. Admin. Code § r. 420-5-10-.05(3)(h) (2018); Ark. Admin. Code § 007.05.11-10(F)(2)(b) (2018); Ark. Admin. Code § 007.05.4-11(F)(2)(b) (2018); Ark. Admin. Code § 016.06.35-136.000 (2018); Cal. Health & Safety Code § 1569.156(a)(3) (2018); Colo. Rev. Stat. § 25.5-4-413(1) (2018); Mich. Comp. Laws § 333.5655(b) (2018); N.Y. Pub. Health § 2997-c(2)(a) (2018); N.Y. Pub. Health § 2997-d(2) (2018); Or. Rev. Stat. § 127.649(1)(a)(A) (2018); Vt. Stat. Ann. tit. 18 § 1871(b) (2018); Wash. Admin. Code § 388-97-0260(3)(b) (2018).

self-administers the medication, as well as other available treatments and care options.[5]

The disclosure laws outlined above are justified not only by patients' interest in knowing the full array of their healthcare options at the end of life, but by our society's interest in fostering a relationship of trust and confidence between patients and their healthcare providers. *Cf.*, *e.g.*, *Washington v. Glucksberg*, 521 U.S. 702, 731, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997) (discussing the state interest in "the trust that is essential to the doctor-patient relationship"); *Canterbury v. Spence*, 464 F.2d 772, 782 (D.C. Cir. 1972) (A physician's "duty [is] to impart information which the patient has every right to expect. The patient's reliance upon the physician is a trust of the kind which traditionally has exacted obligations beyond those associated with armslength transactions. His dependence upon the physician for information affecting his well-being, in terms of contemplated treatment, is well-nigh abject.") (footnotes omitted). These disclosure laws give patients the confidence that their healthcare providers are being fully candid with them about their treatment options – including options that the provider may not offer, or with which the provider may disagree.[6] Those

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[5] *See*, *e.g.*, Cal. Health & Safety Code § 443.5(a)(2) (West 2018); Or. Rev. Stat. § 127.815(1)(c) (2018); Vt. Stat. Ann. tit. 18 § 5283(a)(6) (2018); Wash. Rev. Code § 70.245.040(1)(c) (2018).

[6] Depending on their personal beliefs, physicians and other healthcare providers may be opposed not only to medical-aid-in-dying, but to any number of treatment options, including other end-of-life treatment options such as declining life-saving or

disclosures enable patients to have open and honest discussions with their healthcare providers about their treatment options – discussions in which the healthcare provider is free to make his or her personal opinions and recommendations known.

II. THE FIRST AMENDMENT PERMITS STATES TO REQUIRE HEALTHCARE PROVIDERS TO MAKE NEUTRAL AND TRUTHFUL DISCLOSURES RELATED TO LAWFUL TREATMENT OPTIONS.

A. Petitioners' Arguments Could Be – and Indeed Have Been – Used to Attack End-Of-Life Disclosure Requirements.

In this case, petitioners advocate for an interpretation of the First Amendment that would, by extension, call into question many of the end-of-life disclosure laws discussed above. Petitioners contend that *all* content-based regulation of speech (other than the unprotected categories of speech the Court has previously recognized) is subject to strict scrutiny. (Pet. Br. 28-31.) Petitioners also urge this Court to reject any category of "professional speech" that would be subject to any lesser standard. (*Id.* 42-46.) Petitioners acknowledge that "informed consent" rules are generally permissible, but they argue for an extraordinarily narrow view of "informed consent" that would limit it only to information a licensed physician is required to

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life-prolonging treatment, or even common treatment options such as vaccinations, antibiotics, or blood transfusions.

provide before performing a specific medical procedure. (*Id.* 46-49.) Petitioners suggest that, because they do not *themselves* provide abortions, they cannot be required to inform their clients of the potential availability of public funding for that and other family planning and/or prenatal services under the rubric of "informed consent." (*See id.* 47-49.)

Like the disclosure laws at issue in this case, the end-of-life disclosure laws discussed in this brief are content-based, in that they require specific information to be provided to patients or facility residents in certain circumstances. And, as discussed, many of those laws require those disclosures beyond the traditional confines of "informed consent" rules. Under plaintiffs' theory, if a particular healthcare provider objects to and refuses to provide services relating to a particular lawful end-of-life option, that healthcare provider could also refuse to provide information regarding that option unless the disclosure law satisfied strict scrutiny. Such a rule would threaten to upend the extensive body of state and federal regulation of end-of-life disclosures that has been enacted around the nation, leaving suffering patients ill-informed about their lawful treatment options and harming the special relationship of trust and confidence between patients and their healthcare providers.

Petitioners go further in their advocacy, arguing for an even more extreme position that would essentially render end-of-life disclosure laws (or, really, *any* type of disclosure laws) unenforceable. Petitioners contend that, despite its facial neutrality in requiring only

truthful, factual information regarding treatment options, the mere *mention* of abortion means that the notice required of licensed clinics promotes a "viewpoint" favoring abortion that is contrary to petitioners' "viewpoint" opposing abortion. (Pet. Br. 37-39.) Petitioners ask this Court to hold such "viewpoint discrimination" against private speech to be *per se* unconstitutional. (*Id.* 57-60.)

If, as petitioners contend, any mention of a lawful treatment option amounts to promotion of a "viewpoint" favoring that treatment option, then any healthcare provider who objects to, for example, do-not-resuscitate orders or the refusal of life-prolonging treatment could simply refuse to comply with many of the end-of-life disclosure laws outlined above, claiming that they amounted to "viewpoint discrimination." Such a result would leave patients or facility residents' ability to make informed choices at the mercy of their healthcare providers' personal, private beliefs – an intolerable outcome.

The threat to end-of-life disclosure laws posed by the positions petitioners advance is not hypothetical. In *Vermont Alliance for Ethical Healthcare, Inc. v. Hoser*, 274 F. Supp. 3d 227 (D. Vt. 2017), for example, certain physicians and other healthcare providers sought to enjoin the enforcement of Vermont informed consent statutes to the extent that those statutes could be interpreted to require them to inform patients of their options under Vermont's medical-aid-in-dying statute. Like petitioners here, those healthcare providers claimed that such a requirement would violate

their First Amendment rights, and would amount to a requirement that they "counsel for" medical-aid-in-dying. *See id.* While the district court dismissed that case for lack of standing, *see id.*, the battle lines over end-of-life disclosure laws have plainly been drawn.

B. The First Amendment Permits Reasonable Regulations Requiring that Healthcare Providers Disclose Neutral, Truthful Information Concerning Lawful Treatment Options to Their Patients and Prospective Patients.

The Court should decline to go down the path petitioners advocate, and instead recognize that the First Amendment does not prohibit reasonable laws requiring healthcare providers to disclose truthful information regarding lawful treatment options – even if the healthcare provider does not offer, and in fact morally opposes, a particular treatment option that is subject to disclosure.

First, whether under the category of "professional speech" or under a broader understanding of "informed consent," the Court should recognize that the special relationship of trust and confidence between a healthcare provider and a patient or prospective patient justifies requirements that the provider inform the patient or prospective patient of his or her lawful healthcare options – regardless of whether that provider itself offers them or morally objects to them. *Cf. Canterbury*, 464 F.2d at 782 (a patient's "dependence upon

the physician for information affecting his well-being, in terms of contemplated treatment, is well-nigh abject").

That result is consistent with this Court's precedent. In *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 881-85, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992), for example, the Court upheld requirements that physicians provide information to women seeking abortions concerning the "probable gestational age of the child" and the availability of further information describing the fetus, medical assistance for childbirth, child support options, and adoption agencies and other abortion alternatives – even though that information had nothing to do with the medical risks or benefits of the medical procedure to be performed and, in many instances, related to services that the physicians did not themselves provide. *See id.* at 882 (acknowledging that certain of the required disclosures "have no direct relation to [the patient's] health").

Second, the Court should hold that reasonably providing neutral, truthful information regarding a treatment option does not amount to advocating for a "viewpoint" favoring that treatment option. *Cf. Hill v. Colorado*, 530 U.S. 703, 724-25, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000) (statute regulating speech-related conduct near healthcare facilities without reference to content of speech is not "viewpoint based"); *Employment Div., Dep't of Human Resources of Oregon v. Smith*, 494 U.S. 872, 878-79, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990) (if a "valid and neutral law of general applicability" has the "incidental effect" of burdening the free exercise of

religion or freedom of the press, "the First Amendment has not been offended.") (citation omitted).

Again, *Casey* is instructive. In that case, physicians were required to provide prospective abortion patients with "truthful, nonmisleading information about the nature of the procedure, the attendant health risks and those of childbirth, and the 'probable gestational age' of the fetus[.]" 505 U.S. at 882. The opinion of Justices O'Connor, Kennedy, and Souter concluded that requiring such information "may be permissible" as part of obtaining a woman's informed consent, even if it may have the incidental effect of reducing the number of abortions performed. *Id.* And the Court found no constitutional infirmity in requiring physicians to inform prospective patients of the availability of materials published by the state, even though those materials "expresse[d] a preference for childbirth over abortion." *See id.* at 882-83. If the disclosure regulations at issue in *Casey* did not amount to unconstitutional "viewpoint discrimination," then the licensed clinic disclosure regulation at issue in this case – which merely requires clinics to inform a prospective patient of the potential availability of lawful medical services (including both abortion *and* prenatal care) from an alternative provider, without advocating for or against those services – certainly cannot either.

Healthcare choices are among the most consequential, emotional decisions that a person makes in his or her life – including at the end of life. At those vulnerable junctures in life when healthcare choices must be made, patients and prospective patients rely

on their healthcare providers to provide them with complete, truthful information regarding their options. Allowing healthcare providers to violate that trust on the sole basis of their personal aversion to a particular treatment option leaves those patients ill-served and erodes the basis of the special relationship between healthcare providers and their patients. The First Amendment is not offended by requiring neutral, truthful disclosures in the context of that relationship.

CONCLUSION

Compassion & Choices respectfully asks the Court to affirm the decision of the Ninth Circuit, and to hold that the First Amendment does not forbid reasonable regulations requiring healthcare providers to provide neutral, truthful information to patients or prospective patients regarding the full range of their lawful treatment options.

Respectfully submitted,

DARIN M. SANDS
Counsel of Record
PETER D. HAWKES
LANE POWELL PC
601 SW Second Avenue
Suite 2100
Portland, Oregon 97204
(503) 778-2100
sandsd@lanepowell.com

KEVIN DÍAZ
COMPASSION & CHOICES
4224 NE Halsey Street
Suite 335
Portland, Oregon 97213
(503) 943-6535
kdiaz@
compassionandchoices.com

Counsel for Amicus Curiae Compassion & Choices

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No. 16-1140

IN THE

Supreme Court of the United States

NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES, D/B/A NIFLA, *ET AL.*, *Petitioners*,

v.

XAVIER BECERRA, ATTORNEY GENERAL, *ET AL.*, *Respondents*.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

Brief *Amicus Curiae* of Conservative Legal Defense and Education Fund, Free Speech Coalition, Free Speech Defense and Education Fund, One Nation Under God Foundation, Pass the Salt Ministries, Eberle Associates, Downsize DC Foundation, DownsizeDC.org, Restoring Liberty Action Committee, and The Transforming Word Ministries in Support of Petitioners

JOSEPH W. MILLER
RESTORING LIBERTY ACTION COMMITTEE
P.O. Box 83440
Fairbanks, AK 99708
Attorney for Amicus Curiae RLAC

January 16, 2018
**Counsel of Record*

HERBERT W. TITUS*
WILLIAM J. OLSON
JEREMIAH L. MORGAN
ROBERT J. OLSON
WILLIAM J. OLSON, P.C.
370 Maple Ave. W., Ste. 4
Vienna, VA 22180
(703) 356-5070
wjo@mindspring.com
Attorneys for *Amici Curiae*

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INTEREST OF THE *AMICI CURIAE*[1]

Conservative Legal Defense and Education Fund, Free Speech Defense and Education Fund, One Nation Under God Foundation, Pass the Salt Ministries, Downsize DC Foundation, and The Transforming Word Ministries are nonprofit educational and legal organizations, exempt from federal income tax under Internal Revenue Code ("IRC") section 501(c)(3). Free Speech Coalition and DownsizeDC.org, are nonprofit social welfare organizations, exempt from federal income tax under IRC section 501(c)(4). These organizations were established, *inter alia*, for purposes related to participation in the public policy process, including conducting research, and informing and educating the public on the proper construction of state and federal constitutions, as well as statutes related to the rights of citizens, and questions related to human and civil rights secured by law. Eberle Associates is a for-profit corporation, headquartered in McLean, Virginia. Restoring Liberty Action Committee is an educational organization.

Some of these *amici* filed a brief *amicus curiae* in support of the NIFLA Petition for a Writ of Certiorari.[2]

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[1] It is hereby certified that counsel for the parties have consented to the filing of this brief; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

[2] *See* Brief Amicus Curiae of U.S. Justice Foundation, *et al.*, National Institute of Family and Life Advocates v. Becerra (Apr. 20, 2017).

SUMMARY OF ARGUMENT

Contrary to the finding of the Ninth Circuit below, the California Reproductive FACT Act is not a constitutionally-permissible regulation of "professional speech." First, there is neither textual nor historical evidence to support the California contention that there is a First Amendment exception for "professional speech." Second, the Reproductive FACT Act is not even a regulation of "professional speech," but is a measure purportedly designed to force Crisis Pregnancy Centers to fully inform women so as to enhance the "so-called reproductive rights" of California women. Third, the Reproductive FACT Act required Notices do not constitute one-on-one "professional speech" between a licensed professional and a client, but rather constitute an advertisement to all people who come onto the premises of a California Crisis Pregnancy Center. Thus, both by design and effect, the Reproductive FACT Act requires California's Crisis Pregnancy Centers to facilitate the State's reproductive policy promoting abortion in blatant violation of the CPC's rights under the First Amendment's free marketplace of ideas.

Prior to the ratification of the First Amendment in 1791, the Constitution offered no express, textual barrier to laws coercing the people to propagate information, opinion, and ideas favored by civil rulers. In 1785, however, the people's assembly of delegates in the Commonwealth of Virginia enacted into law Thomas Jefferson's Bill for Establishing Religious Freedom. Designed to protect the people from a sinful and tyrannical government, Jefferson's bill laid down

a jurisdictional line excluding all laws that would compel the people to propagate opinions with which they disagreed. As articulated by Jefferson, "the opinions of men are not the object of civil government, nor under its jurisdiction;" rather, the realm of opinion and ideas belonged to the people "in free argument and debate." As James Madison put it nine years after the ratification of the First Amendment, "[t]he people, not the government possess the absolute sovereignty." Thus, it is for the people to correct the government, not the government to correct the people.

The Reproductive FACT Act is based upon just the opposite foundation, ordering the CPCs to conform their view that abortions are not one of the "reproductive rights" of women to the California's so-called "fully-informed" view that women must be appraised of their abortion rights. Under the First Amendment, however, California is not permitted to "weaponiz[e] the means of government against ideological foes." Greater Baltimore for Pregnancy Concerns, Inc. v. Mayor and City Council of Balt., 2018 U.S. App. LEXIS 297 at *23-*24. Rather, the free market recognized by the First Amendment requires California to "lay down the arms of compelled speech and wield only the tools of persuasion." *Id.*

This Court's First Amendment jurisprudence prevents the government from compelling an individual to speak a message with which it disagrees — and in this case, a message which it abhors. The First Amendment jurisdictional limitation on government is so longstanding and so well-established that it is difficult to understand how the Ninth Circuit

could have upheld the validity of such a statute. The short answer appears to be that the Ninth Circuit viewed the case as an abortion rights case, not a Free Speech case, and based on that mindset, the court below was all too willing to apply a different set of legal principles to give a victory to those who support abortion. Certainly, in the past this Court has given the impression that it will adjust even well-established legal doctrines to reach a result supportive of abortion rights in numerous cases decided in the 45 years since Roe v. Wade. As Justice Scalia pointed out, this Court has demonstrated an "inclination to bend the rules when any effort to limit abortion, or even to speak in opposition to abortion, is at issue." Stenberg v. Carhart, 530 U.S 914, 954 (2000) (Scalia, J., dissenting).

However, in no sense is this case about abortion rights. It certainly cannot be argued, or even thought, that there is an "undue burden" being imposed on access abortion by failing to require pro-life ministries to carry a pro-abortion message. Indeed, the unfairness of such a ruling would create profound disruption for the nation. By most measures, the nation is fairly evenly split on matters of abortion. The pro-life side, however, becomes a significant majority for many specific abortion-related questions. For the large portion of the nation that is pro-life, it has been profoundly disturbing to see the federal judiciary again and again negate state laws which could be viewed as even slightly pro-life, irrespective of the outcome of elections of legislators, governors, and presidents.

These pro-abortion decisions are not truly based on the Constitution's text, or on any effort to ascertain the original meaning of the text, but are best understood as being grounded in the moral values of the federal judiciary. As such, they lose their claim of constitutional legitimacy. And, with decisions not grounded in the U.S. Constitution, the federal judiciary thereby loses its claim to the support of the American people for its rulings. Should this Court now require opponents of abortion to distribute a pro-abortion message, it will provoke Christians to determine whether they, in good conscience, could obey such a decision. It takes little imagination to understand the societal fracture that could be in the offing from such a decision.

ARGUMENT

I. THE CALIFORNIA REPRODUCTIVE FACT ACT IS NOT A CONSTITUTIONALLY PERMISSIBLE REGULATION OF "PROFESSIONAL SPEECH."

According to the Ninth Circuit, the California Reproductive Freedom, Accountability, Comprehensive Care and Transparency Act ("Reproductive FACT Act") regulates "professional speech," and thus deserves less than full First Amendment protection. *See* NIFLA v. Harris, 839 F.3d 823, 839 (9th Cir. 2016). However, as Petitioners point out in their brief, "[t]his Court has never recognized 'professional speech' as a unique category for First Amendment analysis." Brief for Petitioner ("Pet. Br.") at 42. Nor should it. In this very case, the Ninth Circuit manipulated its inventive

"professional speech" doctrine to validate the Reproductive FACT Act even though the speech governed by the Act is not "professional speech," even as that term is defined by the Ninth Circuit itself. There is neither textual nor historical support for such a speech subclassification and, if adopted, such a doctrine would empower judges to devise their own rules governing the freedom of speech in disregard of the original principles governing the First Amendment free marketplace of ideas. *See id.* at 42-43.

A. The Commercial Speech Doctrine Cannot Be Relied on by California.

First, the record is clear that the crisis pregnancy centers in this case are nonprofit organizations offering free services, not commercial entities. Pet. Br. at 6-8. Even if it had been applicable, the "commercial speech" doctrine is deeply flawed and has been repudiated by this Court.

There have been cases where "commercial speech" has routinely been given less protection by this Court than "political speech." *See, e.g.,* Central Hudson Gas v. Public Service Comm. of New York, 447 U.S. 557 (1980). However, the answer to questions under the First Amendment is determined not by a gradation of the identity of the speaker or the kind of speech, but whether the communication at issue is one made within the marketplace of ideas outside the jurisdiction of the State or within the marketplace of goods and services inside the jurisdiction of the State. *Compare* Breard v. Alexandria, 341 U.S. 622 (1951) (door-to-door solicitation of magazine subscriptions is

protected by the First Amendment) *with* Valentine v. Chrestensen, 316 U.S. 52 (1942) (street distribution of a handbill inviting visitors to submarine exhibit upon payment of a fee for admission).

Indeed, the marketplace distinction was abandoned by this Court in Bigelow v. Virginia, 421 U.S. 809 (1975), which struck down the application of a Virginia law that prohibited the advertisement of availability of legal abortion at low cost in New York as a violation of the First Amendment. In Bigelow, Justice Blackmun ruled that the commercial advertiser's "First Amendment interests coincided with the constitutional interests of the general public," as reflected in the recently decided cases of Roe v. Wade, 410 U.S. 113 (1973), and Doe v. Bolton, 410 U.S. 179 (1973), also written by Justice Blackmun. Fittingly, one year after Bigelow, Justice Blackmun explained, "in *Bigelow v. Virginia* ... the notion of unprotected 'commercial speech' all but passed from the scene." Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 759 (1976).

B. The Reproductive FACT Act Does Not Even Purport to Regulate "Professional Speech."

As defined by the Ninth Circuit, professional speech is "speech that occurs between professionals and their clients in the context of their professional relationship." NIFLA, 839 U.S. at 839. Stated another way, the Ninth Circuit avers that speech "can be appropriately characterized as professional when it

occurs within the confines of a professional's practice." *Id.*[3] But, the Reproductive FACT Act's purpose and scope, and indeed its very title, demonstrates that the Act is **not** limited to the "confines of a professional's practice," that is, to one-on-one speech "between a professional and a client" in relation to the "exercise of judgment on behalf of the client in light of the client's individual needs and circumstances...." *See id.* Had the California Legislature's purpose been to regulate a professional practice — although a purpose these *amici* would view as also being outside its authority — it would have applied the regulation to all licensed professionals in that field. But it did not. *See* Pet. Br. at 8.

Instead, the Reproductive FACT Act is a type of abortion rights statute, designed to ensure that Californians generally "receive accurate information about their **reproductive rights,** and to exercise those rights [un]hindered by the existence of crisis pregnancy centers (CPCs)." *Id.* at 829 (emphasis added). As the district court below pointed out, the purpose of the Act is to secure to the women of California their full scope of "reproductive rights," unhindered by the actions of the "nearly 200 CPCs:

> whose **goal** is to **interfere** with women's ability to be fully informed and exercise

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[3] Generally, the professional speech doctrine would apply to any "'speaker ... providing personalized advice in a private setting to a paying client.'" *See* Greater Baltimore for Pregnancy Concerns, Inc. v. Mayor & City Council of Balt., 2018 U.S. App. LEXIS 297, *14. (4th Cir.)

> reproductive **rights**.... [NIFLA v. Harris, 2016 U.S. Dist. LEXIS 92612 at *18, n. 4 (emphasis added).]

Echoing this finding, the Ninth Circuit elaborated that the legislature found that the CPCs "'**pose** as full-service women's health clinics, **but aim** to discourage and to prevent women from seeking **abortions**' in order to fulfill their goal of 'interfer[ing] with women's ability to be fully informed and exercise their reproductive rights.'" NIFLA, 839 F.3d at 829 (emphasis added). The purpose of the Reproductive FACT Act, then, is to block CPCs from accomplishing their goal by ridding the state of CPCs whose purpose ostensibly is to interfere with the state's pro-abortion policy. It certainly cannot be defended as a regulation of "professional speech."

C. The Reproductive FACT Act Required Notice Does Not Constitute Professional Speech.

Even if viewed as a health measure, the Reproductive FACT Act's Notice requirement kicks in "before any professional relationship has begun." Pet. Br. at 44. Thus, as the Petitioners points out in their brief, the Act is not geared to "ensure exchange of truthful information on a particular topic within an ongoing professional relationship." *Id.* Thus, the Reproductive FACT Notice requirement cannot be compared to a regulation requiring "informed consent," as the district court below claimed. *See* NIFLA, U.S. Dist. LEXIS 92612 at*23-*24. The notice is one posted for all to see, not just to ensure those seeking

individual treatment that they will be fully informed about their pregnancy concerns.

The Ninth Circuit attempted to sweep this distinction aside, pronouncing that "[b]ecause licensed clinics offer medical and clinical services in a professional context, the speech within their walls related to their professional services is professional speech." NIFLA, 839 F.3d at 840. According to this view, "**[a]ll** the speech related to the clinics' professional services that occurs within the clinics' walls, including within in the waiting room, is part of the clinics' professional practice." *Id.* (emphasis added). Presto! The information required by the State to be posted in a conspicuous place "within the clinic" becomes "professional speech," unentitled to full First Amendment protection, whereas the same forced speech outside the clinical setting presumably would be impermissible.

If the California legislature was really concerned that the State's women were in need of protection from CPC actions that "misinform" or "intimidate women from making fully-informed, time-sensitive decisions about critical health care," would the state legislators have concluded that "the most effective way" to counter the CPC threat is the posting of notices in a "conspicuous" place in a CPC waiting room? Would not the "most effective way" have been to require the doctors or nurses to impart the required notice in the context of the one-on-one personal relationship, rather than relying on the chance that an emotion-laden pregnant woman might not see, read, and understand an impersonal printed notice no matter how

conspicuous the display? But the Reproductive FACT Act is not a health licensure measure designed to ensure that individual women patients of licensed health professionals are "fully-informed [about] time-sensitive decisions about critical health care," as the Ninth Circuit found. *See id.* at 829. Rather, the Act reflects an effort by the California legislature to undermine the pro-life message by "weaponizing" the pro-choice side in the "abortion debate" with "the means of government" against their pro-life "ideological foes," seizing the CPC's waiting rooms to carry the State's message that abortion is a necessary ingredient if women are to be "fully-informed" of their "reproductive rights." *See* Greater Baltimore at *23.

D. The Reproductive FACT Act Is Designed to Put CPCs Out of Business.

Euphemistically, the State and the Ninth Circuit would have the world believe that the State is just filling in an information gap because CPCs are somehow "**unable** to enroll patients in state-sponsored programs to state the existence of these services." NIFLA at 830 (emphasis added). This Court should not permit this cynical masquerade, implying that the CPCs are falling short because of lack of resources, when in truth, CPCs are being "forced by the state into a corner and required essentially to renounce and forswear what they have come as a matter of deepest conviction to believe." *See* Greater Baltimore at *23.

In truth, the Reproductive FACT Act is an exercise of raw political power by an increasingly politicized and ideologically monolithic State. Overwhelmingly

dominated by one party, the increasingly bold California legislature serves up punitive measures designed to coerce the people to conform to its collective will in flagrant disregard of CPCs' constitutional rights. The Reproductive FACT Act is an abusive and contemptible measure and should not be tolerated by this Court.

II. THE REPRODUCTIVE FACT ACT UNCONSTITUTIONALLY ABRIDGES THE FIRST AMENDMENT'S FREE MARKETPLACE OF IDEAS.

In the district court, the California Defendants contended that, because the Reproductive FACT Act did not "prohibit" CPCs "'from imparting information or disseminating opinions" [or] mentioning, discussing or advocating its pro-life viewpoint or even communicating its disagreement with the statute itself," there is no violation of the First Amendment. NIFLA, 2016 U.S. Dist. at *16. Noting that "[t]he Act does not ban speech or otherwise prohibit Plaintiffs from discussing their message with patients," but only "requires medical providers to advise their patients of various types of treatment available so patients are fully informed," the district court concluded that the Reproductive FACT Act did not violate the First Amendment rights of the CPCs. *Id.* at *22. The Ninth Circuit agreed. Indeed, the appellate panel found that "California's interest in presenting accurate information about the licensing status of individual clinics is particularly compelling" because the legislature found a problem with the very "existence of CPCs, which often present misleading information to

women about reproductive medical services," and therefore, the State-required Notices met First Amendment strictures. NIFLA, 839 F.3d at 843. But the two courts and the California Defendants are seriously mistaken here.

Under the First Amendment, it is not the job of governments to correct the people; rather, it is the job of the people to correct their governments. As James Madison observed in his Report on the Virginia Resolutions of 1800: "The people, not the government, possess the absolute sovereignty." *See* Sources of Our Liberties (R. Perry & J. Cooper, eds.) at 426 (Rev. ed., ABA Found.: 1978). Consequently, in America there is no place for government oversight of the opinions of its citizenry, such as would be the case if the government should, for example, establish an Orwellian "Ministry of Truth" to weed falsehoods out of the public debate. *See* United States v. Alvarez, 132 S.Ct. 2537, 2547 (2012). Instead, the marketplace of ideas is to be free from the coercive power of the State, as a matter of jurisdiction.

The Commonwealth of Virginia planted this jurisdictional seed in 1785 when it enacted into law Thomas Jefferson's 1779 Virginia Bill for Establishing Religious Freedom. That principle grew into the 1791 First Amendment of the United States Constitution a dozen years later. The Virginia premise rings as true today as the day it was passed by the Virginia Assembly of Delegates:

> Whereas Almighty God hath created the mind free; that all attempts to influence it by

> temporal punishments or burthens ... tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the Holy author of our religion, who being Lord both of body and mind, yet chose not to **propagate it by coercions** on either, as was in his Almighty power to do; that the impious **presumption of legislators and rulers**, civil as well as ecclesiastical, who being themselves but fallible and uninspired men, have assumed dominion over the faith of others, **setting up their own opinions and modes of thinking as the only true and infallible**, and as such endeavouring to impose them on others, hath established and maintained false religions over the greatest part of the world, and through all time; that to **compel** a man to furnish contributions of money for the **propagation** of opinions which he **disbelieves**, is sinful and tyrannical.... [Virginia Act for Establishing Religious Freedom, reprinted in 5 The Founders Constitution at 84 (item # 44) (P. Kurland & R. Lerner, eds., Univ. of Chi. Press: 1987) (emphasis added).]

The Reproductive FACT Act violates this principle because it has enlisted the coercive power of the State to compel CPCs to communicate the State's opinion that, to be "fully informed" of her "reproductive rights," a woman must be informed of available abortion services, and to that end, CPCs must post official notices on their premises to communicate the abortion information prescribed by the State. To put it in

Jeffersonian terms, the Reproductive FACT Act compels CPCs to "propagate" an opinion which they not only "disbelieve" but also strongly oppose. Thus, as applied to CPCs, the Reproductive FACT Act is both "sinful and tyrannical." Or, to put it in more modern terms, after review of a city ordinance comparable to the California Act, the Fourth Circuit recently has declared that:

> Weaponizing the means of government against ideological foes risks a grave violation of one of our nation's dearest principles: "that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. " [Greater Baltimore at *23.]

Jefferson understood that the First Amendment jurisdictional line was not subject to existential judicial override by any "important" or even "compelling state interest" or by any level of scrutiny, "intermediate," "strict," or "rational basis." Rather, his Bill as adopted by the Virginia legislature stated:

> [T]he **opinions** of men are **not** the **object** of **civil government**, nor under its jurisdiction: That to suffer the **civil Magistrate to intrude** his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy ... because he being of course Judge of that tendency will **make his own opinions the rule of**

> **judgment**, and approve or condemn the sentiments of others only as they shall square with, or differ from his own...: And finally, that truth is great and will prevail if left to herself; that she is the proper and sufficient antagonist to errour, and has nothing to fear from the conflict, unless by human interposition, disarmed of her natural weapons, **free argument and debate**; errours ceasing to be dangerous when it is permitted freely to contract them. [Jefferson, in 5 The Founders Constitution at 77 (item # 37) (emphasis added).]

In the First Amendment marketplace of ideas, the State legislature simply has no jurisdiction to compel CPCs to promote the California legislature's pro-abortion line. As Fourth Circuit Judge J. Harvie Wilkinson concluded in Greater Baltimore: the opposing sides in the abortion debate must "lay down the arms of compelled speech and wield only the tools of persuasion. The First Amendment requires it." *Id.* at *24.

III. THIS COURT'S FIRST AMENDMENT JURISPRUDENCE SHOULD NOT BE SKEWED BY THIS COURT'S ABORTION PRECEDENTS.

A. From Toleration to Coercion.

Since this Court's January 22, 1973 landmark decision in Roe v. Wade, the state of the nation's law governing abortion has undergone revolutionary

change. Prior to the fateful date on which Roe was decided — and this brief is being filed just six days shy of 45 years after that decision — abortion was disfavored and criminalized in a majority of the states (Roe at 118). Since then, abortion has moved from just being tolerated in limited circumstances[4] to achieving the status of a super-right that may not be hindered, or even must be subsidized by the state. Although some see this evolution as "progress," it is important to remember that others see it as evidence of cultural coarseness at the very least, and perhaps a monument in the line of the moral decline and eventual social and political destruction of our nation.

In Roe, this Court at least rhetorically recognized the states' interest in protecting the unborn — what it termed "the State's important and legitimate interest in potential life...." (*id.* at 163) — a state interest that has largely been ignored in subsequent decisions. Now, this Court is confronted with the opposite assertion by a state. The Ninth Circuit's decision

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[4] Many today forget that in Roe this Court struck down the Texas statute because it criminalized abortion "without regard to pregnancy stage and without recognition of the other interests involved...." *Id.* at 164. This protection was declared not to be wrong — but too broad. Roe decided only that during the first trimester, the "abortion decision" should "be left to the medical judgment of the pregnant woman's attending physician." *Id.* However, after the first trimester, the state could regulate abortion "in ways that are reasonably related to maternal health," and significantly, after viability, the Roe Court held, states may "even proscribe, abortion except where it is necessary...." *Id.* at 164-65.

upheld California's interest not in protecting the unborn, but in impeding the work of pro-life advocates.

These *amici* urge this case be decided according to the text and historic understanding of the First Amendment. Resolved in this manner, these *amici* believe this Court can be counted on to protect the crisis pregnancy centers from this law today, as well as clarifying principles that will protect other advocates on all issues of public policy tomorrow. *See* Sections I and II, *supra*.

These *amici* believe that California can only prevail if this Court's First Amendment principles are overrun by this Court's abortion jurisprudence which decides cases in favor of abortion interests with remarkable consistency. For example, in Planned Parenthood v. Casey, 505 U.S. 833 (1992), the Supreme Court affirmed Roe, but rejected Roe's "rigid" framework — as Roe protected some life. It held that a state has an interest in ensuring "that the woman's choice is informed," but that an attempt "to persuade the woman to choose childbirth over abortion," was permissible as long as these measures do not impose "an undue burden" on the woman's right. Casey at 878. But ensuing cases have undermined even that test, to favor abortion interests so that almost any impediment imposed by a state constitutes an "undue burden."

Eight years later, this Court narrowly sanctioned partial-birth abortions. The legal approach taken to strike down the Nebraska statute was extraordinary, setting on its ear a principle of statutory interpretation

that applies now in all but abortion cases. As explained by Justice Scalia in his dissent in Stenberg v. Carhart:

> To be sure, the Court's construction of this statute so as to make it include procedures other than live-birth abortion involves not only a disregard of fair meaning, but an **abandonment of the principle** that even **ambiguous statutes** should be interpreted in such fashion as to render them valid rather than void. *Casey* does not permit *that* jurisprudential novelty — which must be chalked up to **the Court's inclination to bend the rules when any effort to limit abortion, or even to speak in opposition to abortion, is at issue**. [Stenberg v. Carhart, 530 U.S. 914, 954 (2000) (Scalia, J., dissenting) (emphasis added).]

Indeed, the tide has shifted from removing impediments or burdens to abortion, to compelling states to facilitation access to abortions at a location near to home, at a facility of most any type, and even one paid for by taxpayers or companies against their will, as discussed *infra*. Former President Obama's Affordable Care Act mandated that those employers who provide health insurance to employees must also pay for insurance that covers abortifacients — which some in the abortion industry term contraceptives, but which actually cause the death of a conceived child.[5]

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[5] *See Amicus Curiae* Brief of U.S. Justice Foundation, *et al.*, Zubik v. Burwell (Jan. 11, 2016) at 6 n.4.

That Act led to litigation before this Court about whether pro-life employers must be complicit in funding insurance that provided abortifacients. *See* Burwell v. Hobby Lobby, 573 U.S. ___, 134 S.Ct. 2751 (2014) and Zubik v. Burwell, 578 U.S. ___, 136 S.Ct. 1557 (2016). The people of the United States charted a different course in November 2016, and President Trump expanded the exemptions for those employers claiming sincerely held religious beliefs, but last month even that modest step was enjoined by a federal district court. Pennsylvania v. Trump, 2017 U.S. Dist. LEXIS 206380 (E.D. Pa., Dec. 15, 2017).

B. From Abortion and Beyond.

Members of this Court have noted the willingness of the Court to abandon traditional legal principles to favor the abortion industry. This Court denied certiorari in a case arising from Washington state penalizing a pharmacy because it refused to provide abortifacients for religious reasons. There was evidence in that case that the state regulations were imposed on the pharmacy because of "hostility to pharmacists whose religious beliefs regarding abortion and contraception are out of step with prevailing opinion in the State," and yet certiorari was denied. Stormans v. Wiesman, 136 S.Ct. 2433 (2016) (Alito, J., dissenting from denial of certiorari).

Almost simultaneous with this Court denying the Stormans' petition, this Court struck down a Texas law designed to protect the health and safety of women seeking abortions in that state. Whole Woman's Health v. Hellerstedt, 136 S.Ct. 2292 (2016). This

Court purported to rely on Casey's language of "undue burden," holding that a state statute that has the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion is unconstitutional. The Court instead imposed its ideas of medical safety on the nation, concluding that Texas's law did not "confer[] medical benefits sufficient to justify the burdens upon access" to abortion. Justice Thomas invoked Justice Scalia's description of what he called "the Court's troubling tendency 'to bend the rules when any effort to limit abortion, or even to speak in opposition to abortion, is at issue.'" *Id.* at 2321 (citing Stenberg v. Carhart at 954 (Scalia, J., dissenting)).

Thus, in almost every case in which this Court's decision in Roe v. Wade has been applied, this Court has refused to temper its views, but rather has "doubled down" by broadening the "right to privacy" that it purported to find in the Fourteenth Amendment's concept of "personal liberty." The result has been the development of a separate and special abortion jurisprudence — where the normal principles of law and fact do not apply. Instead, in abortion cases, the Court has succumbed to the siren song of existential philosophy as articulated by autonomous man: "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." Planned Parenthood v. Casey at 851 (Kennedy, Souter, and O'Connor, JJ., concurring).

In this case, the question is, therefore, whether the special abortion jurisprudence will advance even further — beyond a determination not just that

Americans must tolerate the murder of babies in their communities, or that they may not reasonably restrict the practice even for the health and safety of the mothers, or even that the babies are not even safe when partially out of the womb, but also now, for the first time, that those opposed to abortion must promote it, and that those who find it evil and sinful must become complicit in it.

C. The Divisive Consequences of the California Law.

There is no question that the American people are now deeply divided between the pro-life view and the pro-abortion view. The Supreme Court has forced those who embrace a pro-life view to live in a society where it is estimated that more than 58 million unborn babies have been killed.[6] Those who support abortion have won nearly every round in federal court, wholly negating victories for pro-life forces at the ballot box. The question now is whether the pro-abortion community with the California statute has finally gone too far.

Christians have sensed that "there always is, and must be, an 'establishment of religion' in our society, or any other. The question being fought out today is, quite simply, which religion shall be established." M. Stanton Evans, The Theme Is Freedom (Regnery Publishing: 1994) at 130. However, it is becoming more clear that the pro-abortion forces will never be

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[6] S. Ertelt, "58,586,256 Abortions in America Since Roe v. Wade in 1973," LifeNews.com (Jan. 14, 2016).

satisfied until they make the pro-life forces complicit in their behavior. If that is the outcome of this case, the consequences that will be unleashed could be astonishing.

Among those consequences will be an undermining of the legitimacy of the federal judiciary. It will compel many to conduct a re-examination of the doctrine of judicial supremacy first articulated in Cooper v. Aaron, 358 U.S. 1 (1958).

> the federal judiciary is supreme in the exposition of the law of the Constitution.... It follows that the **interpretation** of the Fourteenth Amendment enunciated by **this Court** in the *Brown* case is the **supreme law of the land**, and Art. VI of the Constitution makes it of binding effect on the States.... [Cooper at 18 (emphasis added).]

Although the Cooper Court claimed that judicial supremacy was declared by Chief Justice Marshall in Marbury v. Madison, 5 U.S. 137 (1803), that position is demonstrably false. This Court's claim to the Judicial Supremacy of its opinions in Cooper came only 19 years after Justice Felix Frankfurter articulated the exact opposite position:

> [T]he ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it. [Graves v. New York, 306 U.S. 466, 491-92 (1939) (Frankfurter, J., concurring).]

Holy Writ gives insight into how Bible believers will view this Court's decision. In the fifth chapter of the Book of Acts, the rulers of Israel sought to eradicate what they perceived to be a cult that had formed around the person of Jesus Christ. Fearing that they would lose their religious and political power, these rulers of Israel were deeply offended by those Apostles of Jesus who were testifying to the great things which God had done in Jerusalem. This short story not only explains the continuing threat that can be posed to Christianity from a government, but also gives direction as to how Christians should respond to rulers that demand they violate the Word of God.

> Now when the high priest and the captain of the temple and the chief priests heard these things, they doubted of them whereunto this would grow. Then came one and told them, saying, Behold, the men whom ye put in prison are standing in the temple, and **teaching** the people. Then went the captain with the officers, and brought them without violence: for they **feared the people**, lest they should have been stoned.
>
> And when they had brought them, they set them before the council: and the high priest asked them, Saying, **Did not we straitly command you** that ye should not **teach** in this name? and, behold, **ye have filled Jerusalem with your doctrine**, and intend to bring this man's blood upon us.

> Then Peter and the other apostles answered and said, **We ought to obey God rather than men.** [Acts 5:24-29 (emphasis added).]

As cases are brought in California courts to impose $100, and then $500 civil penalties, it may be that juries, if jury trials are permitted, will refuse to find violations. Certainly, the people will lose confidence in their government, and especially in the courts. This Court would undermine its political and moral authority, as the people cease to respect and obey its decisions. It takes little imagination to understand the societal fracture that could be in the offing.

The predicate of the California law under review is that the legislature of the State of California knows the truth, and decided to compel it be spoken even by those who believe it to be a lie. Courts may be given authority to decide disputes between parties, but they have no authority to decide what is truth. As Jefferson observed, all efforts to use the power of the State to enforce "the truth" breeds hypocrisy and tyranny:

> **The opinions of men are not the object of civil government, nor under its jurisdiction**: That to suffer the civil Magistrate to **intrude** his powers into the field of opinion, and restrain the profession or propagation of principles ... is a **dangerous** fallacy.... [Jefferson, in 5 The Founders Constitution at 77 (item # 37) (emphasis added).]

CONCLUSION

For the reasons set out above, the decision of the U.S. Court of Appeals for the Ninth Circuit should be reversed and the case remanded.

Respectfully submitted,

JOSEPH W. MILLER
RESTORING LIBERTY
ACTION COMMITTEE
P.O. Box 83440
Fairbanks, AK 99708
Attorney for Amicus Curiae
RLAC

HERBERT W. TITUS*
WILLIAM J. OLSON
JEREMIAH L. MORGAN
ROBERT J. OLSON
WILLIAM J. OLSON, P.C.
370 Maple Ave. W., Ste. 4
Vienna, VA 22180
(703) 356-5070
wjo@mindspring.com
Attorneys for *Amici Curiae*

**Counsel of Record*
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IN THE

Supreme Court of the United States

NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES, dba NIFLA, *et al.*,

Petitioners,

—v.—

XAVIER BECERRA, Attorney General of California, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR *AMICI CURIAE* EQUAL RIGHTS ADVOCATES, PLANNED PARENTHOOD AFFILIATES OF CALIFORNIA, CALIFORNIA WOMEN LAWYERS, HADASSAH, AND THE FAMILY VIOLENCE APPELLATE PROJECT IN SUPPORT OF RESPONDENTS

SANFORD JAY ROSEN
Counsel of Record
GAY CROSTHWAIT GRUNFELD
DEVIN W. MAUNEY
ROSEN BIEN GALVAN
& GRUNFELD LLP
50 Fremont Street, 19th Floor
San Francisco, California 94105
(415) 433-6830
srosen@rbgg.com

Counsel for Amici Curiae Equal Rights Advocates, Planned Parenthood Affiliates of California, California Women Lawyers, Hadassah, and the Family Violence Appellate Project

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INTEREST OF *AMICI CURIAE*[1]

Equal Rights Advocates, founded in 1974, is a national non-profit legal advocacy organization dedicated to protecting and expanding economic and educational access and opportunities for women and girls. In concert with ERA's commitment to securing gender equity in the workplace and in schools, ERA seeks to preserve women's right to reproductive choice and protect women's access to health care, including safe, legal contraception and abortion. In addition to litigating cases on behalf of workers and students and providing free legal advice and counseling to hundreds of women each year, ERA has participated in numerous *amicus* briefs in this Court in cases affecting these rights.

Planned Parenthood Affiliates of California is a not-for-profit organization that leads the state-wide public policy and advocacy work on behalf of the seven separately incorporated Planned Parenthood affiliates in California. PPAC's affiliates operate 115 health centers, handling approximately 1.5 million patient visits each year. Affiliated health centers offer a full range of reproductive healthcare, and in some cases, primary care. PPAC's mission is to create a safe climate where individuals have universal and unfettered access to reproductive healthcare services and are free to follow their own beliefs, values, and moral codes when making their own healthcare decisions.

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution to the preparation or submission of this brief. All parties have consented in writing to the filing of this brief.

California Women Lawyers is a non-profit organization chartered in 1974. CWL is the only statewide bar association for women in California, and maintains a primary focus on advancing women in the legal profession. CWL works to better the position of women in society and to eliminate all inequities based on sex. CWL has participated in a wide range of cases to secure the equal treatment of women.

Hadassah, the Women's Zionist Organization of America, Inc., founded in 1912, is the largest Jewish and women's membership organization in the United States, with over 330,000 Members, Associates and supporters nationwide. While traditionally known for its role in developing and supporting healthcare and other initiatives in Israel, Hadassah has longstanding commitments to improving healthcare access in the United States, particularly with regard to the healthcare needs of women. Hadassah strongly supports full and complete access to reproductive healthcare services and a woman's right to make health decisions according to her own religious, moral and ethical values, and recognizes the role that reproductive freedom plays in women's empowerment, economic equity and security.

Family Violence Appellate Project is the only nonprofit organization in California dedicated to representing domestic violence survivors in civil legal appeals for free. FVAP represents low-income survivors who need to appeal dangerous trial court decisions that leave them or their children at risk of ongoing abuse. Partnering with pro bono attorneys from California's top law firms and corporate legal teams, FVAP helps abuse survivors throughout California get the safety and justice they deserve. FVAP's goal is to empower abuse survivors through the court system and ensure that they and their

children can live in safe and healthy environments, free from abuse. Because domestic abusers may use reproductive abuse as a tactic of exercising coercive control over their intimate partners, the ability to seek accurate information about reproductive health is especially important to survivors of abuse. A woman who has been traumatized by having her autonomy undermined, often through violence, and who as a result has been denied access to reproductive health services, or forced to become pregnant against her will, or who is being abused into terminating a pregnancy she wishes to continue, will be particularly vulnerable to and harmed by false and manipulative practices that would be permitted if the FACT Act were overturned.

INTRODUCTION AND SUMMARY OF ARGUMENT

A growing number of "Crisis Pregnancy Centers" ("CPCs") use deceptive tactics to draw in women and dispense medically inaccurate and incomplete information that jeopardizes the health and lives of many women, especially low-income and other at-risk women. In this brief, *Amici* marshal abundant facts revealing this epidemic of deceptive and plainly false information.

In 1927, Justice Brandeis instructed the State of California how to confront fraudsters and peddlers of deception: "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence." *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring). The State of California has heeded this advice and mandated the posting of nonintrusive,

truthful disclosures to provide women the information they need to make informed healthcare choices.

Most CPCs lack state-issued licenses to provide healthcare, but many unlicensed CPCs masquerade as medical offices. Other CPCs obtain state-issued medical licenses, but offer incomplete information and almost no medical care.

Both licensed and unlicensed CPCs commonly employ deceptive tactics to lure women into their facilities and peddle medical misinformation to those they ensnare. References to CPCs in this brief include both licensed and unlicensed entities unless otherwise specified.

One study revealed that 79 percent of the CPC advertisements appearing on Google indicated that the CPCs provided abortions and other medical care, when in fact, these "clinics" do not offer such services and their mission is merely to admonish women not to have abortions. *See* Hayley Tsukayama, *Google removes "deceptive" pregnancy center ads*, Wash. Post (April 28, 2014), https://www.washingtonpost.com/news/the-switch/wp/2014/04/28/naral-successfully-lobbies-google-to-take-down-deceptive-pregnancy-center-ads/?utm_term=.16d848a566c1.

Other studies reveal that CPCs routinely misstate medical facts. *E.g.*, Minority Staff of H. Comm. on Gov't Reform, 109th Cong., *False and Misleading Health Information Provided by Federally Funded Pregnancy Resource Centers* 7 (July 2006) ("Waxman Report") (finding that 87 percent of clinics surveyed "provided false or misleading information"). For example, a volunteer investigator who visited 43 CPCs in California recalled that "[e]very clinic [she visited] spouted the lie that abortions cause breast cancer." Robin Abcarian, *Going undercover at crisis pregnancy*

centers, L.A. Times (May 1, 2015), http://www.latimes.com/local/abcarian/la-me-0501-abcarian-crisis-pregnancy-20150501-column.html. CPC counselors also told her, "Condoms have a bunch of little holes you might not know about." *Id.*

While they spread medical misinformation, unlicensed CPCs deliberately avoid activities that would bring them within the scope of California's regulatory scheme. But these same entities frequently adopt the appearance of medical offices. The Reproductive FACT Act reasonably requires unlicensed clinics that hold themselves out as pregnancy or reproductive care providers to disclose their unlicensed status. Cal. Health & Safety Code § 123472(b)(1).

Licensed CPCs represent themselves as comprehensive reproductive healthcare providers, but provide almost no medical services. Several of the most prominent CPC networks explicitly prohibit their member clinics from offering any contraceptives, or even referring women to providers that do. *See, e.g.*, *Heartbeat Program Policies*, Heartbeat International, https://www.heartbeatservices.org/about-us (last visited Feb. 25, 2018); *Pregnancy Center Standards of Affiliation*, Care Net (January 2013), http://cdn2.hubspot.net/hub/367552/file-2184386735-pdf/Preg-Center-Standards-of-Affilition-1-13-C.pdf?t=1418138924001. Petitioner NIFLA suggests that CPCs obtain licenses not to offer medical care, but to convince women not to have abortions. *See About NIFLA*, National Institute of Family and Life Advocates, https://nifla.org/about-nifla/ (last visited Feb. 25, 2018) ("using ultrasound in a pregnancy center for reaching abortion-minded women" is only reason posited for obtaining medical license in "Medical" section on "About NIFLA" page); *see also Frequently Asked Questions*, Heartbeat

International, https://www.heartbeatservices.org/about-us/faqs#CN (last visited Feb. 24, 2018) (ability to perform ultrasound scans is only "medical service[]" mentioned in section discussing medical licensing).

These licensed CPCs deliberately attract women seeking unbiased counseling, contraceptives, and abortions that they do not provide, and they refuse to offer referrals to providers who do. The FACT Act appropriately mandates that licensed clinics specializing in family planning or pregnancy-related care provide notice to women that they are eligible for state-funded comprehensive family planning services, prenatal care, and abortion. Cal. Health & Safety Code § 123472(a)(1).

Patently false utterances that directly endanger life are not protected speech. As Justice Holmes famously put it, "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre[.]" *Schenck v. United States*, 249 U.S. 47, 52 (1919). In light of the widespread falsehoods inimical to women's lives and health pushed by CPCs, California's interest in correcting this deception is not merely important but compelling. The FACT Act's requirements are narrowly tailored to the women's health issues they address, imposing no unconstitutional burden on CPCs' First Amendment rights.

ARGUMENT

I. CRISIS PREGNANCY CENTERS USE DECEPTIVE TACTICS TO LURE IN WOMEN, GIVE THEM MEDICALLY INACCURATE INFORMATION, AND UNDERMINE THEIR ACCESS TO REPRODUCTIVE HEALTHCARE

Licensed and unlicensed CPCs commonly employ deceptive tactics to draw women into their facilities. As the Ninth Circuit observed, "[f]alse and misleading advertising by clinics that do not provide abortions, emergency contraception, or referrals to providers of such services has become a problem of national importance." *First Resort, Inc. v. Herrera*, 860 F.3d 1263, 1268 (9th Cir. 2017).

Inside their doors, CPCs "distribute misleading, medically inaccurate, and false information regarding abortion risks, sexually transmitted infections, and contraceptive effectiveness[.]" *Regulating Disclosure of Services and Sponsorship of Crisis Pregnancy Centers*, Policy Number 20113, American Public Health Association (Nov. 1, 2011), https://www.apha.org/policies-and-advocacy/public-health-policy-statements/policy-database/2014/07/22/08/33/regulating-disclosure-of-services-and-sponsorship-of-crisis-pregnancy-centers. They "frequently target women who are young, members of minority groups, or financially disadvantaged, and multiple investigations have found that CPCs often engage in techniques that are coercive, threatening, misleading, and aggressive toward these vulnerable groups[.]" *Id.*

The more-than 200 licensed and unlicensed CPCs operating in California generally adopt the form of "local non-profit organizations." S. Comm. on Health,

Reproductive FACT Act 4, Cal. S. Reg. Sess. 2015-2016 (May 4, 2015). But they typically "receiv[e] substantial funding and resources from at least one large pro-life umbrella organization[] such as[] Care Net, [Heartbeat International], and the National Institute of Family and Life Advocates." *Id.* (citing Casey Watters *et al.*, *Pregnancy Resource Centers: Ensuring Access and Accuracy of Information*, Public Law Research Institute, U.C. Hastings College of Law (April 1, 2011) (citations reviewed and updated June 1, 2015)).

A. CPCs Commonly Use Deception to Get Women in the Door

"Crisis Pregnancy Centers['] ... primary purpose is to prevent women who are experiencing unintended pregnancy from seeking abortions by purporting to counsel women on their pregnancy options." *Regulating Disclosure of Services and Sponsorship of Crisis Pregnancy Centers*, American Public Health Association, *supra*; *see also* Pet'rs' Br. at 17. They and their operators have the right to advocate against birth control or abortions. But most CPCs hide their true intentions and instead adopt strategies to attract women who seek the very care CPCs do not provide: unbiased counseling, emergency contraceptives, and abortions. Many would never provide any contraceptives. They step well past the bounds of protected advocacy into deception that endangers women.

One tactic with deep roots is the adoption of "misleading names, such as 'Pregnancy Options Clinic' or 'Women's Resource Center,' which are similar to those used by comprehensive women's health clinics and imply that they discuss a full range of options." *Unmasking Fake Clinics: The Truth About Crisis*

Pregnancy Centers in California 6, NARAL Pro-Choice California Foundation (2010) ("*California CPC Investigation*"), available at: https://www.sfcityattorney.org/wp-content/uploads/2015/08/Unmasking-Fake-Clinics-The-Truth-About-Crisis-Pregnancy-Centers-in-California-.pdf.

In an early iteration of this tactic in the 1980s, an anti-abortion clinic, which provided no healthcare, operated in North Dakota under the name Women's Help Clinic, in order to draw women seeking healthcare away from a real medical clinic called Women's Health Organization, which offered comprehensive reproductive care, including abortions. *Fargo Women's Health Org., Inc. v. Larson*, 381 N.W.2d 176, 177-78 (N.D. 1986). Because Women's Help Clinic (the sham clinic) "mis[led] persons into believing that abortions [we]re conducted at the clinic with the intent of deceptively luring those persons to the clinic to unwittingly receive anti-abortion propaganda[,]" the North Dakota Supreme Court upheld a preliminary injunction prohibiting Women's Help Clinic from continuing to operate under that name or otherwise "falsely lull[ing] people that come to them for counseling into thinking that they are, in fact, the Women's Health Organization or the Fargo Women's Health Organization, Inc." *Id.*

Present day CPCs have merged the tactic of deliberately adopting names similar to those of comprehensive family planning clinics with the additional strategy of locating themselves next to existing healthcare clinics to confuse women looking for care. *Crisis Pregnancy Centers Lie: The Insidious Threat to Reproductive Freedom* 5, NARAL Pro-Choice America (2015) ("*NARAL National CPC Report*"), https://www.prochoiceamerica.org/wp-content/uploads/2017/04/cpc-report-2015.pdf. One CPC in Worcester,

Massachusetts went so far as to set up an office on the same floor of a building that housed a Planned Parenthood clinic and operated under the name "Problem Pregnancy" in order to use the same acronym: "PP." *Id.* When Planned Parenthood moved to a new location, Problem Pregnancy moved as well—directly across the street. *Id.*

Anti-abortion clinics similarly have long used the placement and language of advertisements to mislead women seeking abortions and other medical care. "Warna Lewis, pregnant and desiring an abortion, looked in the Yellow Pages directory under 'Abortion Information and Services' and found an advertisement for the 'AAA Pregnancy Problem Center' in St. Louis, Missouri." *Lewis v. Pearson Found., Inc.*, 908 F.2d 318, 318 (8th Cir.), *on reh'g*, 917 F.2d 1077 (8th Cir. 1990). When Ms. Lewis called and said she wanted an abortion, "a staff member at the Center stated that they would 'help her all they could,' and invited Lewis to come in to take a free pregnancy test." *Id.* at 319. Upon arrival, however, Ms. Lewis received no medical care and was instead ushered to a small room and subjected to a slide show of "dismembered fetuses and abortions being performed by means of crude-appearing instruments" interspersed with "intermittent family scenes." *Id.*; *see also California CPC Investigation* at 7, *supra*.

CPCs now have brought their misinformation into the digital age. Petitioner Pregnancy Care Clinic, located in El Cajon, California, is a good example. It maintains a website deceptively named "www.unplanned parenthood.org," adding only the "un" to what has long been Planned Parenthood's website "www.planned parenthood.org." *See* Pregnancy Care Clinic, www.unplannedparenthood.org (last visited Feb. 25, 2018). Petitioner's web site proclaims, "We are here to

help you," a header lists the word "abortion" between "symptoms" and "services," and visitors are encouraged to "make an appointment." *Id.* Unplannedparenthood.org gives every impression that it will help women obtain abortion or other reproductive or pregnancy care, but as Petitioner admits in its brief, in fact it offers only those services that "advance its pro-life mission." Pet'rs' Br. at 6. Thus, when women show up for their "appointments," Petitioner will provide, not pregnancy-related healthcare, but anti-choice "Abortion Education" and "Post-Abortion Healing Bible Study." *See Services*, Pregnancy Care Clinic, http://www.supportpcc.com/services/ (last visited Feb. 25, 2018); *see also California CPC Investigation* at 3, *supra* (describing one young woman's experience with such a clinic's deception).

CPCs have employed sophisticated strategies to make their own websites appear when computer users google words like "abortion clinic," "morning-after pill," and "women's health clinics." *NARAL National CPC Report* at 4, *supra*. According to one study, "79 percent of the [CPCs] that advertised on Google indicated that they provided medical services such as abortions, when, in fact, they are focused on counseling services and on providing information about alternatives to abortion." Tsukayama, *Google removes "deceptive" pregnancy center ads*, *supra*.

Care Net and Heartbeat International, two of the major CPC umbrella organizations, spend in excess of "$18,000 per month on pay-per-click advertising campaigns that target women searching for abortion providers and bring them to their websites and call center, Option Line." *California CPC Investigation* at 7, *supra*. Option Line will then refer women to the nearest CPC, which of course, will not offer abortion care, emergency contraception, or many other

healthcare services the referred patients were seeking. *See Id.*; Pet'rs' Br. at 33. In fact, women looking for contraception of any kind who book appointments through Option Line cannot possibly get the care they seek from the clinics Option Line refers them to, because Care Net and Heartbeat International, Option Line's sponsors, prohibit affiliated clinics from offering birth control altogether. *See Pregnancy Center Standards of Affiliation*, Care Net (January 2013), available at: http://cdn2.hubspot.net/hub/367552/file-2184386735-pdf/Preg-Center-Standards-of-Affilition-1-13-C.pdf?t=1418138924001; *Heartbeat Program Policies*, Heartbeat International, https://www.heartbeatservices.org/about-us (last visited Feb. 25, 2018). Heartbeat International includes among its policies a commitment not to "promote birth control (devices or medications) for family planning, population control, **or health issues, including disease prevention**." *Id.* (emphasis added).

Some anti-abortion organizations that had been upfront about their ideological mission have now adopted deceptive tactics. In 2005, Westside Pregnancy Clinic "had a website prominently featuring a photo of a woman's bare stomach and a dialogue box coming out of it saying, 'Don't forget about me[,]'" a nod at least to the entity's anti-abortion stance. *NARAL National CPC Report* at 15, *supra*. As of 2015, that same clinic's website falsely claimed to provide "'unbiased, confidential and free medical, educational and support services' for women facing an unplanned pregnancy." *Id.*

A San Francisco-based CPC previously known as "First Resort" changed its name to "Third Box" after losing high profile litigation it brought against the City and County of San Francisco. *See* Katie J.M. Baker, *New National Women's Clinic "Third Box" Has Anti-*

Abortion Past, BuzzFeed News (October 8, 2014), https://www.buzzfeed.com/katiejmbaker/new-national-womens-clinic-third-box-has-anti-abortion-past?utm_term=.lfGbd29Z6#.twBnE0klg; *see also First Resort*, 860 F.3d at 1268. Third Box now boldly claims "to offer the woman struggling with her choice the time, space and support to find her own voice." Amanda Marcotte, *New Anti-Choice Tactic: Pretend to Be Pro-Choice*, Slate (Oct. 9, 2014, 12:52 PM), http://www.slate.com/blogs/xx_factor/2014/10/09/third_box_anti_abortion_clinic_rebrands_itself_as_a_pro_choice_counseling.html. Its CEO, Shari Plunkett, however, believes "every woman's heart is telling her to carry to term, because God has placed truth in her heart, and *the truth is that abortion is never the right answer*." *Id.* (emphasis added).

When healthcare provider and insurer Kaiser learned then-First Resort's goal was not patient care but to make "the San Francisco Bay Area into an abortion-free community," it stopped making referrals to First Resort's clinics. *Kaiser Permanente: Refers Pregnant Patients to Anti-Abortion Counseling Clinic*, California Healthline (Jan. 15, 1999), https://californiahealthline.org/morning-breakout/kaiser-permanente-refers-pregnant-patients-to-antiabortion-counseling-clinic/.

Taking notice of the growth of deceptive advertising by CPCs, Google and Yahoo have taken steps to remove some of their ads. *NARAL National CPC Report* at 5, *supra*; Tsukayama, *Google removes "deceptive" pregnancy center ads*, *supra*. Because Google policy requires that advertisements be truthful, accurate, and factually supportable, it decided to remove certain deceptive ads after a reproductive-rights advocacy organization presented it with evidence of wide-spread deception. *Id.* Yahoo

soon after followed suit. Julian Hattem, *NARAL adds Yahoo success after Google*, The Hill (May 9, 2014), http://thehill.com/policy/technology/205701-after-pressure-yahoo-drops-crisis-pregnancy-center-ads. Even after certain deceptive advertisements were identified and removed, new misleading advertisements surfaced. Nicole Georges *et al.*, *Yahoo and Google are Still Running Deceptive Anti-Abortion Ads*, Vice News (May 9, 2014 12:20 PM), https://news.vice.com/article/yahoo-and-google-are-still-running-deceptive-anti-abortion-ads.

B. CPCs Spread Medical Misinformation, Delay Efforts to Find Appropriate Care, and Endanger Women Sometimes Through Incompetence

Investigators who reviewed a sample of 16% of CPCs in California found that only one-fifth disclosed their anti-abortion position in their advertising materials. *California CPC Investigation* at 8, *supra*. And yet, 69% of them falsely advertised their counseling services as "unbiased." Id. They trade instead in misinformation, fear mongering and bullying that is dangerous to women's health and lives. For example,

> Take Lilly, a woman in her 30s with four children, a happy marriage, and a satisfying career. In the current economic situation, she feels bringing another child into the world would be too financially challenging. Telling the CPC counselor this had no effect on the counseling Lilly received; the counselor did not respond to her questions or demonstrate compassion for her situation. Abortion was not discussed until Lilly mentioned it. The CPC counselor told her stories about women who died after having chosen to terminate a

> pregnancy, and told her she would regret it for the rest of her life.

California CPC Investigation at 12, *supra*; *see also* Tara Culp-Ressler, *"Crisis Pregnancy Center" Tells Woman Her IUD Was A Baby*, ThinkProgress, (March 13, 2015, 1:49 PM), https://thinkprogress.org/crisis-pregnancy-center-tells-woman-her-iud-was-a-baby-46b1b5eb8237/.

Once women walk through their doors and endure their "unbiased counseling," CPCs continue their deception by touting inaccurate information and inhibiting access to medically appropriate treatment options. Investigators who visited fourteen CPCs in four California counties found that most clinics provided information that is simply not true:

- 40 percent of these CPCs "advised that hormonal birth control increases the risk of infertility and breast cancer;"
- 60 percent "advised that condoms are ineffective in reducing pregnancy and the transmission of certain STDs;"
- 70 percent "advised that abortion increases the risk of breast cancer;"
- 85 percent "advised that abortion increases the risk of infertility" and;
- 85 percent "advised that abortion leads to mental health problems."

California CPC Investigation at 2, *supra*.

Each of these claims has been soundly refuted by the scientific community. *See id.*; *see also* Pam Belluck, *Pregnancy Centers Gain Influence in Anti-Abortion Arena*, N.Y. Times (Jan. 4, 2013), http://www.nytimes.com/2013/01/05/health/pregnancy-centers-gain-influence-in-anti-abortion-fight.html?_r=0&pagewanted=all;

Susan A. Cohen, *Abortion and Mental Health: Myths and Realities*, Guttmacher Policy Review, Vol. 9, Issue 3 (Aug. 1, 2006), https://www.guttmacher.org/gpr/2006/08/abortion-and-mental-health-myths-and-realities#boxref1.

High rates of misinformation among CPCs are common. *See* Waxman Report at 7, *supra* (finding that 87 percent of clinics surveyed "provided false or misleading information" and that "three major areas of misinformation involved (1) the purported relationship between abortion and breast cancer; (2) the purported relationship between abortion and infertility; and (3) the purported relationship between abortion and mental illness"); *see also* Belluck, *Pregnancy Centers Gain Influence in Anti-Abortion Arena*, *supra*; Abcarian, *Going undercover at crisis pregnancy centers*, *supra*. "[W]hile '[t]his tactic may be effective in frightening pregnant teenagers and women and discouraging abortion [,]' it 'denies [them] vital health information, prevents them from making an informed decision, and is not an accepted public health practice.'" *First Resort*, 860 F.3d at 1268 (quoting Waxman Report at 14).

One California woman described a shockingly misleading video provided by a CPC:

> [A] staff person gave me a video to watch at home. The video featured interviews with women who regretted their decision to choose abortion. Many of these women were being interviewed from prison. They graphically described their procedures .... Some of the women talked about how their abortions had made them infertile, or that they now had breast cancer or cervical cancer because of their abortions. But what they focused on the most were emotional side effects. They said

> you will regret the abortion for the rest of your life. One of the women described her suicide attempt. Many of the women claimed that their abortions caused them to become alcoholics, drugs addicts, and even criminals. One woman said, "Having had that abortion turned me into a crack head whore and no one told me this would happen." I had been told that the video would describe my options. Really it just told me to not have an abortion.

California CPC Investigation at 8, *supra.*

A brochure titled "Abortion: Some Medical Facts" distributed by one CPC claimed that while "no doubt an unwanted pregnancy can cause intense stress and hardship in a variety of ways ... the medical information is clear—the physical and psychological consequences of abortion can be far worse. Nine short months of pregnancy is a relatively small cost to pay in light of a lifetime of potential physical and mental health problems." *Id.* at 8 & n.54. The brochure then characterizes as "medical evidence" its assertions that "abortion causes breast cancer, infertility, and mental illness." *Id.*

Other California women have described similar misinformation provided directly by "counselors" at CPCs. One woman visited a CPC and recalled the following:

> The counselor told me that if I have an abortion the pregnancy hormones will stay in my body, especially my breasts .... These leftover hormones can disrupt the normal functions and cause cancer. And since the hormones are all over the body, the whole body can be affected.

Id. at 10. A "counselor" told another women that "condoms are like a bag of balloons. You know when you get a bag of balloons and they have a lot of holes in them? Well, condoms are like that, but you can't see the holes." *Id.*

Anti-abortion "counselors" made the same claims to an investigator, who visited forty-three CPCs in California. Abcarian, *Going undercover at crisis pregnancy centers, supra.* "Every clinic [she visited] spouted the lie that abortions cause breast cancer." *Id.* "Condoms," counselors told her, "have a bunch of little holes you might not know about." *Id.* According to these CPCs, birth control pills should never be used because they, " cause headaches and 'put hormones in your body you don't need.'" *Id.*

A woman, who visited "dozens" of CPCs, reported that this type of medical misinformation about pregnancy, abortion, and birth control was the rule, not the exception: "It's like everyone was trained by one person. I heard the same thing over and over again[.]" Culp-Ressler, *"Crisis Pregnancy Center" Tells Woman Her IUD Was A Baby, supra.* "[S]he always heard the same information about how abortion is supposedly linked to breast cancer, depression, and infertility. One employee told her that ending the pregnancy might puncture her uterus and close her Fallopian tubes, preventing her from having any more children in the future." *Id.*

Some CPCs also use unconscionable delay tactics to make it unlikely or impossible for women to obtain the care they seek. CPCs sometimes "attempt to lull women into believing they have as much time as they want to make a decision. CPC workers tell women that they don't need to make a decision because their pregnancy may terminate naturally ... [because] the

likelihood of a miscarriage is 30-50 percent." Jenny Kutner, *Crisis pregnancy center tells woman her IUD is "your baby," plus countless other lies*, Salon (March 18, 2015), https://www.salon.com/2015/03/18/crisis_pregnancy_center_tells_woman_her_iud_is_your_baby_plus_countless_other_lies/. According to the American College of Obstetricians and Gynecologists, the miscarriage rate is less than half that high—just 15 percent. *Id.*

"One CPC volunteer in Maryland told an investigator posing as a pregnant woman, 'Don't panic. Abortion is legal through all nine months of pregnancy, so you have plenty of time to make a decision.'" *NARAL National CPC Report* at 14. A New York clinic made the same claim to another investigator. *Id.*

Therese McCluskey, the perinatal services coordinator for the Alameda County Public Health Department, informed the California Legislature that women who transfer from anti-abortion clinics to the clinics she oversees are typically too far along in their pregnancy to obtain an abortion. Molly Redden, *One State Finally Cracked Down on Deceptive Anti-Abortion Pregnancy Centers*, Mother Jones (Oct. 12, 2015), https://www.motherjones.com/politics/2015/10/state-just-became-first-crack-down-deceptive-anti-abortion-pregnancy-centers/.

A number of CPCs deliver misinformation due to incompetence. Poorly trained, or entirely untrained, staff have mistaken multiple women's intrauterine contraceptive devices (commonly known as "IUDs") for fetuses. Abcarian, *Going undercover at crisis pregnancy centers*, *supra* ("After inserting the wand, the sonogram technician mistook [Dania] Flores' IUD for a fetus, and informed her it did not have a

heartbeat."); Culp-Ressler, *"Crisis Pregnancy Center" Tells Woman Her IUD Was A Baby, supra* ("Cristina asked for an ultrasound at several centers; at two of them, the staff incorrectly identified her IUD as her 'baby.'"); Jenny Kutner, *Crisis pregnancy center tells woman her IUD is "your baby," plus countless other lies, supra.*

II. CPCs' DECEPTIVE TACTICS AND MISINFORMATION HARM WOMEN, ESPECIALLY LOW-INCOME AND OTHER VULNERABLE WOMEN, JEOPARDIZING THEIR LIVES AND HEALTH AND AT GREAT COST TO THE PUBLIC

Aside from the injury of being deceived, lectured, bullied and shamed, CPCs' tactics harm women in numerous ways that directly risk their lives and health. These harms tend to fall most heavily on women in vulnerable circumstances. As the California Legislature found, delay alone causes harm to women seeking reproductive healthcare. *See* 2015 Cal. Legis. Serv. Ch. 700 (A.B. 775) § 1(c). Indeed, "[w]hen a woman is misled into believing that a clinic offers services that it does not in fact offer, she loses time crucial to the decision whether to terminate a pregnancy, and may also lose the option to choose a particular procedure, or to terminate a pregnancy at all." *First Resort*, 860 F.3d at 1269. Delays in accessing care can push women into later, more complex procedures with their increased chance of complications. *See Waiting Periods for Abortion*, Guttmacher Institute (January 2018), https://www.guttmacher.org/evidence-you-can-use/waiting-periods-abortion. In some cases, termination may no longer be an option. *See First Resort*, 860 F.3d at 1269.

When CPCs impede women's access to contraceptives and shame women who ask about them, they harm those women by increasing their risk of future unintended pregnancy. The data show that access to contraception is the best prophylactic against unintended pregnancy. *See State Facts About Unintended Pregnancy: California,* Guttmacher Institute (2017), https://www.guttmacher.org/sites/default/files/factsheet/up-ca.pdf. This is particularly true for low-income women, who experience the greatest barriers to contraceptive care and, consequently, have the highest rates of unintended pregnancies. *State Facts on Publicly Funded Family Planning Services: California,* Guttmacher Institute (September 2017), https://www.guttmacher.org/fact-sheet/state-facts-publicly-funded-family-planning-services-california#1.

In order to reduce these barriers, federal and state governments, including California, and other organizations have invested in making family planning services more widely available. *State Facts About Unintended Pregnancy: California,* Guttmacher Institute, *supra.* Indeed, Eighty-seven percent of Planned Parenthood patients in California are at or below 200% of the federal poverty line and 71% are members of ethnic or racial minorities. *See California Planned Parenthood Education Fund, Inc. Fact Sheet,* Planned Parenthood Affiliates of California (2015), available at: http://www.ppactionca.org/voter-resources/fact-sheets.html.

Due in part to these efforts, two-thirds of women at risk of unintended pregnancy use contraceptives consistently. *State Facts About Unintended Pregnancy: California,* Guttmacher Institute, *supra.* Despite CPCs' claims to the contrary, those contraceptives work: Women consistently using

contraceptives "account for only 5% of all unintended pregnancies, while the remaining 95% of unintended pregnancies are attributable to the one-third of women who do not use contraceptives or who use them inconsistently." *Id.*

Because the CPCs frequently attract "clients by advertising free services, such as pregnancy tests, ultrasounds, and prenatal classes[,]" women most in need of free medical care are drawn in, and low-income women bear the brunt of CPCs' deception. *California CPC Investigation* at 6, *supra*. Yet these women often have the most to gain from the services provided by true healthcare clinics. In 2011, the rate of unintended pregnancy among women with incomes below the federal poverty level was "more than five times the rate among women with incomes of at least 200% of the federal poverty level[.]" *Unintended Pregnancy In the United States*, Guttmacher Institute (September 2016), https://www.guttmacher.org/sites/default/files/factsheet/fb-unintended-pregnancy-us_0.pdf. The difference in the unplanned birth rate was even higher. Poor women are *seven* times more likely to have an unplanned birth than women above 200% of the federal poverty line. *Id.*

The consequences of unintended pregnancy, not only for the woman and her child, but for the polity, are huge. "[A]n extensive body of research links births resulting from unintended or closely spaced pregnancies to adverse maternal and child health outcomes and myriad social and economic challenges." S. Comm. on Health, *Reproductive FACT Act* at 4, *supra*. Women have diminished opportunities for education, employment and career advancement. *See Analysis of California Senate Bill (SB) 999 Contraceptives: Annual Supply* 46, Cal. Health Benefits Review Program (March 28, 2016), http://analyses.chbrp.com/

document/view.php?id=1207. Maternal and child health and mortality suffer. *Id.* at i.

State funded programs intended to increase access to family planning services have been successful: "In 2014, 7.8 million women received publicly funded family planning services; these services helped women avoid 2 million unintended pregnancies, which would likely have resulted in 914,000 unplanned births." *State Facts About Unintended Pregnancy: California*, Guttmacher Institute, *supra*. But CPCs' deceptive tactics undermine the options the State makes available to women.

"In California, low-income women can receive immediate access to free or low-cost comprehensive family planning services and pregnancy-related care through the Medi-Cal and the Family PACT programs." 2015 Cal. Legis. Serv. Ch. 700 (A.B. 775) § 1(c). When CPCs' deception draws low-income women seeking contraceptives or abortion into clinics that do not offer those services, many of these women lack the resources to take additional time off of work or school or to arrange for childcare to make a second trip to a true healthcare clinic. If they are ensnared by CPCs, many of these women may never gain access to the options available to them.

The cost of showing up at the wrong clinic can be greater for women living in rural areas. The rural counties in California are much poorer and have higher rates of unintended pregnancies, including teen pregnancies. *See* Laura Santhanam, *Why is the teen birth rate so much higher in rural areas?*, PBS (Nov 16, 2016 10:28 AM), https://www.pbs.org/newshour/health/teen-birth-rate-higher-rural-areas; *The California Healthcare Landscape*, The Henry J. Kaiser Family Foundation (Aug. 26, 2015), https://www.kff.org/health-

reform/fact-sheet/the-california-health-care-landscape/; Committee on Health Care for Underserved Women, Opinion Number 586, *Health Disparities in Rural Women*, American College of Obstetricians and Gynecologists (February 2014), https://www.acog.org/Clinical-Guidance-and-Publications/Committee-Opinions/Committee-on-Health-Care-for-Underserved-Women/Health-Disparities-in-Rural-Women. They also face much greater provider shortages. *Id.* In California, the majority of CPCs are located in rural areas, and 93% of counties have at least one such clinic. *California CPC Investigation* at 6, *supra*. By contrast, only 59% of California counties host an abortion provider. *Id.* Women in rural counties looking for abortion care who go to the nearest "clinic" are more likely to find themselves at a CPC than a true healthcare clinic. "[R]ural Americans spend a higher percentage of their income on transportation," and "rural counties [in the United States] have a higher rate of car-lessness than urban counties." Lisa Pruitt, *Toward a Feminist Theory of the Rural*, 2007 UTAH L. REV. 421, 433-34 (2007). Following a trip to a CPC, driving to an actual medical clinic may be out of reach for many rural women.

Women in abusive relationships face disproportionate harm from CPCs' practices. "A pregnant woman in an abusive relationship is less likely to want or to have planned her pregnancy." Australian Institute for Judicial Administration, *Sexual and reproductive abuse*, National Domestic and Family Violence Bench Book § 3.1.2 (May 2017), http://dfvbenchbook.aija.org.au/understanding-domestic-and-family-violence/sexual-and-reproductive-abuse/. This is in part because abusive partners may refuse to use, or even may tamper with, contraceptives to exert control. *See, e.g.*, Rachel Camp, *Coercing Pregnancy*,

21 Wm. & Mary J. Women & L. 275, 276 (2015). For example, "Jessica became pregnant less than four months into dating her boyfriend. As she described it, 'he refused to give me funds to purchase birth control, and always refused to use condoms after we became exclusive.'" *Id.*

It is all the more important that women in such situations have convenient access to "discrete methods of contraception that are less susceptible to tampering, such as an intrauterine device, subdermal implant, or contraceptive injection[.]" Kathryn Doyle, *Reproductive Control Can be a Form of Partner Violence*, Reuters (September 4, 2015), https://www.reuters.com/article/us-health-sexassault-coercion/reproductive-control-can-be-a-form-of-partner-violence-idUSKCN0R42CD20150904. These services, of course, are entirely unavailable at Petitioners' clinics and other CPCs. *See Our Services*, Fallbrook Pregnancy Resource Center, http://www.fallbrookprc.com/Our-Services (last visited Feb. 25, 2018) (listing "Abstinence encouragement" as sole service offered to reduce likelihood of unplanned pregnancy); *Services*, Pregnancy Care Clinic, http://www.supportpcc.com/services/ (last visited Feb. 25, 2018) (offering only "Natural Family Planning Information" and "Abstinence Education" as forms of birth control); *About NIFLA*, National Institute of Family and Life Advocates, https://nifla.org/about-nifla/ (last visited Feb. 25, 2018) (providing "ultrasound" scans to convince women not to seek abortions as single example of medical care provided by NIFLA-affiliated clinics).

Finally, some CPCs endanger women and their babies through poor care. Sally Greenwald, an OB-GYN specialist at the University of California—San Francisco, testified before the California Legislature about "taking over the care of a pregnant diabetic

woman from a pro-life center." Redden, *One State Finally Cracked Down on Deceptive Anti-Abortion Pregnancy Centers, supra.* The previous provider "had failed to treat the woman's alarming blood sugar levels," resulting in the fetus's exposure "to lifelong risks, such as cardiac malformations, brain anomalies, and spine deformations." *Id.* Had the patient been transferred to Dr. Greenwald's care sooner, she testified, "[w]e could have lowered the sugar in her blood and we could have had better outcomes both for mom and for baby." *Id.*

Therese McCluskey of the Alameda County Public Health Department testified that when women transfer from anti-abortion clinics to those run by the County, they frequently come "without prenatal records, lab reports, or the pregnancy verification form that entitles them to pregnancy-related health care." *Id.*

III. BOTH UNLICENSED AND LICENSED CPCs ENGAGE IN REGULATORY EVASION THAT THE REPRODUCTIVE FACT ACT APPROPRIATELY REMEDIES WITHOUT UNDUE RESTRICTION ON THE CPCs

To facilitate their campaign of deceptive advertising, biased "counseling," and medical misinformation, CPCs deliberately evade some of California's healthcare regulations. This is most obvious in the case of unlicensed CPCs, which operate entirely outside of the State's healthcare quality regime. *See* Cal. Health & Safety Code § 1200. Licensed CPCs also have taken advantage of regulatory loop-holes in order to give the impression that they offer comprehensive care but then refuse to

refer patients to other providers when they seek care the CPCs do not offer.

A. Unlicensed CPCs Deliberately Evade California's Healthcare Licensing Regime

California law exempts from ordinary licensing requirements entities "that solely provide advice, counseling, information, or referrals on the maintenance of health or on the means and measures to prevent or avoid sickness, disease, or injury[.]" Cal. Health & Safety Code § 1200. The majority of CPCs in California thus operate without a license. *See California CPC Investigation* at 5, *supra*.

While "[t]heir staff members often wear white coats and their waiting rooms look like any other doctor's office," Culp-Ressler, *"Crisis Pregnancy Center" Tells Woman Her IUD Was A Baby*, *supra*, unlicensed CPCs have "clients read their own pregnancy tests," *California CPC Investigation* at 5. By providing only "counseling," unlicensed CPCs avoid extensive clinical quality and patient protection regulations.

Yet unlicensed CPCs go to great lengths to appear to be medical clinics without subjecting themselves to state regulation. In one particularly telling example,

> two investigators from NARAL Pro-Choice California Foundation were alarmed when a San Jose [CPC] counselor insisted that the potentially pregnant patient self-administer her urine test. Holding a Dixie cup of her own urine, [the] investigator was led to the back of the CPC where she used a dropper to transfer her sample to the pregnancy stick while the CPC counselor watched. Because the test never leaves the hands of the client, the CPC

> has exploited a loophole in which it is free to operate in an unregulated manner.

Id.

Many CPCs offer free ultrasound examinations as a way to draw in clients and heighten the appearance of medical legitimacy. *NARAL National CPC Report* at 16. Petitioner Fallbrook Pregnancy Resource Center, for example, advertises on its website free ultrasound scans that "will tell you if your pregnancy is viable and how far along you are." *Our Services*, Fallbrook Pregnancy Resource Center, http://www.fallbrookprc.com/Our-Services (last visited Feb. 25, 2018). "This information," it adds, "may determine what options are available to you." *Id.* Yet in its brief, Fallbrook acknowledges being "an unlicensed center that offers 'non-medical pregnancy-related information and services.'" Pet'rs' Br. at 6. By advertising the service perhaps most associated with prenatal healthcare and offering to diagnose whether a pregnancy is viable, Fallbrook adopts the veneer of something it is not: a licensed medical facility.

The FACT Act is a more than appropriate response to these deceptions. An unlicensed clinic like Fallbrook need only state what is true: "This facility is not licensed as a medical facility by the State of California and has no licensed medical provider who provides or directly supervises the provision of services." Cal. Health & Safety Code § 123472(b)(1).

Against the backdrop of systematic deception and regulatory evasion documented above, it is little wonder the lower court held that this disclosure "survives any level of review." *Nat'l Inst. of Family & Life Advocates v. Harris*, 839 F.3d 823, 844 (9th Cir. 2016). "[D]isclosure requirements trench much more

narrowly on an advertiser's interests ... [because] warnings or disclaimers might be appropriately required in order to dissipate the possibility of consumer confusion or deception." *Zauderer v. Office of Disciplinary Counsel of the Sup. Ct. of Ohio*, 471 U.S. 626, 651 (1985) (internal quotation marks and ellipsis omitted). In the context of healthcare, and in the face of many CPCs' deliberate duplicity, the risks of confusion and deception are at their apex. The disclosure requirement California mandated is entirely reasonable.

B. Licensed CPCs Evade Regulations that Would Require Them to Provide Referrals for Medically Appropriate Care

As noted, some CPCs have obtained California licenses to operate as community, free, or intermittent clinics. *See* Cal. Health & Safety Code §§ 1204, 1206; Assemb. Comm. on Judiciary, *Reproductive FACT Act* 5, Cal. Assemb. Reg. Sess. 2015-2016 (April 16, 2015). Like other practices described above, this one has been pushed by major anti-contraception and anti-abortion umbrella organizations, including Petitioner NIFLA. *California CPC Investigation* at 5, *supra*.

But as NIFLA's website makes clear, the purpose of garnering clinical licenses is not to provide medical care to women. *See Medical Clinic Conversion*, National Institute of Family and Life Advocates, https://nifla.org/medical-clinic-conversion/ (last visited Feb. 25, 2018). Instead, it is to obtain ultrasound practice rights in order to convince women not to have abortions. *Id.* ("Established pro-life medical clinics report than more than 80 percent of abortion-minded mothers choose life after they see their unborn baby via ultrasound. ... Our goal is to have more pro-life

medical clinics in operation using the invaluable tool of ultrasound[.]"); *see also A Comprehensive Medical Conversion Program*, National Institute of Family and Life Advocates, https://nifla.org/life-choice-project-tlc/ (last visited Feb. 25, 2018) ("Because ultrasound is such an invaluable tool in revealing the personhood of unborn children, pro-life pregnancy centers across the nation are seeking to transition to medical clinic status so they may provide this critical resource to vulnerable women.").

CPC network Care Net noted the reason its affiliates perform ultrasound scans in a press release titled "Ultrasound May End Abortion," emphasizing its view that "ultrasounds deter women from getting abortions." Care Net (June 5, 2003), https://www.care-net.org/press-release-060503. Subsequent publications have reemphasized this monothemic approach to ultrasound scans. *E.g.*, *Why Ultrasounds Matter for Women Planning Abortion*, Care Net (Dec. 14, 2014), https://www.care-net.org/center-insights-blog/why-ultrasounds-matter-for-women-planning-abortion (discussing effectiveness of ultrasound scans as abortion deterrent).

Licensed CPCs must abide by regulations that apply to community health clinics. *See* Cal. Health & Safety Code §§ 1204, 1206. But they avoid many of the rules tailored to reproductive healthcare clinics by declining to participate in California's premiere reproductive healthcare program, the Family PACT, which "provide[s] comprehensive family planning services to low-income women and men." Cal. Dep't of Health Care Svcs., *Family PACT Overview* (June 2015), http://www.familypact.org/Providers/provider-resources/TipSheets/Overview6-15ADA.pdf; *see also* Cal. Welf. & Inst. Code § 24005.

Because over 2,000 reproductive healthcare providers participate in the Family PACT program, many quality control and patient protection regulations are made applicable through participation in the program rather than due to mere possession of a clinical license. *E.g.*, Cal. Welf. & Inst. Code § 24005(b) & (c) (requiring that participating clinics demonstrate their "licensed medical personnel [have the appropriate] family planning skills, knowledge, and competency" and that they provide referrals for "the full scope of family planning education, counseling, and medical services specified for the program").

CPCs claim they decline to participate in the Family PACT program because participation "requires a center to provide abortifacients and birth control." Pet'rs' Br. at 10. Thus, they argue, involvement in the program would undermine their "pro-life views." *Id.*

Of course they are free to refuse to participate and thus not share in the state benefits that participation would bring them. But their reasoning for abstaining is fatally flawed. Participation in the Family PACT would not require anti-abortion clinics to provide medical services to which they object. Family PACT participants may offer "the full scope of family planning education, counseling, and medical services specified for the program, either directly *or by referral* ...." Cal. Welf. & Inst. Code § 24005(c) (emphasis added).

C. The Reproductive FACT Act's Notice Requirement Appropriately Applies to Licensed CPCs and Exempts Licensed Clinics which Provide All Services Listed on the FACT Act's Notice

1. The Reproductive FACT Act Provides Women a Minimally Intrusive Escape Hatch from the Trap Set by Licensed CPCs

California's Reproductive FACT Act requires certain clinics "whose primary purpose is providing family planning or pregnancy-related services" to post a notice allowing women to obtain appropriate care if they find themselves in clinics that will not meet their needs. Cal. Health & Safety Code §§ 123471(a), 123472(a). Anti-abortion and anti-birth control clinics need only provide a short, truthful message:

> California has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women. To determine whether you qualify, contact the county social services office at [insert the telephone number].

Cal. Health & Safety Code § 123472(a). In fact, these clinics have several options for distributing this notice in the least intrusive manner: by posting a 8.5 x 11 inch sign, offering a 14-point type notice to incoming clients, or providing a digital notice to clients. *Id.* No staff member is required even to breathe a pro-choice word nor forced to introduce women to particular family planning providers or issue formal medical referrals. The only function of the notice is to inform

women that they have options beyond the limited set presented by CPCs.

In the absence of such a notice, many women are caught in the trap created by deceptive CPCs. A web search for a licensed clinic specializing in reproductive healthcare by a woman seeking abortion care is likely to point her to the nearest licensed CPC. *See* Section I.A., *supra*. The CPC will not provide the care she seeks. *See id.* But without disclosing its true intention, the CPC will invite her to schedule an appointment with the aim (known only to the clinic) of dissuading her from having an abortion. *Id.* When the patient arrives and discovers the CPC will not provide the care she needs, she might ask to be referred to a clinic that will. But despite holding a state-issued medical license, the CPC will decline to give its patient medically relevant information about the care she seeks. *Id.* Rather than deny anti-abortion clinics licenses altogether for their refusal to provide women with medically relevant information or direct patients to other care providers who can meet their needs, the State has simply ensured that these clinics inform patients how to learn about their options.

2. The FACT Act Reasonably Exempts from the Licensed Clinic Notice Requirement those Licensed Clinics which Provide All Services Listed on the FACT Act's Notice

Petitioners seize on the FACT Act's exemption for licensed clinics that participate in both the Family PACT and Medi-Cal, *see* Cal. Health & Safety Code § 123471(c)(2), to claim that CPCs have been unfairly singled out. Pet'rs' Br. 33-34. There is nothing wrong with the State's determination that "a licensed primary care clinic that is both a Medi-Cal provider

and a Family PACT provider [already] offers the full continuum of health care services" specified in the disclosure. Assemb. Comm. on Judiciary, *Reproductive FACT Act* at 9, *supra*. It would, thus, be duplicative for enrolled clinics to post the mandated information they are already required to provide.

Family PACT participants are required to determine whether patients are eligible for the program and inform patients of the service available to them. *Compare* Cal. Dep't of Health Care Svcs., *Family PACT Program Standards* 2 (Jan. 2018), available at: http://www.familypact.org/Providers/policies-procedures-and-billing-instructions *with* Cal. Health & Safety Code § 123472(a). And Family PACT providers already must provide much more extensive disclosures to all patients who enter their facilities. *See* Cal. Dep't of Health Care Svcs., *Family PACT Program Standards* at 2 & 12, *supra* (requiring Family PACT participants to "provide[] to all clients or post[] in a prominent place at the site of clinical services" a statement, which, among other things, advises that patients have the right to "adequate and objective education and counseling," "to participate in selecting the contraceptive method(s) to be used," and "to consent to, or refuse, any contraceptive method, test, examination or treatment"). It would make little sense for the Legislature to require the very clinics that administer the "public programs that provide immediate free or low-cost access to comprehensive family planning services ..., prenatal care, and abortion for eligible women" to provide an extra disclosure stating their existence. *See* Cal. Health & Safety Code § 123472(a).

CONCLUSION

This Court should affirm the Ninth Circuit's judgment that the FACT Act is a reasonable regulation of commercial and professional speech, narrowly crafted to deal with an epidemic of falsehoods that constitutes an imminent danger to many women's lives and health.

Dated: February 27, 2018

Respectfully submitted,

SANFORD JAY ROSEN
Counsel of Record
GAY CROSTHWAIT GRUNFELD
DEVIN W. MAUNEY
ROSEN BIEN GALVAN & GRUNFELD LLP
50 Fremont Street, 19th Floor
San Francisco, California 94105
(415) 433-6830
srosen@rbgg.com

Counsel for Amici Curiae Equal Rights Advocates, Planned Parenthood Affiliates of California, California Women Lawyers, Hadassah, and the Family Violence Appellate Project

No. 16-1140

IN THE

Supreme Court of the United States

NATIONAL INSTITUTE OF FAMILY LIFE ADVOCATES, DBA NIFLA, *et al.*,

Petitioners,

v.

XAVIER BECERRA, ATTORNEY GENERAL OF CALIFORNIA, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF 51 REPRODUCTIVE RIGHTS, CIVIL RIGHTS, AND SOCIAL JUSTICE ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

FATIMA GOSS GRAVES
GRETCHEN BORCHELT
SUNU CHANDY
HEATHER SHUMAKER
NATIONAL WOMEN'S LAW CENTER
11 Dupont Circle NW, Suite 800
Washington, DC 20036

JULIE RIKELMAN
Counsel of Record
AUTUMN KATZ
AMY MYRICK
MOLLY DUANE
CENTER FOR REPRODUCTIVE RIGHTS
199 Water Street, 22nd Floor
New York, NY 10038
(917) 637-3600
jrikelman@reprorights.org

Counsel for Amici Curiae

February 27, 2018

279163

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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INTEREST OF *AMICI CURIAE*[1]

Amici are organizations committed to supporting autonomy, independent decision-making, respectful treatment, and access to quality reproductive healthcare, for women and for all people. Amici have a particular interest in this case because they work on behalf of individuals seeking access to care and/or work to advance the legal rights that protect and expand quality care. Amici respectfully submit that their perspectives and experiences, and the stories of individuals they have collected, shed light on why people visit "crisis pregnancy centers" and their experiences at such centers, which may assist the Court in resolving this case. A full list of signers appears in the appendix.

SUMMARY OF ARGUMENT

Every day, many so-called "crisis pregnancy centers" providing limited services for pregnant women in California sow confusion about the services that they offer. California enacted the Reproductive FACT (Freedom, Accountability, Comprehensive Care, and Transparency) Act (the "Act"), 2015 Cal. Stats. Ch. 700, codified at Cal. Health & Safety Code §§ 123470-123473, to address the public health concerns posed by these centers' ("Pregnancy Centers" or "PCs") dishonest practices. As explained in the legislative history: "[PCs] pose as full-service women's health clinics, but aim to

1. Pursuant to Rule 37.6, counsel for amici affirm that no counsel for any party authored any part of this brief, and that no entity other than amici provided any monetary contribution to fund its preparation or submission. All parties have consented to filing.

discourage and prevent women from seeking abortions. The author [of the bill] conclude[d] that these intentionally deceptive advertising and counseling practices often confuse, misinform, and even intimidate women from making fully-informed, time-sensitive decisions about critical health care." *Reproductive FACT Act: Hearing on AB 775 Before the Assemb. Comm. on Health*, 2015-2016 Leg. 3 (Cal. 2015).

To promote its compelling interest in ensuring women have access to comprehensive and timely healthcare information and services in the face of deception, California developed the Act's neutral and factual disclosure requirements. Licensed PCs[2] must post a sign notifying patients that information about state-funded reproductive health services—including prenatal care, family planning, and abortion—may be accessed by calling a county health department telephone number; unlicensed PCs must post a sign indicating that they do not employ a licensed medical professional.

Amici believe it is vital to women's health and well-being that women be able to access timely, high-quality, individually tailored medical care regardless of whether they are seeking an abortion, family planning services, prenatal care, or counseling to help them determine their

2. Licensed healthcare providers that provide comprehensive reproductive healthcare services and are already capable of enrolling pregnant women in the state-sponsored programs on the spot are exempted from the Act because patients at those facilities are already receiving the information contained in the disclosure. *See* Cal. Health & Safety Code § 123471(c).

options.[3] When a woman visits a facility that deliberately misleads her about the type of services that are available, or about whether that facility is even licensed to provide medical care, the Act's modest disclosure requirements ensure she understands, immediately upon entering the facility, how to access the services she seeks.

In evaluating the Act's requirements, the Court should take into account the context within which women encounter PCs—namely, that some PCs actively misrepresent their services. That deception creates numerous public health concerns that California sought to prevent with the Act's reasonable and neutral requirements. Although this case comes to the Court on a motion for a preliminary injunction prior to discovery, before a record was created, discovery in similar cases and information available in the public record make clear that many PCs seek to dissuade women from obtaining an abortion or contraception through misinformation, shaming and judging, and delay, among other tactics. Furthermore, the public health concerns posed by PCs are not isolated, unique, or limited to California. Rather, PCs harm women across the country through tactics that are part of a campaign spearheaded by national, multi-million-dollar organizations to attract women seeking the very services PCs do not provide.

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3. Amici refer to "women" throughout the brief for ease and consistency, but recognize that all people seek reproductive healthcare, including pregnant people who do not identify as women.

Amici have also gathered stories from women across the country who have been misled by PCs. As the stories demonstrate, women nationwide have experienced shame, stigma, and deception about their medical conditions, and some of these women suffered a range of other harms, including threats to their health and future fertility, loss of a wanted pregnancy, and forced continuation of a pregnancy as a result of PCs' dishonest tactics. Women struggling to make ends meet are particularly burdened by the deceptive tactics employed by PCs.

The Court should affirm the ruling below under its context-based standard for assessing the constitutionality of compelled speech because the Act is a neutral, factual disclosure tailored to ensure that women seeking reproductive healthcare in California have information about how to obtain timely and appropriate care. Not only do Petitioners ask this Court to ignore the context of deceptive practices that justifies the Act, they also ask this Court to extend stronger First Amendment protections to PCs than to other types of healthcare providers, in particular those that offer abortion. No legal grounds support such a double standard.

ARGUMENT

I. Pregnancy Centers Throughout the Country, Along with the National Organizations that Support and Fund Them, Employ Deceptive and Misleading Tactics That Result in Real Harms to Women

A. With Assistance from a National, Coordinated, Multi-Million Dollar Industry, PCs in California and Across the United States Actively Misrepresent the Services They Offer to Target Women Seeking Reproductive Healthcare.

Petitioners present themselves to this Court as religious organizations operating in California in accordance with their "pro-life" views. Br. for Pet'rs 5. Various national networks of PCs, including Care Net, Heartbeat International, and the Human Coalition, portray themselves similarly in amicus briefs. But that is not how PCs portray themselves to the women they hope to attract to their centers. Instead, with the help of nationwide, umbrella organizations, PCs advertise their facilities as providers of bona fide medical care, and delay women's ability to obtain the healthcare they seek.

1. National Umbrella Organizations Fund, Coordinate, and Streamline the Activities of PCs Across the Country.

PCs are a nationwide, coordinated, multi-million dollar industry. Of the roughly 2,700 PCs in the United States, the vast majority are members or affiliates of one or more of the large umbrella organizations—

the National Institute of Family and Life Advocates ("NIFLA"), Care Net, Birthright International, and/or Heartbeat International—as well as membership and consulting organizations like Human Coalition, and the Vitae Foundation, among dozens of others. *See* Br. of *Amicus Curiae* Care Net Supp. Pet'rs 1 (stating Care Net is "one of the largest affiliation organizations for pregnancy resource centers in North America" and has "more than 1,100 affiliates"); Br. of Heartbeat Int'l, Inc. as *Amicus Curiae* Supp. Pet'rs 1 (stating "Heartbeat serves approximately 2,400 pro-life centers" and is "the world's largest such affiliate network"); *About NIFLA*, NIFLA, http://www.nifla.org/about-us-what-we-do.asp (last visited Feb. 21, 2018) ("NIFLA now represents more than 1,400 pro-life pregnancy centers across the country.").[4] As reported on their most recently available

4. *See also About*, Vitae Found., https://vitaefoundation.org/about (last visited Feb. 21, 2018) ("Vitae has become a resource and standard bearer for pro-life media both nationally and internationally. . . . Vitae lends expert advice on marketing strategies, as well as use of its messages to collaborating respect life organizations and Pregnancy Help Centers."); *Search for Locations*, Birthright Int'l, http://birthright.org/en/search-birthrights?view=search (last visited Feb. 21, 2018) (stating Birthright "operate[s] nearly 300 locations" in seven countries and has "a 24/7 toll-free Helpline"); *The Federalist Radio Hour: How One Pro-Life Group is Seeking Out Abortion-Determined Women*, at 2:19-3:06, https://soundcloud.com/fdrlst/how-one-pro-life-group-is-seeking-out-abortion-determined-women (last visited Feb. 21, 2018) ("[Human Coalition] is actually one of the top three largest pro-life organizations in the country that nobody has ever heard of. . . . [W]e have been growing very quickly . . . but very quietly . . . . We have seven of our own [clinics] and then we partner with another thirty-five . . . [and] we're expanding [our] network . . . .").

tax forms, Care Net's total revenue was over $4.3 million in 2015, Heartbeat International's was over $2.7 million in 2014, and NIFLA's was approximately $820,000 in 2015.[5]

Affiliates of these umbrella organizations pay membership fees, and in return receive financial support, legal resources, training, website design, use of the organizations' logos, marketing materials and strategies, and inclusion in national referral databases. *See About NIFLA*, *supra* 6 (NIFLA "provide[s] legal counsel, education and training"); *Our Story*, Heartbeat Int'l, https://www.heartbeatinternational.org/about/our-story (last visited Feb. 21, 2018) (describing themselves as "the 'go-to' place for start-up manuals, model programs, leadership training conferences"). Care Net and Heartbeat also host large annual conferences where session topics include marketing strategies, fundraising, staff training, and legal advice for members.[6]

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5. *See Form 990*, Care Net (2015), http://990s.foundationcenter.org/990_pdf_archive/541/541382723/541382723_201606_990.pdf; *Form 990*, Heartbeat Int'l (2014), http://990s.foundationcenter.org/990_pdf_archive/237/237335592/237335592_201509_990.pdf; *Form 990*, NIFLA (2015), http://990s.foundationcenter.org/990_pdf_archive/541/541673492/541673492_201512_990.pdf.

6. *See 2018 Heartbeat International Annual Conference*, Heartbeat Int'l, https://www.heartbeatservices.org/training/conference (last visited Feb. 21, 2018); *2018 National Conference*, Care Net, https://www.care-net.org/conference (last visited Feb. 21, 2018). Recordings of these conferences are sold on their websites; sessions from Care Net's 2017 conference included: "Marketing Your Pregnancy Center Brand for Fundraising Success," "ClickBait and Switch," "Glozelle, Swag, on Fleek, Oh My! Marking to Abortion-Minded Women Thru Cultural Icons," "Making The Medical Conversion." *Online Catalogue*,

In addition to the resources provided by the umbrella organizations, PCs across the country receive significant funding from both federal and state governments. For example, PCs receive funding from federal abstinence only programs,[7] which include the Title V State Abstinence Education Grant Program, Competitive Abstinence Education program, and abstinence programs created by the Patient Protection and Affordable Care Act.[8] They also receive welfare dollars from Temporary Assistance for Needy Families.[9] Indeed, a congressional report

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Barker Productions [hereinafter *Care Net Recordings*], http://barkerproductions.net/shop.asp?action=cat&catID=16466 (last visited Feb. 21, 2018) (available for purchase); *see also Welcome to Heartbeat Conference Recordings Downloads*, Heartbeat Int'l, http://egamitapes.com/heartbeat/ (last visited Feb. 21, 2018) (available for purchase).

7. U.S. H.R., Comm. on Gov't Reform – Minority Staff, Special Investigations Div., *False and Misleading Health Information Provided by Federally Funded Pregnancy Resource Centers* i (July 2006), https://www.chsourcebook.com/articles/waxman2.pdf

8. Teddy Wilson, *Trump Gives Away Millions to Anti-Choice Fake Clinics*, Rewire (Sept. 7, 2017), https://rewire.news/article/2017/09/07/trump-gives-away-millions-anti-choice-fake-clinics/.

9. Bryce Covert & Josh Israel, *The States That Siphon Welfare Money to Stop Abortion*, Think Progress (Oct. 3, 2016), https://thinkprogress.org/tanf-cpcs-ec002305dd18/; *Dedicated Federal Abstinence-Only-Until-Marriage Programs: Funding by Fiscal Year (FY) 1982-2017*, SIECUS (May 2017), http://www.siecus.org/index.cfm?fuseaction=document.viewDocument&documentid=663&documentFormatId=772&vDocLinkOrigin=1&CFID=21649893&CFTOKEN=28dd8b0890a6fce8-87589B14-1C23-C8EB-809B8F4044AC7367.

estimated that between the years of 2001 and 2006 alone, "pregnancy resources centers . . . received over $30 million in federal funding."[10] Further, fourteen states directly fund PCs from their state budgets.[11]

2. PCs Nationwide Use Deceptive Outreach Strategies Developed by Umbrella Organizations to Target Women Seeking Reproductive Healthcare.

Although the umbrella organizations are openly anti-abortion, the resources they develop and disseminate to PCs nationwide for use in attracting clients intentionally hide this fact. Instead, these materials are specifically intended to reach women actively seeking abortion and suggest—explicitly, implicitly, or by omission—that PCs are full-spectrum reproductive health clinics, while actively concealing the fact that PCs do not provide or refer for abortion or contraception.

For example, Amicus the Human Coalition describes itself as specializing in marketing to "abortion-determined women," which it defines as "somebody who has already

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10. U.S. H.R., Comm. on Gov't Reform – Minority Staff, Special Investigations Div., *supra* note 7.

11. *Who Decides? The Status of Women's Reproductive Rights in the United States*, NARAL Pro-Choice Am. & NARAL Pro-Choice Am. Found. 17 (Jan. 2017), https://www.prochoiceamerica.org/wp-content/uploads/2017/01/WhoDecides2017-DigitalEdition3.pdf (listing the fourteen states that provide direct funding to PCs: Georgia, Indiana, Kansas, Louisiana, Michigan, Minnesota, Missouri, New Mexico, North Carolina, North Dakota, Ohio, Pennsylvania, Texas, and Wisconsin).

made up her mind to abort . . . . if [we] could intercept them."[12] Human Coalition notes that special methods are required because "[t]he abortion-determined woman will not walk into a pregnancy center voluntarily."[13] Similarly, Care Net boasts that its Pregnancy Decision Line "reaches the MOST ABORTION DETERMINED" women, and Extend Web Services, which works with Heartbeat International "to meet the website needs of Pregnancy Help Centers," states on its website that "[w]e are experts at making sure your website is attracting the abortion-minded client." J.A. to Appellants' Br. at 668, *Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Balt.*, No. 16-2325 (4th Cir. Jan. 30, 2017), ECF No. 26 (Balt. J.A.); *About Us*, Extend Web Servs., https://www.extendwebservices.com/about (last visited Feb. 23, 2018).

Among the sophisticated interception techniques that PCs use are search engine optimization and high-tech internet advertising to redirect women searching online for abortion services to local PCs. For example, the Director of Advertising for Care Net's Pregnancy Decision Line gave a training at the 2017 Care Net conference in which he instructed affiliates to add terms found in response to searches for "abortion clinic near me" or "abortion pill" to

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12. *See The Federalist Radio Hour: How One Pro-Life Group is Seeking Out Abortion-Determined Women*, *supra* note 4, at 1:04-1:49

13. *See FRC Speaker Series: Rescuing Mothers and Children from Abortion Using Cutting-Edge Technology and Data*, Family Research Council, at 12:10 (Mar. 22, 2017), http://www.frc.org/university/rescuing-mothers-and-children-from-abortion-using-cutting-edge-technology-and-data.

their websites: "say [on your website] 'we're here to talk to you about abortion including abortion pills and abortion surgery.'"[14] A speaker at the same conference vouched for the technique: "The keyword ads that I've experimented with are amazing. One of my favorite ones is . . . 'planning parenthood' and I've gotten so many clicks on that . . . ."[15] This speaker also noted that reproductive health clinic websites include the phrase "'confidential and individual' and so we took what they did and we put that underneath ours too."[16] By her report, after implementing these tactics "our abortion minded [patients] increased by 134%; our abortion vulnerable increased by 88%."[17] Similarly, Care Net boasts that "[a]lmost 85,000 visitors to the [Pregnancy Decision Line] website have been a result of targeted keyword advertising supported by donations." Balt. J.A. 668 (Care Net report cited in Baltimore legislative record).

Umbrella organizations also facilitate advertisements and mass media campaigns in newspapers, billboards, and public transportation that imply that PCs provide abortion. These campaigns are deliberately deceptive, as discovery in *Greater Baltimore Center for Pregnancy Concerns*, No. 16-2325, revealed. In that case, Vitae Foundation spearheaded a bus advertisement campaign on behalf of a Baltimore PC that that promoted "FREE Abortion Alternatives," "FREE Confidential Options Counseling," "FREE Pregnancy Tests," and "FREE

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14. *See Care Net Recordings*, *supra* note 6, *Optimizing Google Ads, #606*, at 19:07-19:32.

15. *Id.* at 53:07-53:25.

16. *Id.* at 59:23-59:37.

17. *Id.* at 51:47-51:55.

Services." Balt. J.A. 698; *see also id.* at 705-708. The ads led to an increase in "abortion minded callers" who "were under the impression from the bus advertisements that [PCs] assisted in paying for abortions" and "wanted to schedule an abortion." *Id.* at 705. The center's Executive Director acknowledged "those ads are *purposely vague, of course.*" *Id.* at 708 (emphasis added).

But the deception does not end there. Umbrella organizations also train PC staff and volunteers to convince women to make an appointment, regardless of whether the PC provides the services they are seeking. For example, a Care Net report with sample client conversations instructs the "pregnancy coach" to respond to a woman caller saying "I want to know about having an abortion" by diverting the conversation to ask about "the father of the baby" and then providing contact information for a PC without telling the caller that abortion is not available there. *Id.* at 667 (Care Net report).

3. Umbrella Organizations Encourage PCs to Resemble Reproductive Health Clinics, To Confuse Women Seeking Reproductive Healthcare.

Umbrella organizations also encourage PCs to "medicalize" by adopting trappings of a medical facility, without crossing the line to become actual medical facilities, for the purpose of attracting women seeking reproductive healthcare services. Tactics include choosing a name and location designed to make a woman believe she is in a reproductive healthcare clinic, and providing ultrasounds that seem medical, but in fact are strictly for the purposes of confirming pregnancy and deterring abortion.

Some PCs deliberately choose to locate near reproductive health clinics or use names intended to suggest that the center offers a broad range of reproductive healthcare. For example, according to a report published by the Family Research Council ("FRC"), after researching "which name would best describe the services pregnant women would be seeking from such a center," FRC recommended "Women's Resource Center" as having the most strategic value "because it has a much higher appeal among pro-choice women."[18] Many PCs have adopted language, fonts, and colors that are strikingly similar to abortion clinics operating nearby in an effort to confuse women. For example, a PC in the Bronx located across the street from a Planned Parenthood health center displays a large banner on the outside of its facility stating "Plan Your Parenthood."[19] Likewise, in Hartford, Connecticut, a PC recently opened next door to a reproductive healthcare clinic located in the same medical complex and chose a nearly identical name, making it difficult for a woman seeking comprehensive services to know if she is in the right place.[20] Similarly, a

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18. Curtis J. Young, *Turning Hearts Toward Life: Market Research for Crisis Pregnancy Centers*, Family Research Council 10 (1998).

19. *Hearing on Enforcement of Local Law 17 of 2011 and the Regulation of Pregnancy Services Centers*, N.Y.C., Comm. on Consumer Affairs 1-2 (Nov. 15, 2017) (statement of Planned Parenthood of N.Y.C.), https://www.plannedparenthood.org/uploads/filer_public/87/f8/87f867de-da43-4856-abcd-078142b84fea/testimony_regulation_pregnancy_services_centers.pdf.

20. *Public Hearing on Ordinance Amending Chapter 17 to Add Article VI - Pregnancy Information Disclosure*

PC named the "Center for Pregnancy Choices" recently opened across the street from the last abortion clinic in the entire state of Mississippi after years of trying to secure the location.[21] And in Northern Virginia, a PC operated for many years directly next door to an abortion clinic, using the same signage and office décor; when the doctor who provided abortions retired, the PC purchased the clinic and immediately began forwarding women—who still thought they were calling an abortion clinic—to the PC instead without notifying them.[22]

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and Protection of the Municipal Code, Hartford Court of Common Council, at 1:51:57-54:12 (Nov. 20, 2017) (statement of Sally Grossman, Volunteer Clinic Escort, Hartford GYN Ctr.) [hereinafter Hartford Hearing], https://videoplayer.telvue.com/player/7PPkvS60mdVN-j6NEK56CdVErQ4fuNwW/media/309317?autostart=true&showtabssearch=true&fullscreen=false; *see also* Alexandra Svokos, ***What is a Crisis Pregnancy Center? Inside the Pro-Life Centers***, Elite Daily (May 24, 2017), https://www.elitedaily.com/news/inside-pro-life-centers-claim-offer-women-choice-pregnancies/1957892 (stating that, inside the complex, the PC "Hartford Women's Center" is to the right, while the abortion clinic "Hartford GYN Center" is to the left.").

21. Jay Hobbs, *Life-Saving Center Opens 100 Yards from Lone Mississippi Abortion Mill*, Pregnancy Help News (April 26, 2017), https://pregnancyhelpnews.com/pro-life-mississippi-ab-clinic.

22. Peter Dvorak, *How Abortion Opponents Secretly Bought a Va. Abortion Clinic to Deceive Women*, The Wash. Post (Feb. 4, 2016), https://www.washingtonpost.com/local/how-abortion-opponents-secretly-bought-a-virginia-abortion-clinic/2016/02/04/08a3b1c4-c4f5-11e5-8965-0607e0e265ce_story.html?utm_term=.a0e20c8bed52.

Some PCs employ non-medical personnel who wear scrubs or lab coats to offer limited services, such as pregnancy tests and ultrasounds, for the stated purposes of attracting women who are seeking abortion and dissuading them from abortion. Indeed, NIFLA's "medical conversion program" offers guidance on how "to convert to medical clinic status" and "avoid[] legal pitfalls," yet counsels PCs to only offer *limited* ultrasound services for the benefit of "increas[ing]... the number of abortion-minded patients seen."[23]

Critically, PCs offer ultrasounds *not* for the purpose of providing prenatal care, but for the purpose of confirming pregnancy and deterring abortion. For example, Focus on the Family advises its member centers to provide ultrasound services "for abortion-minded and abortion-vulnerable women to help them in the decision-making phase of their pregnancy," but notes that ultrasounds for "women who are not abortion-minded or abortion-vulnerable" should be provided only "at the discretion of the medical director."[24] Further demonstrating that "medical" services like ultrasounds are tied to dissuasion, not bona fide health needs, training materials emphasize that PCs should not provide free medical services

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23. *The Life Choice Project (TLC)*, NIFLA https://www.nifla.org/life-choice-project-tlc/ (last visited Feb. 23, 2018); NIFLA Training the Life Choice Project (on file with author).

24. *Excellence of Care: Standards of Care for Providing Sonograms and Other Medical Services in a Pregnancy Medical Clinic*, Focus on the Family 1 (revised June 5, 2009), http://media.focusonthefamily.com/heartlink/pdf/standardsofcare.pdf; *see also Care Net Recordings, supra* note 6, *Making the Medical Conversion, #205*, at 6:16-6:33 (noting the benefit of "going medical" is that it allows PCs to "reach more abortion-minded clients and save more babies").

unless a woman first submits to religious counseling. *See, e.g.*, Balt. J.A. 758 (guideline for "The Client Who Only Wants a Test" at Greater Baltimore Center for Pregnancy Concerns) (explaining that for a woman who "isn't interested in counseling, and only wants to have the pregnancy test done," the center's policy is to be "firm" and refuse to provide the test unless the woman has "at least 45 minutes" to spend at the center).

The Act responds to the real problem of PCs using sophisticated tactics—such as deceptive advertising and creating the appearance of a reproductive health clinic—to draw women who seek comprehensive medical services into PCs that do not provide such services. To correct this misdirection, the Act's neutral and factual disclosure requirements ensure women have the information they need to access timely and appropriate care.

B. Women Seeking a Range of Medical Services—From Abortion and Contraception to Prenatal Care—Are Misled by PCs' Misrepresentation of Services Provided and Staff Qualifications.

1. Deceptive Tactics by PCs Have Misled Women Across the Nation.

Women from across the country have shared stories with Amici describing how PCs' tactics misled them about what services were available at the facilities they visited and whether medical professionals provided such services.[25] These patterns recur in many stories, a sampling of which are included here.

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25. Gathering stories for this brief was a collective effort in which many Amici were involved. The source of story collection

Sharon

Sharon,[26] a Texas resident who immigrated from Honduras, had a positive result on a home pregnancy test. She did not know whether abortion in the United States was legal, but she knew she wanted to have an abortion if she was pregnant. She wanted a pregnancy test from a medical professional, and searched the internet for "free pregnancy test" and "free ultrasound." She called a PC and spoke with a staffer who led her to believe that she would be going to a health clinic offering comprehensive reproductive healthcare services, including abortion. When Sharon arrived, the outside looked like a medical facility. Inside, they asked for identification and gave her medical history paperwork. Sharon was given a pregnancy test, and then told she could only get the results *after* watching a video. The video promoted religion, adoption, and parenting and featured a woman who regretted her abortion and said she suffered from depression and other medical conditions as a result. After the video, a woman dressed like a nurse performed an ultrasound. The woman asked if Sharon still wanted to have an abortion. When Sharon said yes, the woman told her she was too far along in her pregnancy. Sharon left the facility knowing she still wanted an abortion. She found an abortion clinic where she learned she was actually two weeks further into her

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is indicated for each story. Some of the women who shared their stories were able to use their full names, while others feared consequences and elected to use their first name only or a pseudonym. Names in quotes are pseudonyms.

26. Story shared with National Women's Law Center (NWLC), as facilitated by the National Network of Abortion Funds (NNAF).

pregnancy than the PC had claimed—but still within the legal limit. Sharon became even more upset when PC staff continued calling her, unsolicited, for nearly two months after her visit, saying they were "praying for her" and hoping she would choose parenting or adoption.

Kenya M.

Kenya M.[27] lived in Houston and, after learning she was pregnant, decided to have an abortion. She did an internet search for "abortion clinics in Houston." Because cost was a concern, she selected a facility from her search that advertised free pregnancy testing. It was near an abortion clinic she had visited in the past, and she assumed from its online and physical appearance that it was an abortion clinic. At the facility, she filled out paperwork, including a medical questionnaire asking for the date of her last menstrual period and whether she wanted an abortion. She asked for and received an ultrasound, thinking it was in preparation for an abortion. When she then requested an abortion—having already said repeatedly that she was seeking an abortion—she was finally told that the facility did not offer abortions. The woman she had thought was a medical technician only gave her information about how to fund the pregnancy and asked if she could pray for Kenya to continue the pregnancy. Kenya declined. Afterwards, PC staff continued to call and pressure her, which made Kenya angry.

When Kenya finally was able to visit an abortion clinic, she learned that she was actually in the process of experiencing a miscarriage. Kenya was upset about how

27. Story shared with NWLC, as facilitated by NNAF.

the PC misled and delayed her and would not have gone to the PC had she known it did not provide abortion services.

Cherisse Scott

Cherisse Scott[28] was living in Chicago when she found out she was pregnant. She decided to have an abortion and found a facility where she thought she could obtain that care based on a large advertisement in the phone book that said, "Need abortion? Call us." Cherisse called for an abortion appointment, but the PC never mentioned that it did not provide abortion. Once there, she was taken through an intake process, asked very personal questions, and "counseled" against abortion—including being shown graphic and inaccurate videos about abortion—for nearly three hours. Cherisse then asked to receive an abortion, and was finally told the facility did not provide abortions. Instead, staff told her the next step would be to get an ultrasound at another facility, which led Cherisse to believe she could get the abortion there.

Cherisse took time off from work again and went to her second appointment at a facility that seemed like a medical clinic. Once inside, someone wearing scrubs—whom Cherisse assumed was a nurse—gave her an ultrasound. Despite Cherisse being in her first trimester, the staffer told Cherisse that it was too late in her pregnancy to have an abortion, the procedure would perforate her uterus, and she would never be able to have children. Cherisse relied on this medically inaccurate information provided by a person who appeared to be a medical professional. Because she wanted to be a mother one day, and was

28. Story shared with NWLC, as facilitated by NNAF.

scared that she would not be able to after an abortion, Cherisse decided to continue her pregnancy.

2. PCs Actively Divert and Detain Women Arriving for Appointments at Abortion Clinics.

Women and healthcare providers across the country shared stories with Amici about how PCs present themselves as medical facilities, strategically situate themselves near abortion clinics, and deliberately mask their true intentions—namely, to dissuade patients seeking abortion or contraception from accessing that care. These tactics can delay a woman or cause her to miss a scheduled appointment for the care that she was seeking.

"Shania"

"Shania"[29] and her mother were attempting to go to Shania's appointment at Hartford GYN Center, an abortion clinic, when a woman at the adjacent PC, Hartford Women's Center, beckoned them in. Thinking they were entering the clinic for their appointment, Shania and her mother entered the PC. The woman inside sat them down, and started to talk about sinning and the risks of abortion. In Shania's words, "[s]he was saying stuff like if I get a surgical one I might not make it out alive. She said that someone had half a baby left inside her after. She

29. Shania's story was shared with the Center for Reproductive Rights ("CRR") by the Hartford GYN Center, and submitted as testimony for a Hartford Ordinance Hearing. Hartford Hearing, *supra* note 20, at 1:45:50-47:46 (statement of "Shania" read by Amanda Carrington, Volunteer, Hartford GYN Ctr.).

was ignoring what I was saying and just kept saying all this stuff." Shania's mother recognized that they should leave. They asked where the abortion appointments were, and the woman said there was no abortion center there.

Annie Filkowski

Annie[30] was a high school student in Florida and nervous about telling her mother that she thought she might be pregnant. She went to a PC that displayed a sign for "free pregnancy testing" across the street from a Planned Parenthood, thinking that it was also a reproductive healthcare clinic. The office looked like a medical facility, and Annie was asked to fill out a medical questionnaire. A staff member wearing scrubs took her to another room, shamed her for having sex, and told her that considering abortion wasn't "very Christian of her." Annie was given a pregnancy test that turned out to be negative. She then asked about getting birth control, but was told (incorrectly) that birth control causes cancer. The PC staffer also said that she planned to notify her parents and school about her visit.

Patients at Little Rock Family Planning

Lori Williams, MSN/APRN/CNP/WHNP,[31] is the Clinical Director of Little Rock Family Planning in Arkansas. Ms. Williams sees many women who have appointments with Little Rock Family Planning but mistakenly visit the PC across the street called the

30. Story shared with NWLC, as facilitated by the Floridians for Reproductive Freedom.

31. Story shared with NWLC.

Arkansas Pregnancy Resource Center. Despite these patients notifying the PC's staff that they are checking in for their appointments—thus making it clear that their intention is to visit the abortion clinic—the PC keeps them there for hours, not informing the women that they are in the wrong place. Ms. Williams' patients have explained that the PC looks like a medical clinic, with a waiting room and receptionist, ultrasound machine, and staff in scrubs. This medical façade has caused patients to miss their appointments and even delayed them until after Little Rock Family Planning has closed for the day. Because Little Rock Family Planning is the only surgical abortion facility in Arkansas, many women travel there from great distances. Missing an appointment often means they are delayed another day or week until the physician can see them.

C. Women Suffer a Range of Harms from the Deceptive Tactics and Delays Caused by PCs.

PCs' deceptive tactics result in real harms to women. In addition to the confusion and shaming discussed above, women face other harms, such threats to health and future fertility, loss of a wanted pregnancy, and being forced to carry a pregnancy to term.

1. The Deceptive Tactics of PCs Result in Harms to Women's Health and Future Fertility

PCs provide "medical information" that women rely on, sometimes with serious harms to their health, as the stories below illustrate.

"Sarah"

"Sarah"[32] came to the emergency room with severe abdominal pain. An ultrasound confirmed that Sarah had an ectopic pregnancy that had ruptured, putting Sarah's life at risk and requiring her to have surgery to remove the ectopic pregnancy and fallopian tube in which it was located. Her physician, Dr. Colleen McNicholas said, "[i]t wasn't until after the surgery that Sarah's mother told me about their visit to a [PC]. They went to a center that offered free care and counseling for pregnant women after Sarah confided in her mother that she missed her period and a home pregnancy test was positive. Sarah and her mother discussed her pregnancy before the visit to the [PC] and decided together that terminating the pregnancy, initiating contraception and returning to her life as a high-school student would be best for Sarah. However, they were ecstatic to find out at their visit that Sarah 'wasn't' pregnant. Sarah's mother told me how the woman at the [PC] performed an ultrasound and didn't see a pregnancy in Sarah's uterus. The woman told Sarah that she probably miscarried." Dr. McNicholas noted that "[h]ad [Sarah] received proper medical care earlier, the ectopic pregnancy would have been diagnosed and Sarah could have had a less invasive procedure, preserving her Fallopian tube. Not only was Sarah unable to get appropriate medical care at the [PC] but she received inaccurate information that negatively impacted her health and put her life at risk. The loss of her Fallopian

32. *Public Hearing on H.B. 1848*, 97th Gen. Assem., 2nd Reg. Sess. (Mo. 2014) (statement of Dr. Colleen McNicholas, Leadership Training Acad. Fellow, Physicians for Reprod. Health) (on file with author).

tube is a direct result of the inappropriate care and deceptive guidance given to Sarah by the [PC] and will impact her ability to conceive a child in the future."

2. The Deceptive Practices of PCs Harm Women with Wanted Pregnancies, and Have Even Led to the Loss of a Wanted Pregnancy

Women with wanted pregnancies are also misled and misinformed by PCs, sometimes with tragic results.

"Dartricia Rollins"

Dartricia Rollins[33] visited a PC in Marietta, Georgia, in December 2013 to confirm her wanted pregnancy, with the expectation that she was going to a medical office. On arrival, Dartricia filled out paperwork asking for her medical history, including information about past pregnancies. She was astounded that when she met with staff, they chastised her for being unmarried and not attending church. The staff administered an ultrasound and told her she was due in late August or early September. In fact, Dartricia would later learn that she was due about a month earlier. The staff failed to provide her with any prenatal care resources and continued to chastise Dartricia and her boyfriend about their beliefs and urge them to marry.

Relying on the ultrasound dating, and unable to miss work or disclose her pregnancy to her supervisor, Dartricia

33. Story shared with Feminist Women's Health Center and CRR.

waited to make an appointment with an OB-GYN. By the time she was able to go to a medical provider and was given accurate pregnancy dating, she needed to have several rushed prenatal tests. Tragically, however, Dartricia's doctors were unable to provide a timely diagnosis and take precautions associated with an incompetent cervix. As a result, Dartricia went into premature labor in March 2014, resulting in a stillbirth. Afterwards, Dartricia's doctors told her that if they had caught her condition earlier in her pregnancy, they might have been able to treat her incompetent cervix and save the baby.

Sara Henderson

Sara Henderson[34] was thirty-four years old, living in Georgia with two children, and trying to conceive when she began experiencing pregnancy symptoms. Home pregnancy tests were inconclusive and she was unable to secure a timely appointment with her OB-GYN. Seeking a professionally-administered test to confirm her pregnancy, Sara did an internet search using terms like "pregnancy test" and "pregnancy test in office," and found a medical-sounding facility five minutes away. When she called, the woman on the phone told her a nurse would be available to see her that day to talk about her options. Sara knew the facility was near a hospital and thought it might be an outpatient hospital facility. When Sara arrived, a receptionist behind a desk asked if she had health insurance and requested that she fill out medical paperwork, which referred to her as a "patient."

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34. Story shared with Feminist Women's Health Center and CRR.

A woman wearing scrubs—who Sara assumed was a nurse—gave her a stick pregnancy test. Sara followed the instructions and the "nurse" took her to another room, where the "nurse" told her she was not pregnant. Sara was upset to learn that she was not pregnant and started crying. The woman asked about Sara's relationship status. Sara then asked her if she was a nurse. She responded that she was a volunteer from a local church and asked if she could pray over Sara's stomach. Sara agreed. The woman asked her if she wanted to make an appointment to come back, and Sara said no. However, Sara continued to experience pregnancy symptoms and scheduled an appointment with her OB-GYN for a few weeks later. At that appointment she learned that she was indeed pregnant and had been at the time of her visit to the PC.

Sara was angry and emailed the director of the PC to complain about the experience. The woman responded "[w]ell, we buy those tests from the Dollar Store and sometimes they're wrong." The woman also told Sarah that the facility worked with a registered nurse, but that the nurse was not there full-time. Like the other women who shared their stories, Sara would not have gone to the PC if she had known that it did not provide the care she sought or employ medical professionals delivering actual medical services instead of religious counseling.

3. The Deceptive Tactics of PCs Result in Women Being Forced to Continue a Pregnancy to Term.

Cherisse Scott's story, described above, is one example of how deceptive tactics and lies were used by a PC to effectively force a woman to carry her pregnancy to term. But she is not alone, as the stories below illustrate.

"Betty"

Dr. Jasmine Patel met "Betty"[35] in the emergency room. In Dr. Patel's words, "[s]he came to see us for abdominal pain. [Betty] secretly revealed to me that she was hiding her pregnancy from her family. She had been seeing a women's center in Hartford because she wanted a termination. She told me she had gone every few weeks for the last few months, but was not given any instructions on how to have an abortion. When I performed her ultrasound in the emergency room, I was able to determine that her fetus was 25 weeks and 4 days, which is past the legal limit [for] an abortion. I had to tell her that even though she had clearly indicated her desire to terminate, now she had no choice in the matter because she had been misled and pushed past that legal limit."

"Donna"

"Donna"[36] was a twelve-year old student when she came to see school-based health educator Maria Lopez-Bernstein in 2014. She was pregnant and wanted to have an abortion. Donna tried to go to a Planned Parenthood in the Bronx, but was confused by the signage on the building next door that closely mimicked Planned Parenthood's sign and accidentally went to the PC instead. Donna said she wanted an abortion, and PC staff told her they could help. They "counseled" her about the "dangers" of abortion, showed her graphic abortion videos, and coerced

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35. Hartford Hearing, *supra* note 20, at 2:25:24-27:20 (statement of Drs. Jasmine Patel, Chief Resident, Obstetrics & Gynecology Program, Univ. of Conn. & Hartford Hosp.).

36. Story shared by Maria Lopez-Bernstein with CRR.

Donna into calling her mother. Donna's mother and father came to the PC, where they were all "counseled" and shown the graphic videos. Donna's father then decided that Donna should carry the pregnancy to term. Though Donna still wanted an abortion, she instead became a mother at the age of thirteen.

D. Harms Stemming from PCs' Deceptive Tactics Fall Heavily on Women Struggling to Make Ends Meet—Who Face Logistical Barriers Around Work Schedules, Wages, Travel, and Childcare.

The harms from PCs' deceptive practices fall hardest on poor women and women facing the pressures of low-wage work. More than one in eight women live in poverty according to the most recent census figures, and poverty rates are "particularly high" for women of color.[37] Women are overrepresented in low wage jobs and more likely than men to hold part-time positions that lack benefits and stability in scheduling.[38] Furthermore, women of color are overrepresented in the low-wage workforce.[39] For low-income women, taking time off work and arranging

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37. Kayla Patrick, *National Snapshot: Poverty Among Women and Families, 2016*, NWLC 1 (Sept. 2017), https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2017/09/Poverty-Snapshot-Factsheet-2017.pdf.

38. Julie Vogtman & Jasmine Tucker, *Collateral Damage: Scheduling Challenges for Workers in Low-Wage Jobs and their Consequences*, NWLC 1, 4 (updated Apr. 2017), https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2017/04/Collateral-Damage.pdf.

39. *Id.* at 1.

for childcare to visit a PC is a significant burden; doing it again to obtain the care they actually seek compounds the burdens.

"Marina"

"Marina"[40] was unemployed and supporting her family with her Social Security payments when she inadvertently visited a PC. Marina's boyfriend previously had a vasectomy, so they were shocked to learn she was pregnant. They knew that an abortion was the right decision. Marina suffered from depression for years, and the strain of an unexpected pregnancy combined with grief over her father's recent death meant she needed to obtain her abortion care without any delay for the sake of her mental health. Marina's family was on a tight budget: her teenage son who worked at a summer job to help the family financially had just gone back to school, and the family had recently shouldered funeral expenses for Marina's father. Marina's boyfriend gave her all the extra money he had to travel to a clinic, but the "clinic" turned out to be a PC, draining Marina's resources and forcing her to raise funds anew.

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40. Story Collection, Nat'l Abortion Fed'n (on file with author).

"Sophia"

Reverend Matthew Westfox,[41] Associate Pastor of All Souls Bethlehem Church and Director of Interfaith Outreach, Religious Coalition for Reproductive Choice, told the story of a woman in New York City who called him to receive counseling. "Sophia" worked at a grocery store, and in the pastor's words, "had to negotiate with both her boss and one of her co-workers to get a day off when she could go to a clinic and have the abortion she and her husband had together decided she needed. When she realized she had gone to a place that couldn't provide the service she wanted—that she had wasted her day off, lost the income without purpose, and that it might be three weeks before she could do it again—she was outraged." Sophia's story illustrates that women who work in low wage jobs cannot afford to visit a facility that does not provide the care they seek. In addition to losing wages, the pressures of the workplace can extend any delay for days or weeks—which makes care more costly to obtain.

II. The Act's Neutral, Factual Disclosures, Which Are Needed Because of PC's Deceptive Practices, Are Constitutional Under this Court's Context-Based Standard for Evaluating Compelled Speech.

The Court should reject Petitioners' arguments for overturning the ruling below because they depend on ignoring the entire factual context in which the

41. *A Local Law to Amend the Administrative Code of N.Y.C., in Relation to Limited Service Pregnancy Centers: Hearing on Intro. 0371-2010 Before the Comm. on Women's Issues*, N.Y.C. City Council 48 (Nov. 16, 2010) (statement of Rev. Matthew Westfox) (on file with author).

Act operates. Indeed, in seeking reversal, Petitioners and their Amici ask the Court for a double standard: they argue that speech in facilities that *do not* provide abortion or contraception should receive higher protection than speech in facilities that *do* provide abortion and contraception. The Court should reject the invitation to undermine the values enshrined in the First Amendment by creating such a double standard. Instead, it should apply ordinary First Amendment principles and affirm the Ninth Circuit's decision

A. Context Is Key in Evaluating Compelled Speech Requirements Under the First Amendment.

Petitioners ask the Court to overturn the Ninth Circuit's decision by ignoring the entire context of the Act and claiming that this case is about "religious organizations" engaging in "the purest sort of . . . mission-oriented issue advocacy." Br. for Pet'rs 5, 22. They also argue that they "seek to speak public messages about an ideological cause." *Id.* at 45.

The problem, however, is that many PCs do not advertise or present themselves to the women who come through their doors as religious advocates "seek[ing] to speak public messages about an ideological cause." *Id.* Instead, they present themselves as medical clinics, or centers providing what consumers would view as medical services, without disclosing their ultimate religious advocacy goals. *See supra* 12-16.

The Act's constitutionality should be assessed in light of this context. Indeed, under ordinary First Amendment principles, context is key in evaluating laws that compel

speech, including determining the appropriate level of scrutiny. *See Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988) (holding that "level of scrutiny to apply to a compelled statement" turns on "the nature of the speech taken as a whole and the effect of the compelled statement thereon"); *see also Turner Broad Sys., Inc. v. FCC*, 512 U.S. 622, 637 (1994) (stating that "not every interference with speech triggers the same degree of scrutiny under the First Amendment"); *Stuart v. Camnitz*, 774 F.3d 238, 244-45 (4th Cir. 2014) (citing *Turner*, 512 U.S. at 637; *Riley*, 487 U.S. at 790) (evaluating full context of abortion restriction compelling physician speech to determine appropriate level of scrutiny). Here, the Ninth Circuit appropriately took context into account in affirming the denial of Petitioners' preliminary injunction motion, and there is no basis for disturbing its decision.

B. The Act's Provisions Should Not Be Subject to a Higher Level of Scrutiny Than Other Laws Regulating Speech by Medical Professionals.

The Ninth Circuit rightly held that the Act's notice requirement for licensed clinics should not be subject to a higher level of scrutiny than other laws regulating speech by medical professionals to their patients about medical treatment—and in particular speech about abortion. *See, e.g., Wollschlaeger v. Governor of Fla.*, 848 F.3d 1293, 1301-02 (11th Cir. 2017) (applying intermediate scrutiny and invaliding prohibitions on medical professionals' ability to inquire of patients, and include in medical records, information about whether patients own firearms); *Stuart*, 774 F.2d at 245-46 (applying intermediate scrutiny and holding that abortion restriction that compelled physician speech to patient in middle of medical procedure failed

such scrutiny); *King v. Governor of N.J.*, 767 F.3d 216, 220, 237-40 (3d Cir. 2014) (applying intermediate scrutiny to law prohibiting licensed counselors from engaging in sexual orientation change efforts (SOCE) with patients under eighteen and concluding that law survived such scrutiny). Indeed, in choosing the level of scrutiny to apply to regulations of speech by medical professionals, courts of appeals have sought to ensure that professionals are not simply turned into mouthpieces for the state and that patients are able to distinguish between medical advice and non-medical advocacy—the same interests that are at issue here. *See Wollschlaeger*, 848 F.3d at 1310-11; *Stuart*, 774 F.3d at 245-48; *King*, 767 F.3d at 236 (noting "serious doubts that anything less than intermediate scrutiny" would adequately ensure that legislatures do not regulate professional speech to inhibit "politically-disfavored messages").

For example, grappling with many of the same First Amendment questions posed by this case, the courts in *Stuart* and *King* viewed as important the difference between a medical professional speaking in the context of providing services to a patient versus that same medical professional "speaking to the public at large or offering her personal opinion." *King*, 767 F.3d at 232; *see also Stuart*, 767 F.3d at 247-48. Taking that distinction into account, both the Third and Fourth Circuits concluded that, in the context of patient services, regulations of speech should be analyzed through the lens of the well-established traditions of the medical profession. For instance, in *King*, the Third Circuit concluded that intermediate scrutiny of the prohibition on SOCE counseling for minors was appropriate because the record established that New Jersey had acted to "protect[] its citizens from ineffective

or harmful professional services." 767 F.3d at 235. It then upheld the prohibition because of the substantial evidence that SOCE counseling is ineffective and can cause serious health harms. *Id.* at 238. Similarly, in *Stuart*, the Fourth Circuit's determination that the law at issue was inconsistent with the history and traditions of the medical profession informed both its decision on the level of scrutiny and on the law's ultimate invalidity; the court found, *inter alia*, that the law required physicians to speak an ideological state message "irrespective of the needs or wants of the patient, in direct contravention of medical ethics and the principle of patient autonomy." 774 F.3d at 255.

There is no principled First Amendment argument that supports a higher level of scrutiny for the Act's notice requirements than for the laws at issue in *Wollschlaeger*, *Stuart*, and *King*. For example, the law considered in *Stuart* was far more intrusive on First Amendment interests than the Act: it literally put words into the physician's mouth, requiring the physician to speak the state's anti-abortion message in his or her own voice *in the middle* of a medical procedure, to a partially disrobed patient, even if the physician believed the message would harm the patient. *See Stuart*, 774 F.3d at 254-55.

Petitioners and their Amici nevertheless argue that a different standard should apply because the Act's disclosures are not about a medical procedure or informed consent. Br. for Pet'rs 44-48; Br. for Cato Inst. as *Amicus Curiae* Supp. Pet'rs 5-9; Br. for Tex. et al. as Amici Curiae Supp. Pet'rs ("Br. for Tex.") 9-14. But these arguments are disingenuous and legally meritless. Petitioners simply want to have their cake and eat it too:

"medicalizing" so that they can induce more women to enter their clinics, while at the same time arguing in court that they are not medical enough to comply with informed consent requirements. Indeed, Petitioners intentionally trade on the medicalization of their licensed clinics, and the medical-seeming services offered by their unlicensed clinics, to attract women seeking medical care—including prenatal care, abortion and the full-range of contraception—who otherwise would not call or visit their facilities. *See supra* 9-16. And Petitioners of course do speak to women about "particular medical procedures": they speak to them in great detail about what they view as the risks of abortion and contraception. Because of PCs' targeted efforts, women are entitled to know that they are embarking on a conversation with a religious advocate, not entering a medical relationship in which the professional provides unbiased information so the patient can make an autonomous decision based on her *own* values and goals. *See Stuart*, 774 F.3d at 252 (stating that a "physician's role . . . is to inform and assist the patient without imposing his or her own personal will and values").

In arguing for a double standard, Petitioners' Amici also misrepresent this Court's decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). They contend that states can put any factual information into the mouths of abortion providers, but not staff at PCs, because *Casey* stands for the proposition that "a State can use its regulatory authority to require information about fetal development to be shown to a patient precisely because of the State's interest in protecting unborn life." Br. for Tex. 12-13. According to Petitioners' Amici, *Casey* both establishes a special lower standard of First Amendment review for

speech about abortion and does not impose this special lower standard on PC staff, even though they counsel patients about abortion.

But *Casey* did not create any new or special First Amendment rules. Instead, *Casey* upheld an informed consent statute that was composed of two parts. One part required physicians to provide information that was *already* included in their informed consent process, such as risks and benefits of alternative procedures. *Casey*, 505 U.S. at 881-84; *see also Planned Parenthood of Se. Pa. v. Casey*, 947 F.2d 682, 703-07 (3d Cir. 1991) (making clear that *Casey* plaintiffs were already providing basic information on risks and benefits to patients and their objection to the Pennsylvania law was based on other reasons), *aff'd in part, rev'd in part*, 505 U.S. at 833. The second part of the statute upheld in *Casey* required an offer of state-created printed materials about, *inter alia*, fetal development and the availability of medical assistance for childbirth. 505 U.S. at 881. With respect to this second part of the challenged statute, *Casey*'s holding was extremely narrow. The decision says only that information about fetal development and childbirth assistance "*may* be permissible" when all the State does is make information that is truthful and not misleading *available* to patients in state-produced pamphlets. *Id.* at 882 (emphasis added); *see also id.* at 883. Further, the Court noted that a physician did not need to comply with the statute if, in his or her view, doing so would harm the patient. *Id.* at 883-84 (noting that "in this respect, the statute does not prevent the physician from exercising his or her medical judgment"). Thus, to the extent *Casey* approves of allowing the State to provide its ideological message to abortion patients, it did so only through

the physician's *offer* of the State's *own speech*—with information in the State's publication—and even then only in circumstances when the physician concluded that the offer itself would not harm the patient. Accordingly, *Casey* did not announce a blanket rule that weakened First Amendment protections for abortion providers.

To the contrary, *Casey*'s holding turned on this Court's recognition of the importance of respecting a woman's autonomy in making decisions about her medical care, including the decision whether to carry to term, and allowed physician speech to be regulated only concordantly with that underlying value. The Act seeks to protect women's autonomy by counteracting the deliberately deceptive and confusing tactics by PCs and should be upheld.

In sum, the argument that the regulations at issue in this case should be reviewed under a higher level of scrutiny than speech regulations about other procedures—and in particular abortion procedures—amounts to nothing more than a claim that there should be a different First Amendment standard depending on the viewpoint of the speaker, an argument that this Court should flatly reject.

CONCLUSION

For the foregoing reasons, the Ninth Circuit's decision should be affirmed.

Respectfully submitted,

FATIMA GOSS GRAVES
GRETCHEN BORCHELT
SUNU CHANDY
HEATHER SHUMAKER
NATIONAL WOMEN'S LAW CENTER
11 Dupont Circle NW, Suite 800
Washington, DC 20036

JULIE RIKELMAN
Counsel of Record
AUTUMN KATZ
AMY MYRICK
MOLLY DUANE
CENTER FOR REPRODUCTIVE RIGHTS
199 Water Street, 22nd Floor
New York, NY 10038
(917) 637-3600
jrikelman@reprorights.org

Counsel for Amici Curiae

APPENDIX

APPENDIX — DESCRIPTIONS OF *AMICI CURIAE* ORGANIZATIONS

The **Abortion Access Hackathon**, founded in California, bridges the tech gap in abortion access, through the collaboration and innovation of industry professionals and access stakeholders. We continue to advocate for honest healthcare and access to services while creating space for gender equity leadership in tech.

Abortion Care Network is a national non-profit, membership-based network of community-based, independent abortion care providers and the allies who support them. We are dedicated to ensuring that all people have access to dignified and exceptional abortion care. We work to sustain a health ecosystem of abortion care and to eliminate the obstacles faced by independent abortion care providers through direct services, advocacy, movement-wide collaboration, professional development and actively confronting abortion stigma.

Advocates for Youth partners with youth leaders, adult allies, and youth-serving organizations to advocate for policies and champion programs that recognize young people's rights to honest and medically accurate sexual health information; accessible, confidential, and affordable sexual health services; and the resources and opportunities necessary to create sexual health equity for all youth.

The **Afiya Center** is a non-profit Reproductive Justice organization based in North Texas. The Afiya Center was founded in response to the absence of programs to assist marginalized women living in poverty who are a

high risk of contracting HIV/AIDS. The Afiya Center embraces the Reproductive Justice framework as the most effective means for tackling this dual epidemic. The Afiya Center understands that the right to decide what to do with one's own body is at the core of reproductive justice. We believe that women should have the right to make decision about one's own body; to decide if or when, and how to have children; to choose whether to end or continue a pregnancy; to have an equal opportunity to survive pregnancy and childbirth; to parent one's existing children; and to pursue these rights free from systemic violence.

In 1881, the **American Association of University Women ("AAUW")** was founded by like-minded women who had defied society's conventions by earning 27 college degrees. Since then it has worked to increase women's access to higher education through research, advocacy, and philanthropy. Today, AAUW has more than 170,000 members and supporters, 1,000 branches, and 800 college and university partners nationwide. AAUW plays a major role in mobilizing advocates nationwide on AAUW's priority issues. In adherence with our member-adopted Public Policy Program, AAUW supports choice in the determination of one's reproductive life and increased access to health care and family planning services.

The **American Sexual Health Association** supports the right of women to make fully informed decisions about their sexual and reproductive health with access to medically accurate, unbiased information.

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Americans United for Separation of Church and State is a national, nonsectarian public-interest organization that is committed to ensuring religious freedom and protecting fundamental rights, including reproductive rights, for all Americans by safeguarding the constitutional principle of church–state separation. Americans United represents more than 125,000 members and supporters nationwide. Since its founding in 1947, Americans United has participated as a party, as counsel, or as an amicus curiae in the leading church–state cases decided by the United States Supreme Court, this Court, and by the lower federal and state courts throughout the country.

The **Anti-Defamation League ("ADL")**, founded in 1913, is a national Jewish civil rights and human relations organization dedicated to principles of equality and religious and individual liberty, including the right to privacy. ADL views reproductive choice as an issue of personal and religious freedom. Accordingly, ADL has participated as amicus curiae in every major U.S. Supreme Court case since *Roe v. Wade*, 410 U.S. 113 (1973) supporting reproductive freedom and opposing efforts to curtail abortion rights.

Black Mamas Matter Alliance (BMMA) is a Black women-led cross-sectoral alliance. BMMA centers Black mamas to advocate, drive research, build power, and shift culture for Black maternal health, rights, and justice. BMMA envisions a world where Black mamas have the rights, respect, and resources to thrive before, during, and after pregnancy. As an alliance, BMMA aims to (1) change policy by introducing and advancing policy grounded

in the human rights framework that addresses Black maternal health inequity and improves Black maternal health outcomes; (2) cultivate research by leveraging the talent and knowledge that exists in Black communities and cultivate innovative research methods to inform the policy agenda to improve Black maternal health; (3) advance care for Black mamas: explore, introduce, and enhance holistic and comprehensive approaches to Black mamas' care; and (4) shift culture by redirecting and reframing the conversation on Black maternal health and amplify the voices of Black mamas.

Founded in 2011, **Black Women Birthing Justice** is a collective of African-American, African, Caribbean and multiracial women who are committed to transforming birthing experiences for Black women and transfolks. Our vision is that that every pregnant person should have an empowering birthing experience, free of unnecessary medical interventions. Our goals are to educate, to document birth stories and to raise awareness about birthing alternatives. We aim to challenge medical violence, rebuild confidence in our ability to give birth and decrease disproportionate maternal and infant mortality.

The **Center for Reproductive Rights** is a global human rights organization that uses the law to advance reproductive freedom as a fundamental right that all governments are legally obligated to respect, protect, and fulfill. In the United States, the Center's work focuses on ensuring that women and all people have access to a full range of high-quality reproductive health care. Since its founding in 1992, the Center has been actively involved

in nearly all major litigation in the U.S. concerning reproductive rights, in both state and federal courts, including most recently, serving as lead counsel for the plaintiffs in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016). As a rights-based organization, the Center has a vital interest in protecting the speech rights of health care providers, along with the rights of women in need of access to high-quality and respectful care.

The **Center on Reproductive Rights and Justice at UC Berkeley School of Law** seeks to realize reproductive rights and advance reproductive justice by bolstering law and policy advocacy efforts, furthering scholarship, and influencing academic and public discourse. Our work is guided by the belief that all people deserve the social, economic, political, and legal conditions necessary to make genuine decisions about reproduction.

The **Colorado Organization for Latina Opportunity and Reproductive Rights (COLOR)** works to engage and empower the Latino community to speak out about the policies that impact our community. We are committed to ensuring that women of color are able to make their own decisions regarding pregnancy, parenting and abortion and to receive the health services they need to support their decision.

Feminist Women's Health Center is a non-profit reproductive health, rights, and justice organization that is committed to a vision of judgment-free reproductive health care and access for all who need it. Founded in 1976 in Atlanta, GA, FWHC offers compassionate abortion care

as part of comprehensive reproductive health services and works to improve access for traditionally underserved communities. Using an intersectional reproductive justice approach, the Feminist Center's services and programs aim to meet the unique needs of people of color, low-income, Spanish-speaking, immigrant, refugee, and LGBTQIA+ clients. More than a health care provider, the Feminist Center has been an advocacy leader at the state policy level, and at the national level through coalitions and partnerships, for the past two decades, defending against any attacks on reproductive rights and advancing proactive policy to achieve reproductive justice.

Fund Texas Choice is a non-profit organization that helps Texans equitably access abortion through safe, confidential, and comprehensive travel services and practical support. We were formed in 2013 in response to the passage of Texas House Bill 2, which closed nearly 75% of over 40 Texan clinics in 2013 and 2014. The closures were primarily in rural and low-income areas of the state, necessitating cost-prohibitive, time-wasting, and geographically-difficult travel for groups already facing financial obstacles to abortion. We have a vested interest in the outcome of this case because many of our clients travel out of state to access abortion care after first visiting a crisis pregnancy center.

Ibis Reproductive Health is an international nonprofit organization with a mission to improve women's reproductive autonomy, choices, and health worldwide. Our core activity is clinical and social science research on issues receiving inadequate attention in other research

settings and where gaps in the evidence exist. Our agenda is driven by women's priorities and focuses on increasing access to safe abortion, expanding contraceptive access and choices, and integrating HIV and comprehensive sexual and reproductive health services. We partner with advocates and other stakeholders who use our research to improve policies and delivery of services in countries around the world.

In Our Own Voice: National Black Women's Reproductive Justice Agenda is a national Reproductive Justice organization focused on lifting up the voices of Black women at the national and regional levels in our ongoing policy fight to secure Reproductive Justice for all women and girls. In Our Own Voice is a national-state partnership with eight Black women's reproductive justice organizations: Black Women for Wellness, Black Women's Health Imperative, New Voices for Reproductive Justice, SisterLove, Inc., SisterReach, SPARK Reproductive Justice NOW, The Afiya Center and Women With a Vision. Because we are a Reproductive Justice organization, we work to ensure that Black women and girls receive reproductive health information is honest and trustworthy so that they can make informed decisions about their lives.

Lady Parts Justice League, a 501(c)(3) nonprofit organization founded by Lizz Winstead—co-creator of the Daily Show—uses humor to destigmatize abortion, expose the anti-choice extremist forces working to destroy access to reproductive rights across the US, and support and raise awareness about independent abortion providers. We are committed to ensuring that women and pregnant

people have the timely information, resources, and support that they need to make informed decisions about their reproductive health.

Lambda Legal is the nation's oldest and largest nonprofit legal organization working for full recognition of the civil rights of LGBT people and everyone living with HIV, through impact litigation, education, and policy advocacy. See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Romer v. Evans*, 517 U.S. 620 (1996). Lambda Legal has an interest in this case because free speech and religious freedom rights often have been asserted to excuse harm to LGBT people, and Amicus has represented same-sex couples or appeared as amicus curiae in many cases addressing such defenses. See, e.g., Christian Legal Society Chapter of the *Univ. of Calif. v. Martinez*, 561 U.S. 661 (2010); *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, No. 16-111 (U.S. filed July 22, 2016); *Washington v. Arlene's Flowers, Inc.*, 389 P.3d 543 (Wash. 2017); *Klein, dba Sweetcakes by Melissa v. Oregon Bureau of Lab. & Indus.*, No. CA A159899 (Or. Ct. App. filed April 25, 2016); *N. Coast Women's Care Med. Grp., Inc. v. Superior Ct.*, 189 P.3d 959 (Cal. 2008). Amicus also has an interest in this case because many LGBT people need and use abortion services. In addition, Amicus has an interest in the enforceability of laws analogously regulating mental health services to protect patients from harmful sexual orientation or gender identity "conversion" therapy. Because the millions of LGBT people potentially affected by this case include up to 250,000 Lambda Legal constituents nationwide and more than 55,500 in

California, Lambda Legal has a particular interest in assisting the Court through the information in this brief.

Legal Momentum, The Women's Legal Defense and Education Fund, is a leading national non-profit civil rights organization that for nearly fifty years has used the power of the law to define and defend the rights of girls and women. Legal Momentum has worked for decades to secure and protect reproductive rights and access to reproductive health services, including the right to contraception. Legal Momentum has been involved in dozens of cases protecting reproductive freedom and health in state and federal courts throughout the country. Legal Momentum has also authored and submitted several amicus briefs to the U.S. Supreme Court challenging the constitutionality of policies and statutes that infringe on women's right to reproductive health.

Legal Voice, formerly known as the Northwest Women's Law Center, is a regional nonprofit public interest organization based in Seattle that works to advance the legal rights of women in the five Northwest states (Washington, Oregon, Idaho, Montana, and Alaska) through public impact litigation, legislation, and legal rights education. Since its founding in 1978, Legal Voice has been dedicated to protecting and expanding access to reproductive health care. Legal Voice has participated as counsel and as amicus curiae in cases throughout the Northwest and the country to help ensure rights to health coverage, self-determination, and bodily autonomy.

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The **Maine Women's Policy Center** advocates for the economic, social and political well-being of Maine women and girls. For 40 years we have advocated for access to the full range of health care, including reproductive health care. In order for women to have autonomy and economic security, they must have full control over their reproduction.

Medical Students for Choice is dedicated to ensuring that everyone has the unbiased information and medical services they need to make reproductive health decisions that are right for each individual. As future physicians, we strongly oppose any attempts to undermine our patients' right to comprehensive and accurate medical information.

NARAL Pro-Choice America is a national advocacy organization, dedicated since 1969 to supporting and protecting, as a fundamental right and value, a woman's freedom to make personal decisions regarding the full range of reproductive choices through education, organizing, and influencing public policy. NARAL Pro-Choice America works to guarantee every woman the right to make personal decisions regarding the full range of reproductive choices. Ensuring that women can make these decisions free from deception and coercion, and that they receive medically accurate, unbiased, and comprehensive information is a critical piece of our mission.

National Advocates for Pregnant Women is a non-profit organization that advocates for the civil and human rights of pregnant women. Pregnant women, like all other

constitutional persons in the United States, are entitled to honest and accurate health information from all providers.

The **National Asian Pacific American Women's Forum (NAPAWF)** is the only national, multi-issue Asian American and Pacific Islander (AAPI) women's organization in the country. NAPAWF's mission is to build a movement to advance social justice and human rights for AAPI women, girls, and transgender and gender non-conforming people. NAPAWF approaches all of its work through a reproductive justice framework that seeks for all members of the AAPI community to have the economic, social, and political power to make their own decisions regarding their bodies, families, and communities. Our work includes advocating for the reproductive health care needs of AAPI women and ensuring AAPI women's access to reproductive health care services.

The **National Center for Lesbian Rights (NCLR)** is a national legal nonprofit organization founded in 1977 and committed to advancing the rights of lesbian, gay, bisexual, and transgender (LGBT) people and their families through litigation, public policy advocacy, and public education.

The **National Center for Transgender Equality (NCTE)** is a national social justice organization founded in 2003 and devoted to advancing justice, opportunity, and well-being for transgender people through education and advocacy on national issues. NCTE has worked with local, state, and federal government agencies and other organizations around the country for over a decade to ensure equal access to quality health care for transgender people.

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The **National Council of Jewish Women (NCJW)** is a grassroots organization of volunteers and advocates who turn progressive ideals into action. Inspired by Jewish values, NCJW strives for social justice by improving the quality of life for women, children, and families and by safeguarding individual rights and freedoms. NCJW is committed to creating a world where all people, regardless of race, class, gender, sexuality, ability, or immigration status, have the right to build their families and live their lives with dignity. Our Jewish values teach us that our reproductive freedoms are integrally bound to our religious liberty; we are committed to advancing the goals of reproductive justice so that every person can make their own moral and faith-informed decisions about their body, health, and family.

The **National Health Law Program** is a 49-year-old public interest law organization that engages in education, litigation, research, and policy analysis to advance access to quality health care and protect the legal rights of low-income and underserved populations.

The **National Institute for Reproductive Health ("NIRH")** is a non-profit advocacy organization working to build a society in which everyone has the freedom and ability to control their reproductive and sexual lives. NIRH promotes its mission by galvanizing public support for access to reproductive health care, including abortion and contraception, and supporting public policy that ensures that women have timely, affordable access to the full range of reproductive health care in their communities.

National Latina Institute for Reproductive Health ("NLIRH") is the only national reproductive justice organization dedicated to advancing health, dignity, and justice for the 28 million Latinas, their families, and communities in the United States. We believe that access to comprehensive reproductive healthcare, including abortion, is essential to ensuring that all people can shape their lives and futures with dignity. We trust that when individuals are empowered with knowledge of all reproductive health options, they are able to make the best decision for themselves and their families.

The **National LGBTQ Task Force** is the nation's oldest national LGBTQ advocacy group. As a progressive social-justice organization, the Task Force works to achieve full freedom, justice, and equality for Lesbian, Gay, Bisexual, Transgender, and Queer (LGBTQ) people and their families. The Task Force trains and mobilizes activists across the Nation to combat discrimination against LGBTQ people in every aspect of their lives, including housing, employment, healthcare, retirement, and basic human rights.

The **National Network of Abortion (NNAF)** The National Network of Abortion (NNAF) funds is a non-profit organization that builds power with members to remove financial and logistical barriers to abortion access by centering people who have abortions and organizing at the intersections of racial, economic, and reproductive justice. With over 70 member organizations across the United States and abroad, NNAF is working to make sure every reproductive decision, including abortion, is

supported and free from coercion, and advocates for all people to have the power and resources to care for and affirm their bodies, identities, and health for themselves and their families—in all areas of their lives so that as we shift the conversation about abortion, it will become a real option, accessible without shame or judgment.

The **National Organization for Women Foundation** is a 501(c)(3) organization devoted to furthering women's rights through education and litigation. Established in 1986, NOW Foundation is affiliated with the National Organization for Women, the largest feminist grassroots activist organization in the United States, with hundreds of thousands of members and contributing supporters in hundreds of chapters in all 50 states and the District of Columbia. Since its inception, NOW Foundation's goals have included advocating for improved access to reproductive health care for all women and to safeguarding abortion rights.

The **National Partnership for Women & Families** (formerly the Women's Legal Defense Fund) is a national advocacy organization that develops and promotes policies to foster a society in which workplaces are fair and family friendly, discrimination is a thing of the past, women's reproductive health and rights are secure, everyone has access to quality, affordable health care and every person has the opportunity to achieve economic security and live with dignity. The National Partnership has a deep, unwavering commitment to women's reproductive health, including ensuring that every woman has access to a full range of reproductive health information and services.

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The **National Women's Law Center** is a nonprofit legal advocacy organization dedicated to the advancement and protection of women's legal rights and opportunities since its founding in 1972. The Center focuses on issues of key importance to women and their families, including income security, employment, education, health, and reproductive rights, with special attention to the needs of low-income women and those who face multiple and intersecting forms of discrimination. The Center has participated in numerous cases before this Court to secure a woman's right to decide whether or not to bear children.

New Voices for Reproductive Justice is a Human Rights and Reproductive Justice advocacy organization with a mission to build a social change movement dedicated to the full health and well-being of Black women, femmes, and girls in Pennsylvania and Ohio. Since 2004 the organization has served over 75,000 women of color and LGBTQIA+ people of color through community organizing, grassroots activism, civic engagement, youth mentorship, leadership development, culture change, public policy advocacy and political education. New Voices defines Reproductive Justice as the human right of all people to have full agency over their bodies, gender identity and expression, sexuality, work, reproduction and the ability to form families.

Nurses for Sexual and Reproductive Health (NSRH) is a national grassroots organization dedicated to providing nursing students, faculty and practitioners with the education, tools, and resources necessary to become social change agents within the healthcare system as it relates to sexual and reproductive justice.

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People For the American Way Foundation (PFAWF) is a nonpartisan civic organization established to promote and protect civil and constitutional rights, including first amendment freedoms and reproductive choice. Founded in 1981 by a group of civic, educational, and religious leaders, PFAWF now has hundreds of thousands of members nationwide. Over its history, PFAWF has conducted extensive education, outreach, litigation, and other activities to promote these values.

Reproaction is a national non-profit organization formed to increase access to abortion and advance reproductive justice using advocacy, direct action, and public education campaigns.

The **Reproductive Health Access Project** is a nonprofit organization that mobilizes, trains, and supports clinicians to make reproductive health care accessible to everyone. We focus on three key areas: abortion, contraception, and management of early pregnancy loss. We teach and support providing evidence-based clinical information in an unbiased, patient-centered manner. We have signed on to numerous amicus briefs that aim to protect access to evidence-based clinical care and protect individuals' reproductive rights.

Founded in July 1989, **SisterLove, Inc.** is an HIV/AIDS and reproductive justice nonprofit organization focusing on women, particularly women of African descent, and has the distinction of being the oldest nonprofit of its kind in the State of Georgia. SisterLove's mission is to eradicate the adverse impact of HIV/AIDS and reproductive

oppressions as well as sexual oppressions upon all women, their families, and their communities in the United States and worldwide through education, prevention, support and human rights advocacy. To realize this mission, SisterLove engages in advocacy, health education, and prevention which seeks to educate and empower youth and women of color to the policies that affect those living with HIV as well as those at high risk for contracting the virus and other sexually transmitted infections. In addition to counseling, SisterLove provides free services to those seeking HIV and STI testing. Since its inception, SisterLove has been at the forefront of community-based advocacy for the health, human rights, and well-being of Black women living with HIV/AIDS, those at risk for contracting HIV/AIDS, and for all individuals who belong to marginalized communities that are severely and disproportionately impacted by HIV/AIDS, particularly in the Deep South and the Global South. SisterLove adopted a human rights and reproductive justice approach to HIV advocacy to conceptualized HIV policy issues and innovate community-based solutions to those issues from the grassroots level upwards. SisterLove advances its advocacy objectives by amplifying its experiential perspectives and policy positions through traditional and social media; building power among its base of women and youth; collaborating with community partners to produce intersectional policy writing that utilizes Reproductive Justice and human rights frameworks, intended for use by all who have a stake in SisterLove's advocacy objectives; conducting stakeholder and community engagement and education at local, state, and national levels; and working in coalition with community partners and allies at local, state, and national levels.

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SisterReach is a 501c3 nonprofit based in Memphis, TN which works on the local, state, regional and national levels to achieve Reproductive Justice for women and teens of color, rural and queer marginalized people and their families.

SisterSong is a Southern based, national membership organization. Our purpose is to build an effective network of individuals and organizations to improve institutional policies and systems that impact the reproductive lives of marginalized communities. We work to strengthen and amplify the collective voices of indigenous women and women of color to achieve reproductive justice by eradicating reproductive oppression and securing human rights.

UltraViolet is a powerful and rapidly growing community of people mobilized to fight sexism and create a more inclusive world that accurately represents all women, from politics and government to media and pop culture. We fight attacks against women and work toward a proactive vision of what equality looks like for women. To this end, we fight to ensure that all women have access to full and affordable health care services, including abortion access.

Unite for Reproductive & Gender Equity (URGE) is a non-profit grassroots advocacy organization that works to mobilize young people through a reproductive justice framework. URGE builds infrastructure through campus chapters and city activist networks, where we invite individuals to discover their own power and transform it into action. URGE members educate their communities

and advocate for local, state, and national policies around issues of reproductive justice and sexual health.

Whole Woman's Health (WWH) was founded in 2003 and is a privately-owned feminist organization committed to providing holistic reproductive health care including abortion. WWH manages clinics in 6 states and was the lead plaintiff in the landmark abortion rights Supreme Court Case, *Whole Woman's Health v Hellerstedt* that overturned TRAP laws in Texas.

Whole Woman's Health Alliance (WWHA) is a non-profit organization committed to providing holistic reproductive health care including abortion in challenging places where access to quality care is under attack. The mission of WWHA is to strategically shift the stigma around abortion in our culture. We are committed to fostering open and honest conversations, lifting up all communities and transforming the abortion care environment.

Founded in 1917, the **Women's Bar Association of the District of Columbia (WBA)** is one of the oldest and largest voluntary bar associations in metropolitan Washington, DC. Today, as in 1917, we continue to pursue our mission of maintaining the honor and integrity of the profession; promoting the administration of justice; advancing and protecting the interests of women lawyers; promoting their mutual improvement; and encouraging a spirit of friendship among our members. We believe that the administration of justice includes women's access to healthcare services in a timely, without prejudice, well-informed and high-quality manner, regardless of whether

they are seeking an abortion, family planning services, prenatal care, or counseling.

The **Women's Law Center of Maryland, Inc.** is a nonprofit, public interest, membership organization of attorneys and community members with a mission of improving and protecting the legal rights of women. Established in 1971, the Women's Law Center achieves its mission through direct legal representation, research, policy analysis, legislative initiatives, education and implementation of innovative legal-services programs to pave the way for systematic change. The Women's Law Center is participating as an amicus in *NIFLA v. Becerra* because in particular, the Women's Law Center seeks to ensure the physical safety, economic security, and autonomy of women.

No. 16-1140

In the Supreme Court of the United States

NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES, DBA NIFLA, ET AL.,

Petitioners,

v.

XAVIER BECERRA, ATTORNEY GENERAL OF CALIFORNIA, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR FIRST RESORT, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

KELLY S. BIGGINS
LOCKE LORD LLP
300 S. Grand Avenue, Suite 2600
Los Angeles, California 90071

W. SCOTT HASTINGS
CARL SCHERZ
ANDREW BUTTARO
LOCKE LORD LLP
2200 Ross Avenue, Suite 2800
Dallas, Texas 75201

MARK L. RIENZI
Counsel of Record
ERIC C. RASSBACH
JOSEPH C. DAVIS
THE BECKET FUND FOR RELIGIOUS LIBERTY
1200 New Hampshire Ave. NW, Suite 700
Washington, D.C. 20036
(202) 955-0095
mrienzi@becketlaw.org

Counsel for Amicus Curiae

QUESTION PRESENTED

Across the country, disagreements over abortion have prompted a variety of speech restrictions targeting particular speakers because of their views on abortion. The resulting court decisions have distorted important First Amendment doctrines, particularly in the areas of neutrality analysis, commercial speech, and professional speech. This case provides an important opportunity for the Court to either fully correct these doctrinal distortions or to lay the groundwork to provide a full correction in a subsequent case. The particular law at issue here targets pro-life speakers and requires them to refer women to government programs that will provide abortions, but the Ninth Circuit failed to apply strict scrutiny. The questions presented are:

Whether a content- and viewpoint-based law may avoid strict scrutiny based on judicial guesswork as to a speaker's presumed purpose in engaging in the regulated speech.

Whether this Court's commercial speech doctrine, and references to "professional speech," can be applied to the speech of non-profit pregnancy counselors who provide free and often religiously-motivated assistance to pregnant women.

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INTEREST OF THE AMICUS[1]

First Resort, Inc., is a California non-profit corporation that operates a pregnancy services counseling clinic in San Francisco. First Resort believes that abortion is harmful both to women and their unborn children, and its vision is to build a Bay Area in which abortion is neither desired nor seen as needed. In support of that vision, First Resort does not provide or refer for abortions, but instead empowers women to make fully-informed decisions in line with their own beliefs and values, on the belief that, when given appropriate support, unbiased counseling, and accurate medical information, many women will choose options other than abortion. All of First Resort's services are provided free of charge.

First Resort is concerned that in the vigorous and vital national debate about abortion, numerous state and local governments have impermissibly targeted the speech of counseling organizations like First Resort. The Fourth Circuit recently referred to the ways in which this "[w]eaponizing [of] the means of government against ideological foes"—which can happen from either side in this or any debate—poses "grave" risks to "one of our nation's dearest principles." *Greater Balt. Ctr. for Pregnancy Concerns, Inc.* v. *Mayor & City Council of Balt.*, __ F.3d ____, 2018 WL 298142, at *8 (4th Cir. Jan. 5, 2018) (*Greater Baltimore III*) (Wilkinson, J.).

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[1] No counsel for a party authored any portion of this brief or made any monetary contribution intended to fund the preparation or submission of the brief. Counsel for all parties have consented to the filing of this brief.

One of those grave risks is the distortion of important First Amendment doctrines by lower courts upholding such laws. First Resort's own case is a prime example. There, the Ninth Circuit upheld a San Francisco law targeting advertising by "anti-abortion" pregnancy counselors as viewpoint neutral because speakers *might* engage in pro-life speech "for reasons that have nothing to do with their views on abortion, such as financial or logistical reasons." *First Resort, Inc.* v. *Herrera*, 860 F.3d 1263, 1277 (9th Cir. 2017). And it found that the speech of non-profit pregnancy centers that provide free assistance was actually "classic" commercial speech because free assistance is "commercially valuable," and because the non-profits engage in "fundraising" elsewhere. *Id.* at 1273-74.[2]

First Resort therefore submits this amicus brief to ensure that the Court is aware of the full scope of the distortions of First Amendment doctrine that have arisen in the lower court cases concerning pregnancy centers. This case is an important opportunity either to correct those distortions or to lay the groundwork to do so in a subsequent case.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The First Amendment's protections for minority speakers are most needed—and most in jeopardy—when speech relates to deeply important and deeply controversial issues. When the speech matters most,

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[2] Amicus expects to file a petition for certiorari by February 1, 2018. See Order of Kennedy, J., Granting Application for Extension of Time to File for Writ of Certiorari, *First Resort, Inc.* v. *Herrera*, No. 17A600 (U.S. Dec. 5, 2017).

the temptation toward government control is greatest. This is true both for the political branches the First Amendment is designed to restrain and, perhaps more dangerously, for the judges charged with its enforcement.

California's FACT Act is part of a range of speech regulations enacted in various jurisdictions to target pregnancy counselors who will not recommend abortions. Had the lower courts properly applied the First Amendment, these should have been easy cases. Unfortunately, many courts instead twisted important First Amendment doctrines to uphold these laws. As a result, important doctrines relating to content-neutrality, viewpoint-neutrality, and commercial speech have been badly warped in a growing body of appellate decisions. Left in place, these decisions pose a serious threat to the First Amendment's power to restrain governments that would otherwise wish to control minority speech.

This case presents the Court with an important opportunity to correct, or at least begin to correct, some of those doctrinal distortions. Some of these errors are on full display in this case, including questions about how to determine whether a law is content- and viewpoint-based. The Court should resolve these questions here, and thus provide much needed doctrinal correction. Other errors—chiefly related to the definition of commercial speech and whether that definition can be stretched to include non-profit speakers who neither offer nor engage in commercial transactions with their audience—received less attention from the panel below, but can either be resolved in this case or in a subsequent case in which the issue has been more thoroughly explored.

The freedom to differ depends upon the fair and faithful application of First Amendment doctrines that exist to constrain the government temptation toward speech control. That fair and faithful application has at times been absent in the lower court pregnancy center cases, creating precedents that, if left uncorrected, will result in diminished protection for speakers on a wide variety of issues. This Court has an important opportunity to at least begin correcting these doctrinal distortions and ensuring that the First Amendment continues to protect all speakers, including those who may disagree with their governments on important issues.

ARGUMENT

I. This case presents an important opportunity to correct doctrinal distortions concerning content- and viewpoint-neutrality analysis.

This case is best understood as part of a larger group of cases in which governments have deliberately targeted speakers for special burdens based on either their willingness to, or their refusal to, refer for abortions. This "[w]eaponizing [of] the means of government against ideological foes," *Greater Baltimore III*, 2018 WL 298142, at *8, has led some lower courts to distort the content- and viewpoint-neutrality analysis required by the First Amendment.

A. The FACT Act is one of many laws targeting speech by pro-life pregnancy counselors.

The FACT Act is one of many restrictions on the speech of "pregnancy service centers" that have been

enacted "around the country." *First Resort*, 860 F.3d at 1268. Although these restrictions share the same unconstitutional goal—targeting pro-life pregnancy centers' speech for special disfavor—they pursue that goal in different ways. By Amicus's count, eleven state and local governments have enacted pregnancy-center speech regulations; each of these laws is reproduced in the Appendix attached to this brief, and their relevant provisions are summarized below.[3]

The laws differ first in the nature of the burden they impose. Most pregnancy-center speech regulations—the FACT Act, plus the laws passed in Austin, Baltimore, Hartford, Hawai'i, Illinois, King County, Montgomery County, and New York City—impose burdens in the form of compelled speech: they force pro-life pregnancy centers to disseminate a government-composed message, either in their waiting rooms or otherwise.[4] Sometimes (as under the FACT Act, in Hawai'i, and in Illinois) the compelled message

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[3] Some governments have enacted speech regulations that target pro-abortion centers. See, *e.g.*, Fla. Stat. § 390.025 (1)-(3) (2017) (requiring only those pregnancy counselors that "provide[ ] advice or help * * * in obtaining abortions" to, among other things, register with the government and provide an explanation of abortion alternatives before referring women to abortion providers).

[4] Appendix ("App.") 2a; 4a-5a; 11a-13a; 21a-22a; 28a-29a; 37a-38a; 46a-47a; 51a-52a; 58a-61a.

is effectively an outright abortion referral.[5] Under other laws (Austin, Baltimore, Hartford, King County, Montgomery County, New York), the message is a disclaimer about the scope of the pregnancy center's services—a message that deprives pregnancy centers of the right to truthfully describe their services in their own words.[6]

Other governments—like San Francisco and Oakland—have instead taken the tack of passing pregnancy-center-specific false-advertising laws that prohibit centers that do not provide or refer for abortions (but not those that do) from making "untrue or misleading statements concerning their services."[7] San Francisco has interpreted its law to be violated if, for instance, a pregnancy center does not provide an express disclaimer about abortions in its advertising to women looking for information online about abortion—stretching the idea of falsity far beyond the breaking point and effectively outlawing local pregnancy centers from attempting to reach the very women they exist to serve.

Second, these laws differ in how they go about targeting pro-life pregnancy centers. Many of these regulations (including in Baltimore, Illinois, Oakland, and

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[5] *Id.* 12a; 28a; 37a-38a.

[6] *Id.* 2a; 4a; 21a; 46a; 51a; 58a-60a.

[7] *Id.* 82a-83a; see also *id.* 72a.

San Francisco) directly target pro-life pregnancy centers by providing on their face that they apply *only* to pregnancy centers that do not provide or refer for abortions.[8] The FACT Act, however, zeroes in on pro-life pregnancy centers by way of broad *exemptions* from coverage. The Act provides a mechanism for exempting from coverage for pregnancy centers that can agree to supply all FDA-approved contraceptive methods and supplies—a category that includes abortifacients and thus excludes pro-life centers.[9]

The following chart summarizes the relevant provisions of these laws.

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[8] *Id.* 4a; 70a; 81a; see also *id.* 37a-38a (applying only to service providers who have "conscience-based objections" to certain procedures, including abortion).

[9] *Id.* 11a (exempting centers that are enrolled in the California Family PACT program); see also Pet'rs' Br. at 13-14 (explaining that such centers must provide abortifacients).

Gov't	Compelled speech	False advertising	Application expressly depends on whether speaker refers for abortion
Austin	✓		✓
Baltimore	✓		✓
California	✓		
Hartford	✓	✓	
Hawai'i	✓		✓
Illinois	✓		✓
King Co., WA	✓		
Mont'y Co., MD	✓		
New York City	✓		
Oakland		✓	✓
San Francisco		✓	✓

B. The Court can provide an important correction to First Amendment neutrality doctrine.

Two doctrinal distortions related to neutrality testing have arisen in the pregnancy center cases. First, some courts have suggested that a law can be neutral despite a governmental purpose to discriminate. Second, some courts have suggested that an otherwise content- or viewpoint-based law might nevertheless be deemed neutral, depending on the *speaker's* purpose in engaging in speech.

Both errors are on full display in the decision below. There, the panel found the law content-based, but declined to apply strict scrutiny. Pet. App. 18a-19a. Further, although the Act was carefully designed to apply only to pregnancy centers that do not provide or refer for abortions—and although the legislature's express purpose was to target speakers who "discourage" abortion—the court speculated about speaker motivations to find the law neutral. *Id.* 7a, 20a, 40a.

The Ninth Circuit erred on both counts. "Content-based laws" like the Act "are presumptively unconstitutional and may be justified only if the government proves that they" satisfy strict scrutiny. *Reed* v. *Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015). Further, even a facially-neutral law is considered viewpoint-based if its "justification or purpose" is to target a particular viewpoint. *Id.* at 2226-29; see also *Sorrell* v. *IMS Health Inc.*, 564 U.S. 552, 564-65 (2011) (applying heightened scrutiny because the "legislature designed" the law at issue "to target [certain] speakers and their messages for disfavored treatment"). That plainly is the case here: the Act exempts from coverage

pregnancy centers that provide or refer for abortion, and the legislative history confirms that its purpose was to target pregnancy centers that advocate against abortion.

The Ninth Circuit's errors are independent, but they stem from a common source: confusion about to what extent *purpose* matters in Speech Clause jurisprudence, and if it does, *whose*. The court ignored the legislature's purpose to target centers that "discourage * * * women from seeking abortions." Pet. App. 7a. While ignoring the *government's* purpose, the panel based its neutrality finding on guesswork about the *speaker's* purpose. *Id.* 20a (neutral because some speakers may refuse to refer without having "objections" to abortion).

This reasoning gets this Court's cases precisely backward. One object of this Court's Free Speech doctrines is "the discovery of improper governmental motives." Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. Chi. L. Rev. 413, 414 (1996). Meanwhile, "[u]nder well-accepted First Amendment doctrine, a *speaker's* motivation is entirely irrelevant to the question of constitutional protection." *FEC* v. *Wis. Right to Life, Inc.*, 551 U.S. 449, 468 (2007) (opinion of Roberts, C.J., joined by Alito, J.) (emphasis added) (quoting M. Redish, Money Talks: Speech, Economic Power, and the Values of Democracy 91 (2001)); see also *id.* at 492 (Scalia, J., concurring in part and concurring in the judgment, joined by Kennedy and Thomas, JJ.) ("test[s] that [are] tied to * * * a court's perception" of the speaker's "intent" are "ineffective to vindicate * * * fundamental First Amendment rights"); *Matal* v. *Tam*, 137 S. Ct. 1744, 1766 (2017)

(Kennedy, J., concurring, joined by Ginsburg, Sotomayor, and Kagan, JJ.) (rejecting the argument that a law was viewpoint-neutral because it applied "regardless of the [speaker]'s personal views or reasons for" engaging in the speech). The Ninth Circuit's ruling to the contrary was both wrong and part of a dangerous trend.

1. Content- and viewpoint-discriminatory laws, including those enacted for the purpose of discriminating on the basis of content or viewpoint, are subject to strict scrutiny.

Before *Reed*, many lower courts—including the Ninth Circuit—had held that a governmental motive to censor particular subject matter or a particular viewpoint was the *sine qua non* of content- or viewpoint discrimination. For these courts, "it did not matter if a law regulated speakers based on what they said"; "so long as the regulation of speech was not imposed *because of* government disagreement with the message," the law would be treated as content- and viewpoint-neutral. *Norton* v. *City of Springfield*, 806 F.3d 411, 413 (7th Cir. 2015) (Manion, J., concurring); see also *McCullen* v. *Coakley*, 571 F.3d 167, 176 (1st Cir. 2009) ("Our principal inquiry in this regard * * * 'is whether the government has adopted a regulation of speech because of disagreement with the message'") (quoting *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989)).

In *McCullen* v. *Coakley*, 134 S. Ct. 2518 (2014), however, this Court affirmed what should have been obvious all along: that a speech regulation could *also*

be content- or viewpoint-based if its application depended on the content or viewpoint of the regulated speech, even absent a discriminatory purpose. A content-based law, the Court explained, "draw[s] content-based distinctions on its face." *Id.* at 2531. And a law violates this test if "it require[s] enforcement authorities to examine the content of the message that is conveyed to determine whether a violation has occurred." *Id.* (internal quotation marks omitted).

Reed then confirmed *McCullen*'s reorientation of the content-neutrality inquiry to begin with the actual text of the law. Reiterating *McCullen*, this Court explained in *Reed* that "the crucial first step in the content-neutrality analysis" is "determining whether the law is content neutral on its face"—that is, whether it "draws distinctions based on the message a speaker conveys." 135 S. Ct. at 2227. At the same time, however, the *Reed* Court made clear that the inquiry into facial neutrality *supplements*, but does not *replace*, the inquiry into whether a law has a content- or viewpoint-discriminatory purpose. In other words, a "law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech." *Id.* at 2228 (quoting *Cincinnati* v. *Discovery Network, Inc.*, 507 U.S. 410, 429 (1993)). But if a law *is* motivated by an "illicit legislative intent"—for example, "to suppress disfavored speech" or express "disagreement with the message the [regulated] speech conveys"—then it, too, is subject to strict scrutiny, even if it is facially content- and viewpoint-neutral. *Id.* at 2227-29 (internal quotation marks omitted). Intent to suppress

speech is thus a sufficient but not necessary element of a content or viewpoint discrimination claim.

This Court's earlier decision in *Sorrell* illustrates *Reed*'s point. In *Sorrell*, the Court applied heightened scrutiny for two reasons: facial discrimination and discriminatory purpose. 564 U.S. at 563-65. The law at issue prohibited "the sale, disclosure, and use of pharmacy records that reveal the prescribing practices of individual doctors"—activities that "essentially * * * only" pharmaceutical manufacturers engaged in. *Id.* at 557, 564 (internal quotation marks omitted). The Court thus found that the inevitable effect of the law was to burden the pro-brand-name-drug viewpoint. *Id.* at 564-65. Further, "formal legislative findings" demonstrated that the legislature had "designed [the law] to target [pharmaceutical manufacturers] and their messages for disfavored treatment." *Id.* This combination of the law's "practical operation" and express legislative purpose rendered the law viewpoint-based, regardless of whether it was also facially viewpoint-based. *Id.* at 565 (quoting *R.A.V.* v. *St. Paul*, 505 U.S. 377, 391 (1992)).

Finally, in *Matal*, this Court confirmed that while the *government*'s purpose may be relevant, the *speaker*'s purpose for speaking is not. In *Matal*, this Court held unconstitutional a federal statute prohibiting the registration of "disparag[ing]" trademarks. 137 S. Ct. at 1751. The government argued that the law was viewpoint-neutral because "the disparagement clause applies to trademarks regardless of the applicant's personal views or reasons for using the mark." *Id.* at 1766. But the Court unanimously rejected this argument and found the law viewpoint-based. *Id.* at

1763 (opinion of Alito, J.); 1765-67 (opinion of Kennedy, J.). As Justice Kennedy explained for four Justices, "[t]he danger of viewpoint discrimination is that the government is attempting to remove certain ideas or perspectives from a broader debate." *Id.* at 1767. This danger is realized whenever the government "single[s] out * * * for disfavor" a "subset of messages" from some larger "subject category"—regardless of *why* the speaker chooses to deliver the message. *Id.* at 1766 (citing *Cornelius* v. *NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 806 (1985)).

2. The Act should be subject to strict scrutiny.

The Act is content- and viewpoint-discriminatory, thus triggering strict scrutiny, for two independent reasons.

First, the Act is a content-based regulation of core protected speech. Pet. App. 18a. Under *Reed*, such a law automatically triggers strict scrutiny. 135 S. Ct. at 2227.

Second, the Act is viewpoint-based, because its manifest purpose and effect is to discriminate against speech by pro-life pregnancy centers. The express legislative purpose of the Act is to target pregnancy centers that "discourage * * * women from seeking abortions." Pet. App. 6a-7a. Unsurprisingly, then, the Act exempts from its coverage all pregnancy centers that are enrolled in state programs and supply all FDA-approved contraceptive methods and supplies—a category that includes abortifacients. App. 11a (exempting centers that are enrolled in the California Family PACT program); Pet'rs' Br. at 13-14, 33. Thus, the "inevitable effect" and "practical operation" of the law is

to burden the speech only of pro-life pregnancy centers. *Sorrell*, 564 U.S. at 565 (internal quotation marks omitted).

The Ninth Circuit nonetheless found the law viewpoint-neutral, Pet. App. 19a-22a, because it wrongly focused on the *speaker*'s purpose for speaking rather than the government's purpose for regulating. The court refused to engage with Petitioners' argument that the Act's exemptions rendered pro-life pregnancy centers virtually the only speakers subject to the Act, because, according to the court, the Act is "indifferent to the basis for any objection" that pregnancy centers who do not provide or refer for abortions may have to abortion. *Id.* 40a; see also *id.* 20a (the Act "applies * * * regardless of what, if any, objections [regulated centers] may have to certain family-planning services"). But what matters under this Court's viewpoint-discrimination precedents is simply whether a law singles out one position within a broader subject matter; it is irrelevant if speakers may have different "views or reasons for" speaking with that viewpoint. *Matal*, 137 U.S. at 1766; see also *Air Line Pilots Ass'n, Int'l* v. *Dep't of Aviation of Chi.*, 45 F.3d 1144, 1169 (7th Cir. 1995) ("[T]he same viewpoint can be endorsed by different speakers, for different purposes. Any analysis of allegations of viewpoint discrimination must recognize as much.").

Here, within the larger category of pregnancy centers that speak about abortion, the Act singled out for disfavored treatment centers that refuse to recommend it. It no more matters *why* the regulated centers took this position than it mattered why the Slants chose their band name in *Matal*—or, for that matter,

than it would matter in a challenge to a law prohibiting yard signs for Democratic (but not Republican) candidates if it turned out that the plaintiff wanted to display the sign in jest or only because he had lost a bet. Regardless of the plaintiff's motivations, such a law would patently be viewpoint-based.

3. The Ninth Circuit's errors with respect to content and viewpoint discrimination are reflected in other pregnancy-center cases, too.

The Ninth Circuit's errors reflect widespread confusion in the lower courts regarding the application of this Court's modern Speech Clause jurisprudence to various pregnancy center speech regulations that have been enacted around the country.

For instance, in *First Resort*, the same Ninth Circuit panel that decided *NIFLA* considered a San Francisco ordinance that prohibits pregnancy centers that do not provide or refer for abortions from making "untrue or misleading" statements "concerning th[eir] services." 860 F.3d at 1270 (quoting S.F. Admin. Code, ch. 93 § 93.4). The *First Resort* court did not dispute that the ordinance was content-based, *id.* at 1275-76—nor could it, as the ordinance by its terms applies only to advertisements that "concern" the services of a pregnancy center and are made by pregnancy centers that do not provide or refer for abortion or emergency contraceptives. The ordinance is thus "content based [because] it require[s] enforcement authorities to examine the content of the message that is conveyed to determine whether a violation has occurred." See *McCullen*, 134 S. Ct. at 2531 (internal quotation marks omitted). Nonetheless, the Ninth Circuit declined to apply

strict scrutiny because, in its view, the ordinance applied only to "false or misleading commercial speech," which is outside the protection of the First Amendment. *First Resort*, 860 F.3d at 1271-74.

As explained below, the *First Resort* court erred in determining that the regulated speech was "commercial." See Part II, *infra*. But even if the speech *were* commercial, that still would not save it from strict scrutiny.

Even in the context of commercial speech, *viewpoint* discrimination is still forbidden. *44 Liquormart, Inc.* v. *Rhode Island*, 517 U.S. 484, 513 (1996) ("It is perfectly clear that Rhode Island could not ban all obscene liquor ads except those that advocated temperance[.]"); see also *Matal*, 137 S. Ct. at 1765 (Kennedy, J., concurring) (explaining that commercial speech regulations discriminating based on viewpoint are egregious forms of content-based restrictions that are almost per se unconstitutional); *Wandering Dago, Inc.* v. *Destito*, __ F.3d ____, 2018 WL 265383, at *14 (2d Cir. Jan. 3, 2018) ("*Matal* instructs that viewpoint discrimination is scrutinized closely whether or not it occurs in the commercial speech context.").[10]

In finding the law viewpoint-neutral, the *First Resort* court refused to consider the government's purpose. *First Resort*, 860 F.3d at 1278 ("To the extent

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[10] The panel was wrong to think such discrimination irrelevant simply because the government claimed to be regulating "false and misleading commercial speech." Under *R.A.V.*, the government is barred from discriminating within even categories of speech that are otherwise considered outside the First Amendment. 505 U.S. at 383.

First Resort argues that the Ordinance is a viewpoint-based regulation of speech on the grounds that the City had an illicit motive, that argument also fails." (citing *United States* v. *O'Brien*, 391 U.S. 367, 383 (1968)). Instead, it focused on the speaker's purpose, holding that speakers could have different *reasons* for not providing or referring for abortions, which might "have nothing to do with their views on abortion." *Id.* at 1277 (citing *Greater Balt. Ctr. for Pregnancy Concerns, Inc.* v. *Mayor & City Council of Balt.*, 721 F.3d 264, 288 (4th Cir. 2013) (*Greater Baltimore II*) (en banc)).

This holding that speaker purpose controls, and that governmental purpose is irrelevant, is rich with irony; again, before *Reed*, the Ninth Circuit had held that *only* a discriminatory governmental purpose could trigger strict scrutiny. *Reed* v. *Town of Gilbert*, 707 F.3d 1057, 1071-72 (9th Cir. 2013), *rev'd*, 135 S. Ct. 2218 (2015). Further, to hold that the government's purpose for regulating *doesn't* matter while the speaker's purpose for speaking *does* is, again, to turn this Court's cases on their head. Under *Reed* and *Sorrell*, the government's purpose for regulating may be relevant to determining if a law discriminates on the basis of content or viewpoint. But in determining whether a law discriminates on the basis of viewpoint, the *speaker's* purpose for speaking is *not* relevant: a law that singles out one particular viewpoint for special burdens impermissibly "distort[s] the marketplace of ideas," even if different speakers might have

different "personal views or reasons for" adopting the viewpoint. *Matal*, 137 S. Ct. at 1766 (Kennedy, J.).[11]

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[11] Outside of pregnancy-center cases, most courts have correctly recognized that under *Reed* a law is subject to strict scrutiny if it *either* is content- or viewpoint-discriminatory on its face *or* it was passed for the purpose of discriminating on the basis of content or viewpoint. See, *e.g.*, *March* v. *Mills*, 867 F.3d 46, 54 (1st Cir. 2017) *pet. for cert. filed*, Nov. 9, 2017 (No. 17-689) (under *Reed*, "[t]here are two distinct ways in which a regulation may be deemed to be content based," facial content discrimination, and a content-discriminatory purpose); *Time Warner Cable Inc.* v. *F.C.C.*, 729 F.3d 137, 155 (2d Cir. 2013) (same) *Free Speech Coal., Inc.* v. *Att'y Gen. U.S.*, 825 F.3d 149, 160 (3d Cir. 2016) (same); *Cahaly* v. *Larosa*, 796 F.3d 399, 405 (4th Cir. 2015) (same) *Pursuing Am.'s Greatness* v. *Fed. Election Comm'n*, 831 F.3d 500, 509 (D.C. Cir. 2016) (same).

But in *Phelps-Roper* v. *City of Manchester*, 867 F.3d 883 (8th Cir. 2017), the Eighth Circuit, echoing the Ninth Circuit in *NIFLA* and *First Resort*, held that "[r]egardless of any evidence" that the legislature had a viewpoint-discriminatory purpose in passing the law at issue, the law was "neutral on its face" and thus not viewpoint discriminatory. *Id.* at 892. This split of authority regarding whether *Reed* recognizes two paths to strict scrutiny (facial discrimination or a discriminatory purpose) or just one (facial discrimination only) is another reason for this Court to either clearly reiterate that a law passed with a viewpoint-discriminatory purpose is subject to strict scrutiny or else agree to hear another case cleanly presenting the issue.

The Ninth Circuit is not alone in this error. In another pregnancy center case, the en banc Fourth Circuit considered a regulation requiring pro-life pregnancy centers to post "disclaimer[s]" in their waiting rooms stating that they "do[ ] not provide or make referral for abortion or birth-control services," *Greater Baltimore II*, 721 F.3d at 271 (quoting Baltimore ordinance at issue). Even though the law applied only to pregnancy centers that do not provide or refer for abortions, the en banc court reversed the district court's conclusion that the law was viewpoint-based, relying on the court's own speculation about speaker purposes. In particular, the court thought there *might* be pregnancy centers who do not refer for abortion but have "no moral or religious qualms" about abortion. 721 F.3d at 288 (internal quotation marks omitted). The court cited no authority for its proposition that the viewpoint-neutrality inquiry requires the court to determine whether a speaker has a moral or religious *motive* for expressing a particular viewpoint. See *id.* Yet this unsupported statement from *Greater Baltimore II* became the sole basis for the *First Resort* court to arrive at the same proposition four years later. *First Resort*, 860 F.3d at 1277.[12]

In contrast to this case, *First Resort*, and *Greater Baltimore II*, the district court in *Centro Tepeyac* appropriately applied strict scrutiny upon determining

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[12] After years of discovery confirmed that the *Greater Baltimore* pregnancy center's "clearest motivation" was indeed "moral, philosophical, and religious," the Fourth Circuit ultimately recognized that the law at issue there discriminated on the basis of viewpoint. *Greater Baltimore III*, 2018 WL 298142, at *4, 6.

that a pregnancy center speech regulation was content-based. There, the court explained that because the regulation at issue "require[d] [pregnancy centers] to say something [they] might not otherwise say," it was content-based and triggered strict scrutiny. *Centro Tepeyac* v. *Montgomery County*, 779 F. Supp. 2d 456, 462 (D. Md. 2011), *aff'd* 722 F.3d 184 (4th Cir. 2013) (en banc). The court correctly found it "unnecessary to address" the pregnancy center's additional contention that the regulation also was viewpoint-based, because content-based laws trigger strict scrutiny. 779 F. Supp. 2d at 461-62.

Finally, other district courts have had no trouble concluding that a speech regulation whose applicability turns on whether a speaker provides or refers for abortions discriminates not just based on content, but also on viewpoint. In *National Institute of Family & Life Advocates* v. *Rauner*, the court considered an Illinois law that compelled pregnancy centers with "conscience-based objections" to abortion to either "inform their patients about abortion and counsel them on [its] risks and benefits" or lose the protection of a state law protecting healthcare providers from having to provide abortions directly. Order, *National Institute of Family & Life Advocates* v. *Rauner*, No. 16 C 50310, ECF 65, at 2, 7 (N.D. Ill. July 19, 2017). The court held that the law was both content- and viewpoint-based. *Id.* at 6-8.

Meanwhile, in *Fulwilder* v. *Senior*, the Northern District of Florida considered the converse of the laws at issue in the pregnancy-center cases discussed above: a law that compelled speech by and required a license for only organizations that *do* refer for abortions. Prelim. Injunction, *Fulwilder* v. *Senior*, No.

4:16-cv-00765, ECF 43, at 2 (N.D. Fla. Sept. 29, 2017) (citing Fla. Stat. § 390.025). The court held that because the law "requir[ed] a person to register and pay a fee when providing advice or help in favor of abortion but not in opposition," the law was "plainly viewpoint-based." *Id.* at 20; see also *id.* at 21 (law was a "naked effort to impede speech * * * promoting a disfavored but legal viewpoint"). Precisely the same reasoning should apply to laws, like the FACT Act and the others described above, that impose burdensome speech regulations on persons when providing advice or help in *opposition* to abortion but not *in favor* of it.

* * *

This Court should craft its disposition in this case so as to resolve the confusion about how *Reed*, *Sorrell*, and *Matal* apply to the various pregnancy center speech regulations that have been enacted around the country. When a speech regulation regulates core protected speech on the basis of content or viewpoint, it is subject to strict scrutiny. In determining whether a law regulates on the basis of viewpoint, the government's purpose for regulating is relevant, but the speaker's purpose for speaking is not. These rules—fundamental to ensuring that the government does not impermissibly put a thumb on the scale in the hotly contested and deeply important societal debate over abortion—should apply to abortion-related speech just as they do to any other type of speech.

II. This case presents an important opportunity to clarify that the "commercial" and "professional" speech categories cannot be used to shield ideological speech restrictions from strict scrutiny.

In the lower court, Respondents attempted to avoid the ineluctable result of the Act's content- and viewpoint-based discrimination—strict scrutiny—by claiming that the Act regulates only "professional" and "commercial" speech subject to lower tiers of constitutional protection. The Ninth Circuit summarily rejected the commercial speech argument, reasoning in a footnote that while "[c]ommercial speech does no more than propose a commercial transaction," the Act "primarily regulates the speech that occurs within the clinic," where pregnancy centers propose no commercial transactions but rather provide their counseling services on a pro bono basis. Pet. App. 18a-19a n.5 (internal quotation marks omitted). But the court accepted the professional speech argument as to the Act's Licensed Notice, holding that because that notice applies only to licensed pregnancy centers, all the speech regulated under that provision of the Act "occurs between professionals and their clients in the context of their professional relationship" and can accordingly be regulated subject only to intermediate scrutiny. *Id.* 28a-33a.

The court was right about commercial speech and wrong about professional speech, largely for the same reason: neither doctrine applies to morally and religiously-motivated counseling services offered for free. Regarding professional speech, this Court has "never formally endorsed the professional speech doctrine" in

the first place. *Serafine* v. *Branaman*, 810 F.3d 354, 359 (5th Cir. 2016). But this Court has rejected arguments to subject pro bono speech offered by a licensed professional to a lower tier of constitutional scrutiny. *In re Primus*, 436 U.S. 412 (1978); *NAACP* v. *Button*, 371 U.S. 415 (1963).

As for commercial speech, the very reason the doctrine exists is that this Court has presumed that speech in which the speaker offers to sell something to the listener is "more durable than other kinds" of speech. *Virginia State Bd. of Pharm.* v. *Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 n.24 (1976). And the Court's cases have closely tracked this rationale. "*[T]he test*" for whether speech is commercial, this Court has explained, is whether it is a "proposal of a commercial transaction," *Discovery Network*, 507 U.S. at 423 (quoting *Bd. of Trustees of State Univ. of New York* v. *Fox*, 492 U.S. 469, 473-74 (1989)) (emphasis in *Discovery Network*). This test plainly is not satisfied when the speaker doesn't sell anything at all.

Nonetheless, courts around the country have struggled to apply this Court's commercial speech precedents to the principles-driven, nonpecuniary speech engaged in by pro-life pregnancy centers. Two courts—the Ninth Circuit in *First Resort* and the en banc Fourth Circuit in *Greater Baltimore II*—have dispensed with the requirement that commercial speech "propose a commercial transaction," instead suggesting that if a pregnancy center offers commercially valuable services, or if it could at some point have greater success in raising funds for its mission by virtue of the success of its counseling services, its speech may be treated as commercial. *First Resort*, 860 F.3d at 1271-

74; *Greater Baltimore II*, 721 F.3d at 284-87.[13] This novel approach replaces this Court's "propose a commercial transaction" test with an amorphous multi-factor test under which no one element is either necessary or sufficient. *First Resort*, 860 F.3d at 1273-74; *Greater Baltimore II*, 721 F.3d at 285-86. It ignores that "the solicitation of charitable contributions is" *itself* "protected speech." *Riley* v. *Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 789 (1988). And it also effects a sweeping expansion of the commercial speech doctrine, subjecting a vast swath of speech by ideologically-oriented nonprofit organizations to lower levels of constitutional protection, and higher levels of government control.

In addition to addressing professional speech, then, this Court could use this case as an opportunity to resolve the distortions in the commercial speech doctrine that have arisen in the lower courts' pregnancy-center cases. Alternatively, if the Court does not address the commercial speech doctrine here, it should agree to hear another pregnancy-center case presenting the issue more fully, such as *First Resort*.

A. Under this Court's cases, pro-life advocacy by pregnancy centers is not commercial speech.

This Court has held that speech regulations may sometimes be subject to lower tiers of constitutional

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[13] After several years of additional discovery, the trial court found, and a Fourth Circuit panel recently affirmed, that the particular pregnancy center at issue in *Greater Baltimore* was *not* engaged in commercial speech. *Greater Baltimore III*, 2018 WL 298142, at *3-4.

scrutiny if the speech regulated can be characterized as "commercial." See *Cent. Hudson Gas & Elec. Corp.* v. *Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980). But this doctrine cannot apply to the moral and religious advocacy at issue in this and other pregnancy-center cases. Indeed, this Court has long accepted that religious groups can solicit funds or even invite purchases without their speech becoming "commercial." *Murdock* v. *Pennsylvania*, 319 U.S. 105, 111 (1943) (speech was not commercial "merely because the handbills invite the purchase of books for the improved understanding of the religion or because the handbills seek in a lawful fashion to promote the raising of funds for religious purposes"). Otherwise, "the passing of the collection plate in church would make the church service a commercial project." *Id.*

Between pregnancy centers and the women who come to them for help, there is not even a passing of the plate. And this Court has never held that speech by entities who provide all their services for free and in furtherance of a moral or religious mission can be regulated as "commercial."

This Court has explained the "commonsense differences" between commercial speech and other speech, providing "a different degree of protection" to commercial speech because "commercial speech may be more durable than other kinds." *Va. State Bd.*, 425 U.S. at 771 n.24. "Since advertising is the [s]*ine qua non* of commercial profits, there is little likelihood of its being chilled by proper regulation and forgone entirely." *Id.* This logic, centered on the power of profits to make speech more durable, plainly dissolves when the speaker merely wants to render her listener free services.

No wonder, then, that since *Virginia State Board*, this Court has repeatedly held that "*the test*" for commercial speech is whether it is a "proposal of a commercial transaction." *Discovery Network*, 507 U.S. at 429 (quoting *Fox*, 492 U.S. at 473-74). And it has articulated the archetypical example of such speech as "I will sell you the X [product] at the Y price." *Va. State Bd.*, 425 U.S. at 761. This type of speech—speech that proposes a commercial transaction and thus relates "to the economic interests of [both] the speaker and its audience," *Cent. Hudson*, 447 U.S. at 561—is a minimum requirement for speech to be characterized as "commercial" for purposes of the commercial speech doctrine.

Contrary to the assertion of some courts in pregnancy-center cases discussed below, this Court did not waver from this principle in *Bolger* v. *Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983). There, the Court considered whether informational pamphlets that did not *just* propose a commercial transaction but also "contain[ed] discussions of important public issues" could be characterized as commercial. *Id.* at 67-68. The Court held that when evaluating speech that "cannot be characterized *merely* as proposals to engage in commercial transactions," courts should look to three factors to determine whether the speech as a whole should be treated as commercial: whether the speech constitutes an "advertisement[]"; whether it "reference[s] a specific product"; and whether the speaker "has an economic motivation for" speaking. *Id.* at 66-67 (emphasis added). In other words, under *Bolger*, the mere addition of noncommercial elements cannot transform otherwise commercial proposals into non-

commercial speech; courts must apply the *Bolger* factors to determine whether speech mixing the two should be treated as ultimately "commercial" or not. *Id.*; cf. *Murdock*, 319 U.S. at 111 (appending "moral platitudes" not enough). But nothing in *Bolger* dispenses with the bedrock requirement that for speech to be considered commercial, the speaker must propose a commercial transaction in the first place. And indeed, since *Bolger*, this Court has repeatedly reaffirmed in no uncertain terms that "the difference between commercial and noncommercial speech" is that commercial speech is "define[d]" as "speech that proposes a commercial transaction." *Fox*, 492 U.S. at 482; *Discovery Network*, 507 U.S. at 423.

Here, under this Court's longstanding test, the Ninth Circuit was correct to conclude that the speech by licensed pregnancy clinics who provide all of their services for free is not "commercial." Pet. App. 18a-19a n.5. Observing that commercial speech "propose[s] a commercial transaction," the Ninth Circuit easily disposed, in a footnote, of California's claim that the clinic speech was commercial. *Id.* There are obviously no commercial transactions being proposed in a clinic that offers its services for free.

B. The Ninth Circuit's "professional speech" holding is in clear conflict with this Court's cases.

Although the so-called "professional speech" doctrine has different origins than the commercial speech doctrine, it, too, is rooted in the notion that a speaker's interest in obtaining money from a listener can potentially justify higher levels of regulation. Lower courts have traced the doctrine back to a concurring opinion

in *Thomas* v. *Collins*, 323 U.S. 516 (1945), in which Justice Jackson articulated the justification for professional-licensing schemes as being based on "[t]he modern state['s] * * * duty to protect the public from those *who seek for one purpose or another to obtain its money*." *Id.* at 545 (emphasis added). As with commercial speech, this justification obviously dissolves when the speaker is not attempting to obtain money from his listener.

And as with commercial speech, this Court's decisions demonstrate that nonremunerative speech receives full constitutional protection—even when it is offered by a professional. In *Primus*, a lawyer was disciplined for the ethical violation of soliciting a potential client for the ACLU. *Primus*, 436 U.S. at 418-21. But because the lawyer's solicitation had consisted of offering the ACLU's *pro bono* services, the Court held that the lawyer's solicitation "c[a]me[] within the generous zone of First Amendment protection." *Id.* at 422, 431. In so holding, the *Primus* Court distinguished the case from another decided the same day, *Ohralik* v. *Ohio State Bar Assn.*, 436 U.S. 447 (1978), in which the Court upheld disciplinary action against an attorney for solicitation. The distinguishing factor: unlike in *Ohralik*, the solicitation in *Primus* was not "for pecuniary gain." *Primus*, 436 U.S. at 422; see also Eugene Volokh, *The Trouble with "Public Discourse" as a Limitation on Free Speech Rights*, 97 Va. L. Rev. 567, 575 n.20 (2011) (*Primus* distinguished *Ohralik* by "expressly stress[ing] the commercial nature of the transaction" at issue in *Ohralik*).

Here, the Ninth Circuit concluded that any "speech within [the clinics'] walls related to their professional services is professional speech" "[b]ecause licensed

clinics offer medical and clinical services in a professional context." Pet. App. 30a. But this analysis is irreconcilable with *Primus*, given that in *Primus*, too, the speech "related to [the lawyer's] professional services," *id.*: it was an *offer* of such services to a potential client.

Failing to distinguish *Primus*, the Ninth Circuit effectively conceded that it was rejecting it, stating: "We do not think a necessary element of professional speech is for the client to be a paying client. A lawyer who offers her services to a client pro bono, for example, nonetheless engages in professional speech." *Id.* 32a n.8. But this flatly disregards this Court's holding in *Primus* that a "lawyer who offers her services to a client pro bono" engages in fully protected speech.

C. Other pregnancy-center cases demonstrate confusion over commercial speech doctrine, which should be considered in this Court's disposition of this case.

As with the *NIFLA* court's errors with respect to this Court's content- and viewpoint-discrimination jurisprudence, the *NIFLA* court's error with respect to professional speech reflects widespread confusion in the lower courts regarding the application of this Court's commercial- and professional-speech precedents to pregnancy center speech regulations. This Court's commercial speech precedents make clear that the *sine qua non* of commercial speech is that the speech proposes a commercial transaction. Yet the Ninth Circuit has held, and the Fourth Circuit has suggested, that proposing a commercial transaction is not a necessary element of a commercial speech defense.

In *First Resort*, the same Ninth Circuit panel that decided *NIFLA* held that the regulated pregnancy-center speech was "commercial," even though the pregnancy center provided all of its services for free and proposed no commercial transactions to its clients. The speech regulated by the San Francisco ordinance was "statement[s] * * * concerning services provided by" pregnancy centers that do not provide or refer for abortions—that is, advertisements for such pregnancy centers' counseling services. 860 F.3d at 1272 (internal quotation marks omitted). But First Resort's advertisements were not proposals for a commercial transaction; they were efforts to attract listeners for the center's free counseling services, during which the center, for moral and religious reasons, would provide women with information about pregnancy in the hope that they would choose a non-abortion option. *Id.* at 1267-68, 1276.

The court nonetheless applied the commercial speech doctrine. It first recognized that "commercial speech is defined as speech that does no more than propose a commercial transaction," but it held that speech that satisfies the *Bolger* factors could also be considered commercial. *Id.* at 1272 (internal quotation marks omitted). It then held that the regulated speech satisfied the *Bolger* factors. Regarding the third factor, the court concluded that First Resort engaged in advertising for the "economic motive" of "solicit[ing] a patient base." *Id.* Even though First Resort "do[es] not * * * receive payments from patients for services rendered," the court reasoned, its "ability to fundraise" is improved the more women it serves, because it can use "client stories" in fundraising. *Id.* at 1273. Further, the court concluded, even if First Resort did *not* have

an economic motive for its speech—and thus even if the third *Bolger* factor was not satisfied—its speech could *still* be considered commercial, because the services it offers are "commercially valuable." *Id.* at 1273-74.

This Court's cases provide no support for the *First Resort* court's sweeping view of commercial speech. First, as explained above, the *Bolger* factors are useful only for evaluating speech that *in addition to* proposing a commercial transaction, also includes speech on political, religious, moral, or other noncommercial subjects. The *Bolger* factors cannot be used to render speech "commercial" that does not propose a commercial transaction at all. "[*T*]*he test* for identifying commercial speech," this Court has repeatedly held, looks for whether there has been a "proposal of a commercial transaction." *Discovery Network*, 507 U.S. at 423 (quoting *Fox*, 492 U.S. at 473-74). Because the *First Resort* court held the regulated speech to be "commercial" even though the pregnancy center did not propose a commercial transaction, the court clearly erred.

But the court also erred in its breathtakingly broad reading of the *Bolger* factors themselves. Under the *First Resort* court's view of *Bolger*—under which the mere possibility of improved fundraising provides the requisite "economic motive," *First Resort*, 860 F.3d at 1272—broad swaths of core political, religious, and moral advocacy could be regulated as commercial. To take one example, a church's advertisements for its worship services would qualify as commercial under the *First Resort* court's reasoning. A church, too, improves its fundraising opportunities by attracting more people to its services; the more congregants there are, the more likely it is that the offering plate will be

filled. And churches, too, often give away for free things of "commercial value," like musical performances, moral and spiritual instruction, and even "sacramental wine, communion wafers, [and] prayer beads." *Greater Balt. Ctr. for Pregnancy Concerns, Inc.* v. *Mayor & City Council of Balt.*, 683 F.3d 539, 554 (4th Cir. 2012) (*Greater Baltimore I*) (internal quotation marks omitted). But advertisements for worship services were precisely the kind of speech this Court held to be fully protected in *Reed*. 135 S. Ct. at 2225. And indeed, this Court more than seventy years ago rejected as absurd the notion that "the passing of the collection plate in church would make the church service a commercial project." *Murdock*, 319 U.S. at 111.

Strikingly, *First Resort*'s commercial speech reasoning rested *entirely* on other pregnancy-center cases. First, the *First Resort* court found "persuasive" (860 F.3d at 1273) the North Dakota Supreme Court's decision in *Fargo Women's Health Org., Inc.* v. *Larson*, 381 N.W.2d 176 (N.D. 1985). There, the court upheld as a regulation of "commercial speech" an injunction preventing pro-life pregnancy centers from falsely or misleadingly indicating in their advertisements that they performed abortions. *Id.* at 177, 179. The *Larson* court pioneered the unbounded view of commercial speech later adopted in *First Resort*, holding that because the pregnancy center's advertisements were placed "in a commercial context," the advertisements were commercial, even though the center argued that its advertisements constituted "advocacy of the pro-life position" and that it charged nothing for the advertised services. *Id.* at 180-81.

First Resort also relied on the Fourth Circuit's en banc decision in *Greater Baltimore II*. Unlike the laws

in *First Resort* and *Larson*, the *Greater Baltimore* law did not regulate advertising; indeed, it "applie[d] to all" pregnancy centers that do not provide or refer for abortions "*regardless* of whether they advertise at all." *Greater Baltimore I*, 683 F.3d at 558. For this reason, the district court rejected the government's argument that the ordinance regulated commercial speech, and the Fourth Circuit panel—correctly finding it "dispositive" that the ordinance "target[ed] speech regarding the provision of 'free services'" and that the regulated center did not "propos[e] any commercial transaction"—affirmed. *Id.* at 553-54.

The en banc Fourth Circuit, however, held that the government's "commercial speech theory should not have been so easily dismissed." *Greater Baltimore II*, 721 F.3d at 284. As relied upon by the *First Resort* court, the *Greater Baltimore II* court held that even if the speech regulated by the ordinance did not "satisf[y] the 'propose a commercial transaction' test," it could nonetheless be treated as commercial under *Bolger*. *Id.* at 284-85. And as in *First Resort*, the *Greater Baltimore II* court suggested that speech may be commercial if it is "directed at the providing of services" that are commercially valuable, even though the services were in fact provided for free. *Id.* at 284-86 (internal quotation marks omitted). The court therefore remanded for further discovery into whether the plaintiff center "possesse[d] economic interests apart from its ideological motivations." *Id.* at 285. Unsurprisingly, that discovery ultimately revealed that the center's "clearest motivation [was] not economic" and that the purported link between the center's advocacy and its fundraising was "speculative at best." *Greater Baltimore III*, 2018 WL 298142, at *4.

Meanwhile, at least two courts have recognized that because pregnancy centers that provide all of their services for free to advance a moral and religious mission do not propose a commercial transaction, their speech cannot be regulated as commercial. For instance, in a decision issued before *Greater Baltimore II*, the court in *Centro Tepeyac* held that a pregnancy center that was "motivated by social concerns" and provided its services "free of charge" could by definition not be held to be proposing "a commercial transaction." 779 F. Supp. 2d at 463-64. It thus held that the commercial speech doctrine did not apply. *Id.*; see also 5 F. Supp. 3d at 756-60 (again rejecting commercial speech argument after *Greater Baltimore II*).

Likewise, the district court in *Evergreen Ass'n, Inc.* v. *City of New York* held that because pregnancy centers' "missions—and by extension their charitable work—are grounded in their opposition to abortion and emergency contraception," their communications with women are not regulable as commercial speech. 801 F. Supp. 2d 197, 205 (S.D.N.Y. 2011), *aff'd in part, vacated in part on other grounds*, 740 F.3d 233 (2d Cir. 2014). The government offered the same workaround to this obstacle that the defendants would later offer in *First Resort* and *Greater Baltimore II*—that even if pregnancy centers do not charge for their services, their "fundraising prowess" is increased the better they are at "attracting clients." *Id.* (internal quotation marks omitted). But the court correctly rejected this argument, because pregnancy centers "do not advertise 'solely' for that purpose," and in any event, "the Supreme Court has never viewed 'charitable solicitation * * * as a variety of purely commercial speech.'"

Id. at 205-06 (quoting *Village of Schaumburg* v. *Citizens for a Better Env't*, 444 U.S. 620, 632 (1980)).

* * *

Whatever the wisdom of the commercial- and professional-speech doctrines as a matter of first principles, these doctrines are stretched beyond recognition when they are applied to pro-life pregnancy centers that render all of their services for free and in furtherance of their moral and religious missions. Further, although this Court has been clear that the *sine qua non* of commercial speech is speech that proposes a commercial transaction, some courts even outside the pregnancy-center context have, like the courts in *First Resort* and *Greater Baltimore II*, incorrectly viewed the *Bolger* factors as a substitute for the propose-a-commercial-transaction test, rather than a test applied to speech that both proposes a commercial transaction and speaks to noncommercial matters.[14] The

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[14] See:

- *Facenda* v. *N.F.L. Films, Inc.*, 542 F.3d 1007, 1017 (3d Cir. 2008) (applying only the *Bolger* test to determine whether speech is commercial);
- *Adventure Commc'ns, Inc.* v. *Ky. Registry of Election Fin.*, 191 F.3d 429, 440-41 (4th Cir. 1999) (same);
- *Proctor & Gamble Co.* v. *Amway Corp.*, 242 F.3d 539, 552 (5th Cir. 2001) (same), *abrogated on other grounds by Lexmark Int'l, Inc.* v. *Static Control Components, Inc.*, 134 S. Ct. 1377 (2014);

Court should thus use this case as an opportunity to reaffirm the limitations on the commercial- and professional-speech doctrines, or otherwise agree to hear an additional case more squarely presenting the issue.

CONCLUSION

The Court should reverse the decision below.

Respectfully submitted.

KELLY S. BIGGINS
LOCKE LORD LLP
300 S. Grand Avenue, Suite 2600
Los Angeles, California 90071

W. SCOTT HASTINGS
CARL SCHERZ

MARK L. RIENZI
Counsel of Record
ERIC C. RASSBACH
JOSEPH C. DAVIS
THE BECKET FUND FOR RELIGIOUS LIBERTY
1200 New Hampshire Ave. NW, Suite 700
Washington, D.C. 20036

• *Dryer* v. *Nat'l Football League*, 814 F.3d 938, 943 (8th Cir. 2016) (declaring that the *Bolger* factors determine whether speech is commercial).

Meanwhile, six circuits correctly recognize that *Bolger* applies only to "non-core" commercial speech—*i.e.*, speech that does not *just* propose a commercial transaction but also includes speech on other topics. See *Bad Frog Brewery, Inc.* v. *N.Y. State Liquor Auth.*, 134 F.3d 87, 97 (2d Cir. 1998); *Semco, Inc.* v. *Amcast, Inc.*, 52 F.3d 108, 112 (6th Cir. 1995); *Jordan* v. *Jewel Food Stores, Inc.*, 743 F.3d 509, 516-17 & n.6 (7th Cir. 2014); *Proctor & Gamble Co.* v. *Haugen*, 222 F.3d 1262, 1274-75 (10th Cir. 2000); *Edward Lewis Tobinick, MD* v. *Novella*, 848 F.3d 935, 950 (11th Cir. 2017); *Spirit Airlines, Inc.* v. *U.S. Dep't of Transp.*, 687 F.3d 403, 412 (D.C. Cir. 2012).

ANDREW BUTTARO
LOCKE LORD LLP
2200 Ross Avenue,
Suite 2800
Dallas, Texas 75201

(202) 955-0095
mrienzi@becketlaw.org

Counsel for Amicus Curiae

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APPENDIX

AUSTIN ORDINANCE

ORDINANCE NO. 20120126-045

AN ORDINANCE AMENDING THE CITY CODE TO ADD CHAPTER 10-10 TO REQUIRE SIGNS AT UNLICENSED PREGNANCY SERVICE CENTERS; CREATING AN OFFENSE AND IMPOSING A PENALTY.

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF AUSTIN:

PART 1. The City Code is amended by adding a new Chapter 10-10 to read as follows:

CHAPTER 10-10 UNLICENSED PREGNANCY SERVICE CENTERS.

§ 10-10-1 DEFINITIONS.

In this chapter:

(1) **UNLICENSED PREGNANCY SERVICE CENTER or CENTER** means an organization or facility that:

(a) as its primary purpose, provides pregnancy related services, including pregnancy testing and options counseling; and

(b) does not have a health care provider that is licensed by a state or federal regulatory entity maintaining a full time practice on site.

(2) **MEDICAL SERVICE** includes, without limitation, diagnosing pregnancy or performing a sonogram.

(3) **OWNER OR OPERATOR** means a person who owns, operates, or manages an unlicensed pregnancy service center.

§ 10-10-2 NOTICE REQUIRED.

(A) The owner or operator of an unlicensed pregnancy service center shall prominently display a black and white sign, in English and in Spanish, affixed to the entrance of the center so that the sign is conspicuously visible to a person entering the center, that accurately discloses the following information:

(1) whether the center provides medical services.

(2) if the center provides medical services, whether all medical services are provided under direction and supervision of a licensed health care provider; and

(3) if the center provides medical services, whether the center is licensed by a state or federal regulatory entity to provide those services.

(B) Each sign must be at least eight and one-half inches by eleven inches and the text must be in a font size of at least 36 point.

§ 10-10-3 PENALTY.

(A) An owner or operator commits an offense if the owner or operator violates this chapter.

(B) An offense under this article shall be punished by a fine of not less than $250 for the first offense, not less than $350 for a second offense,

and not less than $450 for a third or succeeding offense.

(C) A culpable mental state is not required, and need not be proved; for an offense under this chapter.

PART 2. This ordinance takes effect on February 6, 2012.

PASSED AND APPROVED

January 26, 2012

/s/ Lee Leffingwell
Mayor

APPROVED:

/s/ Karen M. Kennard
City Attorney

ATTEST:

/s/ Shirley A. Gentry
City Clerk

BALTIMORE CITY REVISED CODE

SUBTITLE 5

LIMITED-SERVICE PREGNANCY CENTERS

§ 3-501. "Limited-service pregnancy center" defined.

In this subtitle, "limited-service pregnancy center" means any person:

(1) whose primary purpose is to provide pregnancy-related services; and

(2) who:

(i) for a fee or as a free service, provides information about pregnancy-related services; but

(ii) does not provide or refer for:

(A) abortions; or

(B) nondirective and comprehensive birth-control services.

(Ord. 09-252.)

§ 3-502. Disclaimer required.

(a) *In general.*

A limited-service pregnancy center must provide its clients and potential clients with a disclaimer substantially to the effect that the center does not provide or make referral for abortion or birth-control services.

(b) *How given.*

The disclaimer required by this section must be given through 1 or more signs that are:

(1) written in English and Spanish;

(2) easily readable; and

(3) conspicuously posted in the center's waiting room or other area where individuals await service.

(Ord. 09-252.)

§ 3-503. Violation notice.

If the Health Commissioner learns that a pregnancy center is in violation of this subtitle, the Commissioner shall issue a written notice ordering the center to correct the violation within 10 days of the notice or within any longer period that the Commissioner specifies in the notice.

(Ord. 09-252.)

§§ 3-504 to 3-505. ***{Reserved}***

§ 3-506. Enforcement by citation.

(a) *In general.*

The failure to comply with an order issued under § 3-503 {"Violation notice"} of this subtitle may be enforced by issuance of:

(1) an environmental citation under City Code Article 1, Subtitle 40 {"Environmental Control Board"}; or

(2) a civil citation under City Code Article 1, Subtitle 41 {"Civil Citations"}.

(b) *Process not exclusive.*

The issuance of a citation to enforce this subtitle does not preclude pursuing any other civil or criminal remedy or enforcement action authorized by law.

(Ord. 09-252.)

12/31/09

CALIFORNIA FACT ACT

Assembly Bill No. 775

CHAPTER 700

An act to add Article 2.7 (commencing with Section 123470) to Chapter 2 of Part 2 of Division 106 of the Health and Safety Code, relating to public health.

[Approved by Governor October 9, 2015. Filed with Secretary of State October 9, 2015.]

LEGISLATIVE COUNSEL'S DIGEST

AB 775, Chiu. Reproductive FACT Act.

Existing law, the Reproductive Privacy Act, provides that every individual possesses a fundamental right of privacy with respect to reproductive decisions. Existing law provides that the state shall not deny or interfere with a woman's right to choose or obtain an abortion prior to viability of the fetus, as defined or when necessary to protect her life or health. Existing law specifies the circumstances under which the performance of an abortion is deemed unauthorized.

This bill would enact the Reproductive FACT (Freedom, Accountability, Comprehensive Care, and Transparency) Act, which would require a licensed covered facility, as defined, to disseminate a notice to all clients, as specified, stating, among other things, that California has public programs that provide immediate free or low-cost access to comprehensive family planning services, prenatal care, and abortion, for eligible women. The bill would also require an unlicensed covered facility, as defined, to disseminate a

notice to all clients, as specified stating, among other things, that the facility is not licensed as a medical facility by the State of California.

The bill would authorize the Attorney General, city attorney, or county counsel to bring an action to impose a specified civil penalty against covered facilities that fail to comply with these requirements.

The people of the State of California do enact as follows:

SECTION 1. The Legislature finds and declares that:

(a) All California women, regardless of income, should have access to reproductive health services. The state provides insurance coverage of reproductive health care and counseling to eligible, low-income women. Some of these programs have been recently established or expanded as a result of the federal Patient Protection and Affordable Care Act.

(b) Millions of California women are in need of publicly funded family planning services, contraception services and education, abortion services, and prenatal care and delivery. In 2012, more than 2.6 million California women were in need of publicly funded family planning services. More than 700,000 California women become pregnant every year and one-half of these pregnancies are unintended. In 2010, 64.3 percent of unplanned births in California were publicly funded. Yet, at the moment they learn that they are pregnant, thousands of women remain unaware of the public programs available to provide them with contraception, health education and counseling, family planning, prenatal care, abortion, or delivery.

(c) Because pregnancy decisions are time sensitive, and care early in pregnancy is important, California must supplement its own efforts to advise women of its reproductive health programs. In California, low-income women can receive immediate access to free or low-cost comprehensive family planning services and pregnancy-related care through the Medi-Cal and the Family PACT programs. However, only Medi-Cal providers who are enrolled in the Family PACT program are authorized to enroll patients immediately at their health centers.

(d) The most effective way to ensure that women quickly obtain the information and services they need to make and implement timely reproductive decisions is to require licensed health care facilities that are unable to immediately enroll patients into the Family PACT or Presumptive Eligibility for Pregnant Women Medi-Cal programs to advise each patient at the time of her visit of the various publicly funded family planning and pregnancy-related resources available in California, and the manner in which to directly and efficiently access those resources.

(e) It is also vital that pregnant women in California know when they are getting medical care from licensed professionals. Unlicensed facilities that advertise and provide pregnancy testing and care must advise clients, at the time they are seeking or obtaining care, that these facilities are not licensed to provide medical care.

SEC. 2. The purpose of this act is to ensure that California residents make their personal reproductive health care decisions knowing their rights and the health care services available to them.

SEC. 3. Article 2.7 (commencing with Section 123470) is added to Chapter 2 of Part 2 of Division 106 of the Health and Safety Code, to read:

Article 2.7. Reproductive FACT Act

123470. This article shall be known and may be cited as the Reproductive FACT (Freedom, Accountability, Comprehensive Care, and Transparency) Act or Reproductive FACT Act.

123471. (a) For purposes of this article, and except as provided in subdivision (c), "licensed covered facility" means a facility licensed under Section 1204 or an intermittent clinic operating under a primary care clinic pursuant to subdivision (h) of Section 1206, whose primary purpose is providing family planning or pregnancy-related services, and that satisfies two or more of the following:

(1) The facility offers obstetric ultrasounds, obstetric sonograms, or prenatal care to pregnant women.

(2) The facility provides, or offers counseling about, contraception or contraceptive methods.

(3) The facility offers pregnancy testing or pregnancy diagnosis.

(4) The facility advertises or solicits patrons with offers to provide prenatal sonography, pregnancy tests, or pregnancy options counseling.

(5) The facility offers abortion services.

(6) The facility has staff or volunteers who collect health information from clients.

(b) For purposes of this article, subject to subdivision (c), "unlicensed covered facility" is a facility that

is not licensed by the State of California and does not have a licensed medical provider on staff or under contract who provides or directly supervises the provision of all of the services, whose primary purpose is providing pregnancy-related services, and that satisfies two or more of the following:

(1) The facility offers obstetric ultrasounds, obstetric sonograms, or prenatal care to pregnant women.

(2) The facility offers pregnancy testing or pregnancy diagnosis.

(3) The facility advertises or solicits patrons with offers to provide prenatal sonography, pregnancy tests, or pregnancy options counseling.

(4) The facility has staff or volunteers who collect health information from clients.

(c) This article shall not apply to either of the following:

(1) A clinic directly conducted, maintained, or operated by the United States or any of its departments, officers, or agencies.

(2) A licensed primary care clinic that is enrolled as a Medi-Cal provider and a provider in the Family Planning, Access, Care, and Treatment Program.

123472. (a) A licensed covered facility shall disseminate to clients on site the following notice in English and in the primary threshold languages for Medi-Cal beneficiaries as determined by the State Department of Health Care Services for the county in which the facility is located.

(1) The notice shall state:

"California has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women. To determine whether you qualify, contact the county social services office at [insert the telephone number]."

(2) The information shall be disclosed in one of the following ways:

(A) A public notice posted in a conspicuous place where individuals wait that may be easily read by those seeking services from the facility. The notice shall be at least 8.5 inches by 11 inches and written in no less than 22-point type.

(B) A printed notice distributed to all clients in no less than 14-point type.

(C) A digital notice distributed to all clients that can be read at the time of check-in or arrival, in the same point type as other digital disclosures. A printed notice as described in subparagraph (B) shall be available for all clients who cannot or do not wish to receive the information in a digital format.

(3) The notice may be combined with other mandated disclosures.

(b) An unlicensed covered facility shall disseminate to clients on site and in any print and digital advertising materials including Internet Web sites, the following notice in English and in the primary threshold languages for Medi-Cal beneficiaries as determined by the State Department of Health Care

Services for the county in which the facility is located.

(1) The notice shall state: "This facility is not licensed as a medical facility by the State of California and has no licensed medical provider who provides or directly supervises the provision of services."

(2) The onsite notice shall be a sign at least 8.5 inches by 11 inches and written in no less than 48-point type, and shall be posted conspicuously in the entrance of the facility and at least one additional area where clients wait to receive services.

(3) The notice in the advertising material shall be clear and conspicuous. "Clear and conspicuous" means in larger point type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from the surrounding text of the same size by symbols or other marks that call attention to the language.

123473. (a) Covered facilities that fail to comply with the requirements of this article are liable for a civil penalty of five hundred dollars ($500) for a fi offense and one thousand dollars ($1,000) for each subsequent offense. The Attorney General, city attorney, or county counsel may bring an action to impose a civil penalty pursuant to this section after doing both of the following:

(1) Providing the covered facility with reasonable notice of noncompliance, which informs the facility that it is subject to a civil penalty if it does not correct the violation within 30 days from the date the notice is sent to the facility.

(2) Verifying that the violation was not corrected within the 30-day period described in paragraph (1).

(b) The civil penalty shall be deposited into the General Fund if the action is brought by the Attorney General. If the action is brought by a city attorney, the civil penalty shall be paid to the treasurer of the city in which the judgment is entered. If the action is brought by a county counsel, the civil penalty shall be paid to the treasurer of the county in which the judgment is entered.

SEC. 4. The provisions of this act are severable. If any provision of this act or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

HARTFORD ORDINANCE

Introduced by: Mayor Luke A. Bronin

SUBSTITUTE FOR ITEM #15

HEADING AND PURPOSE:

AN ORDINANCE AMENDING CHAPTER 17 OF THE HARTFORD MUNICIPAL CODE TO ADD ARTICLE VI -PREGNANCY INFORMATION DISCLOSURE AND PROTECTION

COURT OF COMMON COUNCIL,
CITY OF HARTFORD

December 11, 2017

Be it ordained by the Court of Common Council of the City of Hartford that Chapter 17 of the Municipal Code be amended to add Article VI. — Pregnancy Information Disclosure and Protection as follows.

ARTICLE VI. - PREGNANCY INFORMATION DISCLOSURE AND PROTECTION

Section 17-138. Findings

(a) The Council's intention is to ensure that individuals in Hartford have access to comprehensive information about, and timely access to, all types of reproductive health services including, but not limited to, pregnancy, prenatal care, emergency contraception, and abortion.

(b) Pregnancy decisions are time sensitive, and care early in pregnancy is important, whether a woman chooses to continue her pregnancy and needs prenatal care or wants to end her pregnancy and needs an abortion. Connecticut prioritizes the health of women

and families, and low-income women can receive immediate access to free or low-cost comprehensive family planning services and pregnancy-related care through Connecticut's Medicaid program.

(c) Prenatal care, abortion and emergency contraception are all time sensitive services. Increasing the proportion of women receiving adequate and early prenatal earn is a pronounced objective of the United States Department of Health and Human Services. The federal Centers for Disease Control and Prevention urges that comprehensive prenatal care begin as soon as a woman decides to become Pregnant. Similarly to prenatal care, delayed access to abortion and emergency contraception poses a threat to public health. Delay in accessing abortion or emergency contraception creates increased health risks and financial burdens and may eliminate a women's ability to obtain these services altogether, severely limiting her reproductive health options. Delays in deciding to terminate a pregnancy, in particular, may mean that a less invasive method is no longer available or that the woman is prevented from choosing an abortion altogether.

(d) A woman's right to choose whether to terminate a pregnancy is protected by both the federal and state Constitutions, and is protected from interference by third parties and the government.

(e) Many people have deeply held religious and moral beliefs both supporting and opposing abortion, and the City respects the right of individuals to express and promote such beliefs.

(f) In recent years, clinics that seek to counsel clients against abortion have become common throughout

Connecticut, with more than 20 such clinics in the state. These clinics are often referred to as crisis pregnancy centers ("CPCs"). Although some CPCs are licensed to provide various medical services to pregnant women, most CPCs are not licensed medical clinics.

(g) While some CPCs openly acknowledge, in their advertising and their facilities, that they do not provide abortions or emergency contraception or refer clients to other providers of such services, many CPCs, through their appearance and services offered, appear to offer abortion services and unbiased and comprehensive counseling. Moreover, some CPCs have engaged in conduct that intentionally leads clients to believe that they are in a reproductive health care facility and/or have received reproductive health care and counseling from a licensed medical provider when, in fact, they have not.

(h) The Council finds that there are CPCs in Hartford that advertise as medical facilities and use signage similar to actual medical facilities.

(i) It is vital that pregnant women in Connecticut know whether they are getting medical care from licensed professionals. Facilities that advertise and provide pregnancy testing and care must ad vise clients, at the time they are seeking or obtaining care, whether or not these facilities have licensed medical professionals on staff who provide or directly supervise that care.

(j) Many CPCs advertise on billboards, mass-transit facilities, and through websites, and some CPCs utilize a technology that allows them to target social

media advertisements to women when they approach or enter an abortion clinic.

(k) Most clients do not come to CPCs as a result of a referral from a medical professional. Clients with an unplanned pregnancy or at risk of an unplanned pregnancy are often experiencing emotional and physical stress and are therefore especially susceptible to false or misleading elements in advertising by CPCs. These circumstances raise the need for regulation that is more protective of consumers of pregnancy center services.

(l) Because of the time-sensitive and constitutionally protected nature of the decision to terminate a pregnancy, false and misleading advertising by clinics that do not offer or refer clients for abortion or emergency contraception is of special concern to the City. When a woman is misled into believing that a clinic offers services that it does not in fact offer, she loses time crucial to the decision whether to terminate a pregnancy. Under these circumstances a client may also lose the option to choose a less invasive method, or to terminate the pregnancy at all.

(m) The City respects the right of pregnancy services centers to counsel against abortions, if the centers are otherwise operating in compliance with this Chapter, and the City does not intend by this Chapter to regulate, limit, or curtail advocacy. However, women seeking medical care or those who have chosen to terminate a pregnancy should not be misled and delayed by the actions or false advertising of CPCs.

(n) After carefully balancing the constitutionally protected right of a woman to choose to terminate her

pregnancy. the right of individuals to express their religious and ethical beliefs about abortion, and the harm to women effected by even slight delays that can be caused by false advertising for pregnancy and/or abortion services, the City has determined that there exists a need to regulate false and misleading advertising by pregnancy services centers and to require that pregnancy centers make certain disclosures to ensure that patients are adequately informed when they seek services at a pregnancy services center.

Section 17-139. Definitions

For the purposes of this Chapter, the following terms shall have the following meanings:

(a) "Abortion" shall mean the termination of a pregnancy for purposes other than producing a live birth. "Abortion" includes, but is not limited to, a termination using pharmacological agents.

(b) "Client" shall mean an individual who is inquiring about or seeking services at a pregnancy services center.

(c) "Emergency contraception" shall mean one or more prescription drugs (1) used separately or in combination, to prevent pregnancy, when administered to or self-administered by a patient, within a medically-recommended amount of time after sexual intercourse, (2) dispensed for that purpose in accordance with professional standards of practice, and (3) determined by the United States Food and Drug Administration to be safe for that purpose.

(d) "Health information" shall mean any oral or written information in any form or medium that relates

to health insurance and/or the past, present, or future physical or mental health or condition of a client.

(e) "Licensed medical provider" shall mean a person licensed or otherwise authorized under the provisions of federal, state, or local law to provide medical services.

(f) "Pregnancy services center" shall mean a facility, including mobile facilities, the primary purpose of which is to provide services to women who are or may be pregnant, that either (1) offers to provide or does provide obstetric ultrasounds, obstetric sonograms or prenatal care to pregnant women, or (2) has the appearance of a medical facility. A pregnancy service center has the appearance of a medical facility if two or more of the following factors are present:

(1) The facility offers pregnancy testing and/or pregnancy diagnosis;

(2) The facility bas staff or volunteers who wear medical attire and uniforms

(3) The facility contains one or more examination tables;

(4) The facility contains a private or semi-private room or area containing medical supplies and/or medical instruments;

(5) The facility has staff or volunteers who collect health information from clients; or

(6) The facility is located on the same premises as a state-licensed medical facility or provider or shares facility space with a state-licensed medical provider.

It shall be prima facie evidence that a facility has the appearance of a medical facility if it has two or

more of the characteristics listed above, "Pregnancy service center" does not include or mean any facility or office that is licensed by the state of Connecticut or the United States government to provide medical or pharmaceutical services or where a licensed medical provider is present to directly provide or directly supervise the provision of all medical services mentioned in this section at all times during which these services are being provided at the facility, including abortion, emergency contraception, prenatal care, pregnancy diagnosis and testing, obstetric ultrasounds or sonograms.

(g) "Premises" shall mean land and improvements or appurtenances or any part thereof.

(h) "Prenatal care" shall mean services consisting of physical examination, pelvic examination, or clinic laboratory services provided to a woman during pregnancy. Clinic laboratory services refers to the microbiological, serological, chemical, hematological, biophysical, cytological, or pathological examination of materials derived from the human body, for the purposes of obtaining information, for the diagnosis, prevention, or treatment of disease or the assessment of health condition.

Section 17-140. Required Disclosures

(a) A pregnancy services center shall disclose if it does not have a licensed medical provider on the premises who provides or directly supervises the provision of all medical services provided at such pregnancy services center at all times during which these services are being provided.

(b) The disclosures required by this section must be provided:

(1) in writing, in English and Spanish in a size and style as determined in accordance with rules promulgated by the City Department of Health and Human Services on (A) at least one sign conspicuously posted in the entrance of the pregnancy services center; (B) at least one additional sign posted in any area where clients wait to receive services; and (C) on any website of the pregnancy services center; and

(2) orally, whether in person or by telephone communication, whenever a client or prospective client requests any of the following services: (A) abortion, (B) emergency contraception, or (C) prenatal care.

(c) Penalty. Covered facilities that fail to comply with the requirements of this Section (Required Disclosures) of this Chapter are liable for a civil penalty of one hundred dollars ($100) per offense. Each day any such violations continue shall constitute a separate offense.

Section 17-141. Prohibition of false, misleading, or deceptive advertising

(a) It is unlawful for any pregnancy services center, with intent directly or indirectly to perform pregnancy-related services (professional or otherwise), to make or disseminate or cause to be made or disseminated any statement concerning those services, professional or otherwise, or concerning any circumstance or matter of fact connected with the proposed performance or disposition thereof, which is untrue, misleading, or deceptive, whether by statement or omission, that the pregnancy services center knows, or which by the exercise or reasonable care should know, to be untrue or misleading. This prohibition

applies to statement s made before the public in the city or statements that are made, disseminated or caused to be disseminated from the city before the public anywhere, in any newspaper or other publication, or in any other manner or means whatsoever, including over the Internet.

(b) It is unlawful for any pregnancy services center, with intent directly or indirectly to perform pregnancy-related services (professional or otherwise), to make or disseminate or cause to be so made or disseminated any such statement identified in subsection (a) as part of a plan or scheme with the intent not to perform the services expressly or impliedly offered, as advertised.

(c) Penalty. Covered facilities that fail to comply with the requirements of this Section (Prohibition of False, Misleading. or Deceptive Advertising) of this Chapter are liable for a civil penalty of one hundred dollars ($100) per offense. Each day any such violations continue shall constitute a separate offense.

Section 17-142. Enforcement and opportunities to cure

(a) The City Department of Health and Human Services may enforce the provisions of Section 3 (Required Disclosures) and Section 4 (Prohibition of False, Misleading, or Deceptive Advertising) of this Chapter through a civil action in any court of competent jurisdiction, following exhaustion of administrative remedies. Prior to initiating a civil action, the City shall:

(1) Provide the covered facility with written notice of noncompliance, which informs the facility that it is subject to a civil penalty if it does not correct the vio-

lation within ten (10) days from the date the notice is sent to the facility.

(2) Verify that the violation was not connected within the ten-day period described in paragraph (1).

(b) Any civil penalties imposed by the court pursuant to Sections 3(e) or 4(c) of this Chapter shall be paid to the City of Hartford.

(c) Upon a finding by a court of competent jurisdiction that a pregnancy services center has violated Section 3 or 4 of this Chapter, the City shall be entitled to recover penalties from each and every party responsible for the violation. In addition, if the City prevails it shall be entitled to reasonable attorney's fees and costs pursuant to order of the court.

(d) Nothing in this Chapter shall be interpreted as restricting or otherwise limiting the enforcement authority that state law or the Charter or Municipal Code vest in the City, its agencies, officers or employees or any state agency.

(e) Nothing in this Chapter shall be interpreted as creating a right of action for any patty other than the City.

(f) Nothing in this Chapter shall be interpreted as restricting, precluding or otherwise limiting a separate or concurrent criminal prosecution under the Municipal Code or state law. Jeopardy shall not attach as a result of any court action to enforce the provisions of this Chapter.

Section 1 7-143. General provisions.

(a) Severability. If any section, subjection, sentence, clause, or phrase of this ordinance is for any reason

held to be invalid or unconstitutional by a decision of any court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of the ordinance.

(b) No Conflict with State or Federal Law. Nothing in this ordinance shall be interpreted or applied so as to create any requirement, power, or duty in conflict with any federal or state law.

(c) Undertaking for the General Welfare. In adopting and implementing this ordinance, the City of Hartford is assuming an undertaking only to promote the general welfare. It is not assuming, nor is it imposing in its officers and employees, an obligation for breach of which it is liable in money damages to any person who claims that such breach proximately caused injury.

This ordinance shall become effective July 1, 2018

HAWAI'I STATUTE

Approved by the Governor
on July 11. 2017
The Senate
Twenty-Ninth Legislature, 2017
State of Hawaii
Act 200, S.B. No. 501, S.D. 1, H.D. 2, C.D. 1

A BILL FOR AN ACT

RELATING TO HEALTH

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

SECTION 1. The legislature finds that all women in Hawaii, regardless of income, should have meaningful access to effective reproductive health services. Public programs providing insurance coverage and direct services for reproductive health care and counseling to eligible, low-income women are currently available through the department of health and department of human services.

Thousands of women in Hawaii are in need of publicly-funded family planning services, contraception services and education, pregnancy-related services, prenatal care, and birth-related services. In 2010, sixteen thousand women in Hawaii experienced an unintended pregnancy, which can carry enormous social and economic costs to both individual families and to the State. Many women in Hawaii, however, remain unaware of the public programs available to provide them with contraception, health education and counseling, family planning, prenatal care, pregnancy-related, and birth-related services.

Because family planning decisions are time sensitive and care early in pregnancy is important, Hawaii must make every possible effort to advise women of all available reproductive health programs. In Hawaii, low-income women can receive immediate access to free or low-cost comprehensive family planning services and pregnancy-related care through Med-QUEST and the department of health's family planning program. Providers who contract with these programs are able to immediately enroll patients in these programs at the time of a health center visit.

Requiring facilities that provide pregnancy- or family planning-related services to provide accurate health information arid to inform clients of the availability of and enrollment procedures for reproductive health programs will help ensure that all women in the State can quickly obtain the information and services that they need to make and implement informed, timely, and personally appropriate reproductive health decisions.

The purpose of this Act is to ensure that women in Hawaii are able to make personal reproductive health decisions with services that are available.

SECTION 2. Chapter 321, Hawaii Revised Statutes, is amended by adding two new sections to be appropriately designated and to read as follows:

"§321-A Limited service pregnancy centers; notice of reproductive health services.

(a) For purposes of this section, "limited service pregnancy center" or "center":

(1) Means a facility that:

(A) Advertises or solicits clients or patients with offers to provide prenatal sonography, pregnancy tests, or pregnancy options counseling;

(B) Collects health information from clients or patients; and

(C) Provides family planning or pregnancy-related services, including but not limited to obstetric ultrasound, obstetric sonogram, pregnancy testing, pregnancy diagnosis, reproductive health counseling, or prenatal care; and

(2) Shall not include a health care facility. For the purposes of this paragraph, a "health care facility" means any facility designed to provide comprehensive health care, including but not limited to hospitals licensed pursuant to chapter 321, intermediate care facilities, organized ambulatory health care facilities, emergency care facilities and centers, health maintenance organizations, federally qualified health centers, and other facilities providing similarly organized comprehensive health care services.

(b) Every limited service pregnancy center in the State shall disseminate on-site to clients or patients the following written notice in English or another language requested by a client or patient:

"Hawaii has public programs that provide immediate free or low-cost access to comprehensive family planning services, including, but not limited to, all FDA-approved methods of contraception and pregnancy-related services for eligible women.

To apply online for medical insurance coverage, that will cover the full range of family planning and prenatal care services, go to mybenefits.hawaii.gov.

Only ultrasounds performed by qualified healthcare professionals and read by licensed clinicians should be considered medically accurate. "

The notice shall contain the internet address for online medical assistance applications and the statewide phone number for medical assistance applications.

(c) The information required by subsection (b) shall be disclosed in at least one of the following ways:

(1) A public notice on a sign sized at least eight and one-half inches by eleven inches, written in no less than twenty-two point type, and posted in a clear and conspicuous place within the center' s waiting area so that it may be easily read by individuals seeking services from the center; or

(2) A printed or digital notice written or rendered in no less than fourteen point type that is distributed individually to each patient or client at the time of check-in for services; provided that a printed notice shall be available to all individuals who cannot or do not wish to receive the notice in a digital format.

(d) No limited service pregnancy center that collects health information from any individual seeking or receiving its services shall disclose any individually identifiable health information to any other person, entity, or organization without express written authorization from the subject individual. Any disclosure made under this section shall be limited by the express terms of the written authorization and all applicable state and federal laws and regulations, including the federal Health Insurance Portability and

Accountability Act of 1996 and title 45 Code of Federal Regulations part 164.

(e) A limited service pregnancy center that provides or assists in the provision of pregnancy testing shall provide the individual tested with a free written statement of the results of the pregnancy test in English or another language requested by a client or patient immediately after the test is completed.

(f) Upon receipt of a written request from an individual to examine or copy all or part of the individual's recorded health information or other information retained by a limited service pregnancy center, the center shall, promptly as required under the circumstances but in no case later than fifteen working days after receiving the request:

(1) Make the information available for examination by the individual during regular business hours;

(2) Provide a free copy to the individual, if requested;

(3) Inform the individual if the information does not exist or cannot be found; and

(4) If the center does not maintain the record or information, inform the individual of that fact and provide the name and address of the entity that maintains the record or information.

§321-B Limited service pregnancy centers; enforcement; private right of action.

(a) A limited service pregnancy center that violates section 321-A shall be liable for a civil penalty of $500 for a first offense and $1,000 for each subsequent offense. If the center is provided with reasona-

ble notice of noncompliance, which informs the center that it is subject to a civil penalty if it does not correct the violation within thirty days from the date the notice is sent to the center, and the violation is not corrected as of the expiration of the thirty-day notice period, the attorney general may bring an action in the district court of the district in which the center is located to enforce this section.

A civil penalty imposed pursuant to this subsection shall be deposited to the credit of the general fund.

(b) Any person who is aggrieved by a limited service pregnancy center's violation of section 321-A may bring a civil action against the limited service pregnancy center in the district court of the district in which the center is located to enjoin further violations and to recover actual damages sustained together with the costs of the suit including reasonable attorneys' fees. The court may, in its discretion, increase the award of damages to an amount not to exceed three times the actual damages sustained. If damages are awarded pursuant to this subsection, the court may, in its discretion, impose on a liable center a civil fine of not more than $1,000 to be paid to the plaintiff.

A party seeking civil damages under this subsection may recover upon proof of a violation by a preponderance of the evidence.

For the purposes of this subsection, "person" includes a natural or legal person.

(c) The enforcement procedure and remedies provided by this section shall be in addition to any other procedure o remedy that may be available to the

State or a person aggrieved by a violation of this chapter.

(d) This section and section 321-A are not intended to require regulation or oversight of limited service pregnancy centers by the department of health."

SECTION 3. In codifying the new sections added by section 2 of this Act, the revisor of statutes shall substitute appropriate section numbers for the letters used in designating the new sections in this Act.

SECTION 4. If any provision of this Act, or the application thereof to any person or circumstance, is held invalid, the invalidity does not affect other provisions or applications of the Act that can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

SECTION 5. New statutory material is underscored.

SECTION 6. This Act shall take effect upon its approval.

APPROVED this 11TH day of July 2017

/s/ David Y. Ige
Governor of the State of Hawaii

THE SENATE OF THE STATE OF HAWAII

Date: May 2, 2017
Honolulu, Hawaii 96813

We hereby certify that the foregoing Bill this day passed Final Reading in the

Senate of the Twenty-ninth Legislature of the State of Hawaii, Regular Session of 2017.

/s/ Ronald D. Kouchi, President of the Senate

/s/ Clerk of the Senate

THE HOUSE OF REPRESENTATIVES OF THE STATE OF HAWAII

Date: May 2, 2017
Honolulu, Hawaii

We hereby certify that the above-referenced Bill on this day passed Final Reading in the House of Representatives of the Twenty-Ninth Legislature of the State of Hawaii, Regular Session of 2017.

/s/ Joseph M. Souki
Speaker
House of Representatives

/s/ Brian L. Takeshita
Chief Clerk
House of Representatives

ILLINOIS ACT

Public Act 099-0690 LRB09905684HEP25727b

SB1564Enrolled

AN ACT concerning civil law.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

Section 5. The Health Care Right of Conscience Act is amended by changing Sections 2, 3, 6, and 9 and by adding

Sections 6.1 and 6.2 as follows:

(745 ILCS 70/2) (from Ch. 111 1/2, par. 5302)

Sec. 2. Findings and policy. The General Assembly finds and declares that people and organizations hold different beliefs about whether certain health care services are morally acceptable. It is the public policy of the State of Illinois to respect and protect the right of conscience of all persons who refuse to obtain, receive or accept, or who are engaged in, the delivery of, arrangement for, or payment of health care services and medical care whether acting individually, corporately, or in association with other persons; and to prohibit all forms of discrimination, disqualification, coercion, disability or imposition of liability upon such persons or entities by reason of their refusing to act contrary to their conscience or conscientious convictions in providing, paying for, or refusing to obtain, receive, accept, deliver, pay for, or arrange for the payment of health care services and medical care. It is also the public policy of the State of Illinois to ensure that patients receive

timely access to information and medically appropriate care.

(Source: P.A. 90-246, eff. 1-1-98.)

(745 ILCS 70/3) (from Ch. 111 1/2, par. 5303)

Sec. 3. Definitions. As used in this Act, unless the context clearly otherwise requires:

(a) "Health care" means any phase of patient care, including but not limited to, testing; diagnosis; prognosis; ancillary research; instructions; family planning, counselling, referrals, or any other advice in connection with the use or procurement of contraceptives and sterilization or abortion procedures; medication; or surgery or other care or treatment rendered by a physician or physicians, nurses, paraprofessionals or health care facility, intended for the physical, emotional, and mental well-being of persons;

(b) "Physician" means any person who is licensed by the State of Illinois under the Medical Practice Act of 1987;

(c) "Health care personnel" means any nurse, nurses' aide, medical school student, professional, paraprofessional or any other person who furnishes, or assists in the furnishing of, health care services;

(d) "Health care facility" means any public or private hospital, clinic, center, medical school, medical training institution, laboratory or diagnostic facility, physician's office, infirmary, dispensary, ambulatory surgical treatment center or other institution or location wherein health care services are provided to any person, including physician organizations and associations, networks, joint ven-

tures, and all other combinations of those organizations;

(e) "Conscience" means a sincerely held set of moral convictions arising from belief in and relation to God, or which, though not so derived, arises from a place in the life of its possessor parallel to that filled by God among adherents to religious faiths;

(f) "Health care payer" means a health maintenance organization, insurance company, management services organization, or any other entity that pays for or arranges for the payment of any health care or medical care service, procedure, or product; and

(g) "Undue delay" means unreasonable delay that causes impairment of the patient's health.

The above definitions include not only the traditional combinations and forms of these persons and organizations but also all new and emerging forms and combinations of these persons and organizations.

(Source: P.A. 90-246, eff. 1-1-98.)

(745 ILCS 70/6) (from Ch. 111 1/2, par. 5306)

Sec. 6. Duty of physicians and other health care personnel. Nothing in this Act shall relieve a physician from any duty, which may exist under any laws concerning current standards of medical practice or care, to inform his or her patient of the patient's condition, prognosis, legal treatment options, and risks and benefits of treatment options, provided, however, that such physician shall be under no duty to perform, assist, counsel, suggest, recommend, refer or participate in any way in any form

of medical practice or health care service that is contrary to his or her conscience.

Nothing in this Act shall be construed so as to relieve a physician or other health care personnel from obligations under the law of providing emergency medical care.

(Source: P.A. 90-246, eff. 1-1-98.)

(745 ILCS 70/6.1 new)

Sec. 6.1. Access to care and information protocols. All health care facilities shall adopt written access to care and information protocols that are designed to ensure that conscience-based objections do not cause impairment of patients' health and that explain how conscience-based objections will be addressed in a timely manner to facilitate patient health care services. The protections of Sections 4, 5, 7, 8, 9, 10, and 11 of this Act only apply if conscience-based refusals occur in accordance with these protocols. These protocols must, at a minimum, address the following:

(1) The health care facility, physician, or health care personnel shall inform a patient of the patient's condition, prognosis, legal treatment options, and risks and benefits of the treatment options in a timely manner, consistent with current standards of medical practice or care.

(2) When a health care facility, physician, or health care personnel is unable to permit, perform, or participate in a health care service that is a diagnostic or treatment option requested by a patient because the health care service is contrary to the conscience of the health care facility, physician, or

health care personnel, then the patient shall either be provided the requested health care service by others in the facility or be notified that the health care will not be provided and be referred, transferred, or given information in accordance with paragraph (3).

(3) If requested by the patient or the legal representative of the patient, the health care facility, physician, or health care personnel shall: (i) refer the patient to, or (ii) transfer the patient to, or (iii) provide in writing information to the patient about other health care providers who they reasonably believe may offer the health care service the health care facility, physician, or health personnel refuses to permit, perform, or participate in because of a conscience-based objection.

(4) If requested by the patient or the legal representative of the patient, the health care facility, physician, or health care personnel shall provide copies of medical records to the patient or to another health care professional or health care facility designated by the patient in accordance with Illinois law, without undue delay.

(745 ILCS 70/6.2 new)

Sec. 6.2. Permissible acts related to access to care and information protocols. Nothing in this Act shall be construed to prevent a health care facility from requiring that physicians or health care personnel working in the facility comply with access to care and information protocols that comply with the provisions of this Act.

(745 ILCS 70/9) (from Ch. 111 1/2, par. 5309)

Sec. 9. Liability. No person, association, or corporation, which owns, operates, supervises, or manages a health care facility shall be civilly or criminally liable to any person, estate, or public or private entity by reason of refusal of the health care facility to permit or provide any particular form of health care service which violates the facility's conscience as documented in its ethical guidelines, mission statement, constitution, bylaws, articles of incorporation, regulations, or other governing documents.

Nothing in this Act shall be construed so as to relieve a physician, health care personnel, or a health care facility from obligations under the law of providing emergency medical care.

(Source: P.A. 90-246, eff. 1-1-98.)

KING COUNTY, WASHINGTON, REGULATION

KING COUNTY

Signature Report

July 21, 2017

R&R BOH17-04

Proposed No. BOH17-0.42

Sponsors

A RULE AND REGULATION relating to disclosure of information by limited service pregnancy centers; adding a new Title A to the BOH Code; enacted pursuant to RCW 70.05.060, including the latest amendments or revisions thereto.

BE IT ADOPTED BY THE KING COUNTY BOARD OF HEALTH:

SECTION 1. **Findings:**

A. The King County Board of Health finds that the Board of Health has a compelling interest in ensuring that women who might be pregnant are notified about whether or not the limited service pregnancy centers they visit for ultrasound, pregnancy testing or pregnancy diagnosis or pregnancy options counseling are health care facilities. Lack of such a notification presents a threat to the public health because it might delay women from having the necessary information to seek comprehensive family planning and reproductive health care services or obstetric health care available elsewhere, including information enabling them to

seek free or low-cost avenues of receiving those services.

B. All women in King County, regardless of income, should have access to comprehensive family planning and reproductive health care services. Further, all pregnant women in King County, who might wish to continue their pregnancies, should have access to obstetric health care. Ensuring access to those services has been shown Tobe critical for saving lives and reducing ill-health for both women and their children. Forewomen who might be pregnant, particularly if their pregnancies were unintended, access to those services might be even more critical.

C. Research has shown that investments in comprehensive sexual and reproductive health result in benefits such as: preventing unintended pregnancies, which can improve birth spacing and outcomes; improving maternal health; increasing prevention or early diagnosis of breast or cervical cancer; and preventing, diagnosing and treating sexually transmitted infections, including those that could be transmitted during gestation or birth.

D. Health care facilities providing health care to women who might be pregnant either:. Provide important information for women on how to access comprehensive family planning and reproductive health care services and obstetric health care, including information to help pregnant women find health insurance, local doctors or midwives and other community resources to support healthy pregnancies; or. Provide those services themselves.

E. Conversely, some limited service pregnancy centers have been reported to provide little or no in-

formation on the availability of free, low-cost or full-cost comprehensive family planning and reproductive health care services to women. Also those limited service pregnancy centers do not provide comprehensive family planning and reproductive health care services or obstetric health care for women. Beyond potential misunderstanding as to whether women are receiving care from health care. Facilities because of a lack of disclosure from the facilities that the women are not receiving that care, some limited service pregnancy centers have been reported to misinform women about their health and their health care options. That misinformation can delay access to comprehensive family planning and reproductive health care services and obstetric health care and can lead to more risky reproductive decisions, such as later-term and expensive abortions. Thus, lack of information, namely failure to notify the women who might be pregnant and visit these limited service pregnancy centers for ultrasounds, pregnancy testing and diagnosis, or pregnancy options counseling, that the facilities are not health care facilities, is a threat to the public health.

F. In 2014, an estimated 429,910 women in Washington were in need of publicly funded contraceptive services and supplies. That year, Public Health - Seattle & King County served 9,534 family planning clients. It is estimated that 288 unintended pregnancies are prevented per every 1,000 users of publicly funded contraceptive services. In 2014 Public Health - Seattle & King County is estimated to have prevented nearly 2,120 unintended pregnancies, which are estimat-

ed to translate to 1,0 0 fewer births from unintended pregnancies, 720 fewer abortions and 340 fewer miscarriages.

G. While every year thousands of women in King County are in need of publicly funded comprehensive family planning, reproductive health care services and obstetric health care, many, including women who learn they are pregnant, remain unaware of the programs available to provide them with these services free or at low cost. For women facing unwanted or otherwise crisis pregnancies, the public health risks of lacking access to information on where and how they can obtain free or low-cost comprehensive family planning and reproductive health care services and obstetric health care, are even more dangerous.

H. In addition to the time-sensitive nature of the decision about whether or not to continue a pregnancy, for women who face additional challenges such as intimate partner violence, behavioral health issues or medical diagnoses that can lead to complications during pregnancy, having information enabling them to more quickly access obstetric health care, comprehensive family planning and reproductive health care services might prove life-altering for their health and for the health of their future children, if they decide to and are able to continue the pregnancies.

I. Further, pregnancy itself has been identified as a time of high risk for women. The prevalence of both antenatal and postnatal psychological distress has been studied, with some studies finding that socioeconomic deprivation and psychological distress tend to occur. Research suggests that there is a positive association between antenatal distress and birth out-

comes. There is also research on the impact of maternal mental health, which is known to have lasting implications on child and adolescent behavior. Consequently, timely access for pregnant women to health care facilities, which have the tools to assess for and address those needs, is imperative for the short-term and long-term public health.

J. It is vital that pregnant women in King County know when they are receiving care from health care facilities, as delay in accessing that care resulting from lack of information or misinformation could permanently alter the reproductive decisions available to them and the adequacy of their prenatal care. Ensuring that limited service pregnancy centers notify that they are not health care facilities is an effective way to help women determine whether the facilities have the requisite staff to either assist or hinder the women's efforts to make timely reproductive and prenatal care decisions. Therefore, King County has a public health interest in supplementing its efforts to ensure that women who might be pregnant know who is providing their pregnancy-related care.

SECTION 2. There is hereby created a new Title 4A in the Board of Health Code, to be named Information Disclosure for Care Other Than Health Care.

SECTION 3. Sections 4, 5, 6 and 7 of this rule should constitute a new chapter in the new Title of the Board of Health Code created in section 2 of this rule.

NEW SECTION. SECTION 4. **Purpose – liberal construction – scope – intent.**

A. This chapter is enacted as an exercise of the Board of Health powers of King County to protect and preserve the public health, safety and welfare. Its provisions shall be liberally construed for the accomplishment of these purposes.

B. It is the intent of this chapter to place the obligation of complying with its requirements upon limited service pregnancy centers designated by this chapter within its scope, and any provision of or term used in this chapter is not intended to impose any duty whatsoever upon Public Health - Seattle & King County or any of its officers or employees, for whom the implementation or enforcement of this chapter shall be discretionary and not mandatory.

NEW SECTION. SECTION 5. **Definitions.** For the purposes of this chapter:

A. "Clear and conspicuous" means:

1. Larger point type than the surrounding text;

2. In contrasting type, font or color to the surrounding text of the same size; and

3. Set off from the surrounding text of the same size by symbols or other marks that call attention to the language.

B. "Health care facility" means a hospital, clinic, nursing home, laboratory, 1office, or similar place where a licensed, certified, registered, or otherwise authorized 1health care provider conducts functions that make it governed by chapter 70.02 RCW.

C. "Health information" means any oral or written information in any form or 1medium that relates to

the past, present or future physical or mental health or condition of a client.

D. "Limited service pregnancy center" means a facility that is not a health care facility and whose primary purpose is to provide either pregnancy options counseling or 1pregnancy tests, or both, for a fee or as a free or low-cost service; and that satisfies two or 1more of the following:

1. The facility offers obstetric ultrasounds;

2. The facility offers pregnancy testing;

3. The facility advertises or solicits patrons with offers to provide prenatal sonography, pregnancy tests or pregnancy options counseling; and

4. The facility has staff or volunteers who collect health information from clients.

NEW SECTION. SECTION 6. **Disclosure – required – manner.**

A. A limited service pregnancy center shall disseminate to clients on site and in any print and digital advertising materials including Internet web sites, the following notice in English, Spanish, Vietnamese, Russian, Somali, Chinese, Korean, Ukrainian, Amharic and Punjabi: "This facility is not a health care facility."

B. The on-site notice shall be on a sign at least A3 size paper and written in at least forty-eight-point type, and shall be posted conspicuously, in a manner that it is 1easily read, at the entrance of the facility and at least one additional area where

persons 1wait to receive services. The notice shall not contain other statements or markings.

C. The notice in the advertising materials shall be clear and conspicuous.

D. The director of Public Health - Seattle & King County shall make available a downloadable on-site notice on the Public Health - Seattle & King County Internet web site.

NEW SECTION. SECTION 7. **Enforcement – penalties.**

A. The director of Public Health - Seattle & King County may utilize BOH chapter 1.08 to enforce the requirements of this chapter, consistent with subsection B. of this section.

B. An entity violating this chapter is subject to a civil penalty of up to one 1hundred dollars. Each day upon which a violation occurs or is permitted to continue constitutes a separate violation.

SECTION 8. Severability. If any provision of this rule or its application to any person or circumstance is held invalid, the remainder of the rule or the application of the provision to other persons or circumstances is not affected.

R&R BOH17-04 was introduced on 7/20/2017 and passed as amended by the Board of Health on 7/20/2017, by the following vote:

Yes: 11 - Mr. Baker, Dr. Danielson, Ms. Bagshaw, Mr. McDermott, Ms. Wales, Mr. Dembowski, Dr. Daniell, Ms. Gonzalez and Ms. Juarez

No: 2- Ms. Lambert

Excused: 0

BOARD OF HEALTH
KING COUNTY, WASHINGTON

/s/ Rod Dembowski, Chair

ATTEST: Melani Pedroza, Clerk of the Board

Attachments: None

MONTGOMERGY COUNTY, MD, ORDINANCE

Clerk's Note: added the word "services" on line 14 to reflect Council action.

CORRECTED COPY
Resolution No.: 16-1252
Introduced: November 10, 2009
Adopted: February 2, 2010

COUNTY COUNCIL

FOR MONTGOMERY COUNTY, MARYLAND

SITTING AS THE MONTGOMERY COUNTY BOARD OF HEALTH

By: Councilmembers Trachtenberg, Navarro, Floreen, Elrich, Leventhal, and Berliner

SUBJECT: Board of Health Regulation Requiring a Disclaimer for Certain Pregnancy Resource Centers

Background

1. County Code §2-65, as amended effective August 10, 2000, provides that the County Council is, and may act as, the County Board of Health, and in that capacity may adopt any regulation which a local Board of Health is authorized to adopt under state law.

2. Maryland Code Health-General Article §3-202(d) authorizes the County Board of Health to adopt rules and regulations regarding any nuisance or cause of disease in the County.

3. On December 1, 2009, the County Council held a public hearing on this regulation. As required by law,

each municipality in the County and the public were properly notified of this hearing.

4. On January 25, 2010, the Health and Human Services Committee held a worksession on this regulation and recommended the Council adopt the regulation as amended.

5. The County Council, sitting as the Board of Health, finds after hearing the testimony and other evidence in the record of the public hearing that requiring a disclaimer for certain pregnancy resource centers is necessary to protect the health of County residents. The Board of Health's concern is that clients may be misled into believing that a Center is providing medical services when it is not. Clients could therefore neglect to take action (such as consulting a doctor) that would protect their health or prevent adverse consequences, including disease, to the client or the pregnancy.

Action

The County Council for Montgomery County, Maryland, sitting as the County Board of Health, approves the following regulation:

Required Disclaimers for Certain Pregnancy Resource Centers Definitions.

(a) **Definitions.**

(1) ***"Client"*** means a client or potential client.

(2) ***"Licensed medical professional on staff"*** means one or more individuals who:

(A) are licensed by the appropriate State agency under Title 8, 14, or 15 of the Health Occupations Article of the Maryland Code;

(B) provide medical-related services at the Center by either:

(i) providing medical services to clients at the Center at least 20 hours per week; or

(ii) directly overseeing medical services provided at the Center; and

(C) are employed by or offer their services at the Center.

(3) ***"Limited Service Pregnancy Resource Center"*** or ***"Center"*** means an organization, center, or individual that:

(A) has a primary purpose to provide pregnancy-related services;

(B) does not have a licensed medical professional on staff; and

(C) provides information about pregnancy-related services, for a fee or as a free service.

(b) **Disclaimer required.**

(1) A limited service pregnancy resource center must post at least 1 sign in the Center indicating that:

(a) the Center does not have a licensed medical professional on staff; and

(b) the Montgomery County Health Officer encourages women who are or may be pregnant to consult with a licensed health care provider.

(2) The sign required in paragraph (b)(l) must be:

(a) written in English and Spanish;

(b) easily readable; and

(c) conspicuously posted in the Center's waiting room or other area where individuals await service.

(c) **Enforcement.**

(1) Any violation of this regulation is a Class A civil violation.

(2) The County Attorney may file an action in a court with jurisdiction to enjoin repeated violations of this regulation.

(3) The Department of Health and Human Services must investigate each complaint alleging a violation of this regulation and take appropriate action, including issuing a civil citation when compliance cannot be obtained otherwise. If the Department learns that a limited service pregnancy resource center is in violation of this regulation, the Department must, before issuing a citation, issue a written notice ordering the Center to correct the violation within either:

(a) 10 days of the notice; or

(b) a longer period that the Department specifies in the notice.

(d) **Applicability**. This regulation applies Countywide.

(e) **Severability**. If the application of this regulation or any part of it to any facts or circumstances is held invalid, the rest of the regulation and its application to all other facts and circumstances is intended to remain in effect.

(f) **Effective Date**. This regulation takes effect on the date on which it is adopted.

This is a correct copy of Council action.

/s/ Linda M. Lauer, Clerk of the Council

NEW YORK REGULATION

Department of Consumer Affairs Notice of Adoption of Rule

Notice of Adoption of an Amendment to Chapter 5 of Title 6 of the Rules of City of New York by adding a new Subchapter P regarding pregnancy services centers.

NOTICE IS HEREBY GIVEN PURSUANT TO THE AUTHORITY VESTED IN the Commissioner of the Department of Consumer Affairs (the "Department") by Section 2203 of the New York City Charter and Section 20-816(f)(1) of Chapter 5, Subchapter 17, of Title 20 of the Administrative Code of the City of New York and in accordance with the requirements of Section 1043 of the New York City Charter, of the adoption by the Department of Sections 5-266, 5-267, 5-268, 5-269, 5-270, and 5-271 of Title 6 of the Rules of the City of New York, Chapter 5, Subchapter P, to implement and carry out the provisions of Local Law 17 of 2011 regarding the disclosure that pregnancy service centers must make.

This rule was proposed and published on December 10, 2015. The required public hearing was held on January 11, 2016. The rule will be effective on May 27, 2016.

Statement of Basis and Purpose of Rule

Section 20-816(b) of the Administrative Code, enacted as part of section 2 of Local Law 17 of 2011, provides that a pregnancy services center "shall disclose if it does or does not have a licensed medical provider on staff who provides or directly supervises the provi-

sion of all of the services at such pregnancy services center." Section 20-815(g) defines a pregnancy services center as "a facility, including a mobile facility, the primary purpose of which is to provide services to women who are or may be pregnant, that either: (1) offers obstetric ultrasounds, obstetric sonograms or prenatal care; or (2) has the appearance of a licensed medical facility." Section 20-815(g) excludes from this definition "a facility that is licensed by the state of New York or the United States government to provide medical or pharmaceutical services or where a licensed medical provider is present to directly provide or directly supervise the provision of all services described in this subdivision that are provided at the facility."

Section 20-816(f) of the Administrative Code requires that the disclosure must be made "(1) in writing, in English and Spanish in a size and style as determined in accordance with rules promulgated by the commissioner on (i) at least one sign conspicuously posted in the entrance of the pregnancy services center; (ii) at least one additional sign posted in any area where clients wait to receive services; and (iii) in any advertisement promoting the services of such pregnancy services center in clear and prominent letter type and in a size and style to be determined in accordance with rules promulgated by the commissioner". Section 20-816(f) additionally requires that the disclosure must be made orally.

The rules:

- Clarify the meanings of the following terms: "services", "directly provide", "directly supervise", "social media site", and "social network site".

- Clarify which facilities are excluded from the definition of "pregnancy services center".
- Specify the language of the disclosure, and set forth the size, color and location of the signs required to be posted at the pregnancy services center and in advertisements promoting the services of the pregnancy services center.
- Specify the language of the disclosure that must be made orally.
- Clarify that a facility's distribution of a pregnancy test kit shall not, by itself, be sufficient to establish that it has the "appearance of a licensed medical facility," provided that the test is self- administered, self-diagnosed, and self-interpreted.

"Shall" and "must" denote mandatory requirements and may be used interchangeably in the rules of this department, unless otherwise specified or unless the context clearly indicates otherwise.

Rule Amendment

Section 1. Chapter 5 of Title 6 of the Rules of the City of New York is amended by adding a new subchapter P to read as follows:

SUBCHAPTER P

PREGNANCY SERVICES CENTERS

§ 5-266. Definitions.

As used in this chapter, the following terms have the following meanings:

Directly provide. The term "directly provide" means that the licensed medical provider provides the service.

Directly supervise. The term "directly supervise" means that the licensed medical provider is on site and directly overseeing the provision of the service from beginning to end.

Services. The term "services" mean s abortion, emergency contraception, obstetric ultrasounds, obstetric sonograms, prenatal care, pregnancy testing, pregnancy diagnosis, and other medical and/or pharmaceutical services.

Social media site or social network site. The term "social media site" or "social network site" means a form of electronic communication, such as a website for social networking or microblogging, which allows users to interact or through which users create online communities to share information, ideas, personal messages, and other content, and includes, but is not limited to, Facebook, Twitter, YouTube, Flickr, LinkedIn, Tumblr and Myspace.

§ 5-267. Exemption.

A pregnancy services center shall not include a facility:

(a) that is licensed by the state of New York or the United States government to provide medical or pharmaceutical services; or

(b) where a licensed medical provider is present to directly provide or directly supervise the provision of all services defined in Section 5-266 of this Subchapter that are provided at the facility.

§ 5-268. Display of Sign for Required Disclosure.

(a) Every pregnancy services center must display at its facility, including a mobile facility, a sign provided by the Department stating in English and Spanish: "This facility does not have a licensed medical provider on site to provide or supervise all services." The Department will provide both signs on its website for downloading by pregnancy services centers. The sign will measure eleven (11) inches by seventeen (17) inches and the lettering will be one inch high.

(b) Every pregnancy services center must post the sign at every public entrance. If the pregnancy services center is located in an office building or other structure containing two or more independent units, the sign must be posted at each entrance used exclusively for entry to the pregnancy services center. The sign must be: (1) posted on the outside of the entrance door and so that the distance from the top of the sign to the floor is between sixty-six (66) and seventy (70) inches and the distance between the frame of the door and the closest edge of the sign is not more than twelve (12) inches; (2) clearly and conspicuously visible to the client as she or he enters the pregnancy services center; and (3) laminated or protected by a clear sheeting or other suitable material so that the text will not be destroyed, soiled, distorted, or rendered illegible.

(c) Every pregnancy services center must post at least one sign in every area where clients wait to receive services. If the waiting area contains a reception desk, the sign must be posted on the reception desk or on a wall at a location not greater than 12 inches from the reception desk. If the sign is posted

on a wall, it must be posted so that the distance from the top of the sign to the floor is between sixty-six (66) and seventy (70) inches.

§ 5-269. Disclosures in Advertising.

(a) "Advertisement promoting the services of a pregnancy services center" includes all promotional materials, statements, visual descriptions, or other visual representations of any kind disseminated in print or electronically, including, but not limited to, mailings, postcards, signs, business cards, flyers, hand-outs, brochures, banners, billboards, subway or bus signs, window signs, store-front signs, newspaper print advertisements and listings, telephone directory listings, television advertisements, internet advertisements, social media or social network sites and radio advertisements. "Advertisement promoting the services of a pregnancy services center" does not include communications or statements made by a center in the course of its operations that do not promote the center's services to clients or the general public, and that are directed exclusively to the center's non-client directors, employees, past financial donors, and interns.

(b) Every advertisement promoting the services of a pregnancy services center must include in English and Spanish the statement: "This facility does not have a licensed medical provider on site to provide or supervise all services." The lettering of such statements in printed materials must be clear, legible, and in the same color and darkness, and in a type size at least one-third as high and one-third as broad, as the largest print in the advertisement. The lettering of such statement in television and internet advertisements must be clear and legible and in close proximi-

ty to the description of services provided at the pregnancy services center. The lettering of such statement on business cards may be printed on the back of the cards.

(c) Every pregnancy services center must also post the statement provided in Subsection (b) of this Section on its website and social media or social network sites. The lettering of such statement must be clear, legible, in the same color and darkness, and in a type size at least one-third as high and one-third as broad, as the largest print on the website or on the social media or social network site. The statement must be posted on every page of the website and social media or social network site. Where a page of the website or social media or social network site contains the description of services provided by such pregnancy services center, the statement must also be contained on that page, in close proximity to the services description.

(d) In addition to the disclosure requirements provided in subsection (c), the statement provided in subsection (b) must be included in the text of each post made on a social media or social network site. In the event a social media or social network site, such as Twitter, limits the number of characters that may be used in a post, the statement may be attached as a photo image to each post rather than included in the text of each post. Where the statement is included in a photo image, the lettering of such statement shall be consistent with the requirements described in subsection (c). Where a post contains the description of services provided by such pregnancy services center, the statement must also be in close proximity to the services description. Each post that does not comply

with this requirement shall constitute a single violation, except that for the purpose of imposing a sealing order pursuant to section 20-818(b)(1) of the administrative code, each day of noncompliance shall be treated as a separate occasion.

§ 5-270. Oral Disclosure.

Upon a client or prospective client request for an abortion, emergency contraception and/or prenatal care service, a pregnancy services center shall orally disclose in English and Spanish the statement: "This facility does not have a licensed medical provider on site to provide or supervise all services."

§ 5-271. Evidence.

(a) It shall be prima facie evidence that a facility has the appearance of a licensed medical facility if it has two or more of the factors listed in subparagraphs (a) through (f) of Title 20, Subchapter 17, Section 20-815(g)(2) of the New York City Administrative Code.

(b) A facility's distribution of a pregnancy test kit shall not, by itself, be sufficient to establish that it has the "appearance of a licensed medical facility," provided that the test is self-administered, self- diagnosed, and self-interpreted. Notwithstanding, a facility's distribution of a pregnancy test kit – even if the pregnancy test kit was exclusively self-administered, self-interpreted, and self-diagnosed – may be relied upon, in combination with another legally permissible factor, to establish the "appearance of a licensed medical facility."

OAKLAND ORDINANCE

16 JUN 24 AM 9:05

APPROVED AS TO FORM AND LEGAILTY
/s/ Barbara J. Parker
City Attorney's Office

OAKLAND CITY COUNCIL

ORDINANCE NO. 13378 C.M.S.

INTRODUCED BY VICE MAYOR ANNIE CAMPBELL WASHINGTON, OAKLAND CITY ATTORNEY BARBARA J. PARKER, COUNCIL MEMBER ABEL GUILLEN, AND COUNCIL MEMBER REBECCA KAPLAN

ADOPT AN ORDINANCE AMENDING SECTION 5.06 OF THE OAKLAND MUNICIPAL CODE TO PROHIT LIMITED SERVICES PREGNANCY CENTERS FROM MAKING FALSE OR MISLEADING STATEMENTS TO THE PUBLIC ABOUT PREGNANCY-RELATED SERVICES THE CENTERS OFFER OR PERFORM.

WHEREAS, a woman's right to choose whether to terminate a pregnancy is protected by both the federal and state Constitutions, and is protected from interference by third parties and the government; and

WHEREAS, when a woman considers termination of a pregnancy, time is a critical factor. Delays in deciding to terminate a pregnancy may mean that a less invasive option is no longer available or that the option to terminate a pregnancy is no longer available; and

WHEREAS, many people have deeply held reli-

gious and moral beliefs both supporting and opposing abortion, and the City respects the right of individuals to express and promote such beliefs; and

WHEREAS, in recent years, clinics that seek to counsel clients against abortion have become common throughout California. These clinics are often referred to as crisis pregnancy centers or limited services pregnancy centers. Although some of these centers (referred to herein as "LSPCs") are licensed to provide various medical services to pregnant women, most LSPCs are not licensed medical clinics; and

WHEREAS, some LSPCs openly acknowledge, in their advertising and their facilities, that they do not provide abortions or access to emergency contraception or refer clients to other providers of such services. Some of these same LSPCs also openly acknowledge that they believe abortion is morally wrong. Many LSPCs, however, seek to mislead women contemplating abortion into believing that their facilities offer abortion services and unbiased counseling. This misleading of women seeking medical advice and/or care has the potential to be extremely harmful to women; and

WHEREAS, the City respects the right of LSPCs to counsel against abortions, if the centers are otherwise operating in compliance with this Chapter, and the City does not intend by this Chapter to regulate, limit or curtail such advocacy; and

WHEREAS, the City has carefully balanced (1) the constitutionally protected right of a woman to choose to terminate her pregnancy, (2) the right of individuals to express their religious and ethical beliefs about abortion, (3) the serious harm to women

that can result from even slight delays due to false advertising for pregnancy and/or abortion services, and (4) the cost to local taxpayers that can accrue from such delay, the City has determined that there exists a need to regulate false and misleading advertising by pregnancy clinics offering limited services; and

WHEREAS, there are several circumstances prompting the need for LSPC regulation that is more protective of potential consumers of pregnancy center services; and

WHEREAS, LSPCs often purchase "pay per click" ads on online search services such as Google for terms such as "abortion," so that persons searching for abortion services will see a link and advertisement for the LSPC at the top of the results page. In addition, many LSPCs advertise on billboards, mass-transit facilities, and through websites; and

WHEREAS, LSPCs often change their names, making it difficult for potential clients to do online research and find reviews of their services. Although the name of the LSPC organization may change, the entity does not, as evidenced by maintaining the same address and location, phone number, license number with the Department of Public Health and Federal Tax Identification number; and

WHEREAS, most clients do not come to LSPCs as a result of a referral from a medical professional. Clients seeking information regarding options to terminate a pregnancy commonly experience emotional and physical stress and are therefore especially susceptible to false or misleading elements in advertising by LSPCs. These circumstances raise the need for

regulation that is more protective of potential consumers of pregnancy center services; and

WHEREAS, due to the time-sensitive and constitutionally protected nature of the decision to terminate a pregnancy, false and misleading advertising by clinics that do not offer or refer clients for abortion or access to emergency contraception is of special concern to the City. When a woman is misled into believing that a clinic offers services that it does not in fact offer, she loses time crucial to the decision whether to terminate a pregnancy. Under these same circumstances a client may also lose the option to choose a particular procedure, or to terminate the pregnancy at all; and

WHEREAS, the State of California recently recognized this problem and passed the Reproductive FACT Act, and in turn, LSPC proponents have filed suit for their right to withhold information from clients. In addition, there are several cities within California and many states across the Country seeking to address this issue; and

WHEREAS, local tax dollars provide the financial support for local medical providers of last resort for indigent individuals who need medical care. These individuals include women facing unexpected pregnancies; and

WHEREAS, if women who have chosen to terminate a pregnancy are misled and delayed by the false advertising of LSPCs, the cost of providing more invasive and expensive options may fall upon health facilities funded by local taxpayers, which provide the medical services of last resort for the City's indigent population; now, therefore be it

RESOLVED: that the City of Oakland has determined that there exists a need to regulate false and misleading advertising by pregnancy clinics offering limited services.

THE COUNCIL OF THE CITY OF OAKLAND DOES ORDAIN AS FOLLOWS:

SEC 5.06.110. TITLE

This new Section 5.06.110 of Oakland Municipal Code Chapter 5.06, entitled Advertising Matter, shall be known as the "Pregnancy Information Disclosure and Protection Ordinance."

SECTION 1. Findings. The City Council finds and determines the foregoing findings to be true and correct and hereby makes them a part of this ordinance.

1. A woman's right to choose whether to terminate a pregnancy is protected by both the federal and state Constitutions, and is protected from interference by third parties and the government.

2. When a woman considers termination of a pregnancy, time is a critical factor. Delays in deciding to terminate a pregnancy may mean that a less invasive option is no longer available or that the option to terminate a pregnancy is no longer available.

3. Many people have deeply held religious and moral beliefs both supporting and opposing abortion, and the City respects the right of individuals to express and promote such beliefs.

4. In recent years, clinics that seek to counsel clients against abortion have become common throughout California. These clinics are often referred to as

crisis pregnancy centers or limited services pregnancy centers. Although some of these centers (referred to herein as "LSPCs") are licensed to provide various medical services to pregnant women, most LSPCs are not licensed medical clinics.

5. Some LSPCs openly acknowledge, in their advertising and their facilities, that they do not provide abortions or access to emergency contraception or refer clients to other providers of such services. Some of these same LSPCs also openly acknowledge that they believe abortion is morally wrong. Many LSPCs, however, seek to mislead women contemplating abortion into believing that their facilities offer abortion services and unbiased counseling. This misleading of women seeking medical advice and/or care has the potential to be extremely harmful to women.

6. The City respects the right of LSPCs to counsel against abortions, if the centers are otherwise operating in compliance with this Chapter, and the City does not intend by this Chapter to regulate, limit or curtail such advocacy.

7. The City has carefully balanced (1) the constitutionally protected right of a woman to choose to terminate her pregnancy, (2) the right of individuals to express their religious and ethical beliefs about abortion, (3) the serious harm to women that can result from even slight delays due to false advertising for pregnancy and/or abortion services, and (4) the cost to local taxpayers that can accrue from such delay, the City has determined that there exists a need to regulate false and misleading advertising by pregnancy clinics offering limited services.

8. There are several circumstances prompting the

need for LSPC regulation that is more protective of potential consumers of pregnancy center services.

9. LSPCs often purchase "pay per click" ads on online search services such as Google for terms such as "abortion," so that persons searching for abortion services will see a link and advertisement for the LSPC at the top of the results page. In addition, many LSPCs advertise on billboards, mass-transit facilities, and through websites.

10. LSPCs often change their names, making it difficult for potential clients to do online research and find reviews of their services. Although the name of the LSPC organization may change, the entity does not, as evidenced by maintaining the same address and location, phone number, license number with the Department of Public Health and Federal Tax Identification number.

11. Most clients do not come to LSPCs as a result of a referral from a medical professional. Clients seeking information regarding options to terminate a pregnancy commonly experience emotional and physical stress and are therefore especially susceptible to false or misleading elements in advertising by LSPCs. These circumstances raise the need for regulation that is more protective of potential consumers of pregnancy center services.

12. Due to the time-sensitive and constitutionally protected nature of the decision to terminate a pregnancy, false and misleading advertising by clinics that do not offer or refer clients for abortion or access to emergency contraception is of special concern to the City. When a woman is misled into believing that a clinic offers services that it does not in fact offer,

she loses time crucial to the decision whether to terminate a pregnancy. Under these same circumstances a client may also lose the option to choose a particular procedure, or to terminate the pregnancy at all.

13. The State of California recently recognized this problem and passed the Reproductive FACT Act, and in turn, LSPC proponents have filed suit for their right to withhold information from clients. In addition, there are several cities within California and many states across the Country seeking to address this issue.

14. Local tax dollars provide the financial support for local medical providers of last resort for indigent individuals who need medical care. These individuals include women facing unexpected pregnancies.

15. If women who have chosen to terminate a pregnancy are misled and delayed by the false advertising of LSPCs, the cost of providing more invasive and expensive options may fall upon health facilities funded by local taxpayers, which provide the medical services of last resort for the City's indigent population.

16. The City of Oakland has determined that there exists a need to regulate false and misleading advertising by pregnancy clinics offering limited services.

SECTION 2. Definitions. For the purposes of this Chapter, the following terms shall have the following meanings:

(a) "Abortion" shall mean the termination of a pregnancy for purposes other than producing a live

birth. "Abortion" includes, but is not limited to, a termination using pharmacological agents.

(b) "Client" shall mean an individual who is inquiring about or seeking services at a pregnancy services center.

(c) "Emergency contraception" shall mean one or more prescription drugs (1) used separately or in combination, to prevent pregnancy, when administered to or self-administered by a patient, within a medically-recommended amount of time after sexual intercourse, (2) dispensed for that purpose in accordance with professional standards of practice, and (3) determined by the United States Food and Drug Administration to be safe for that purpose.

(d) "Health information" shall mean any oral or written information in any form or medium that relates to health insurance and/or the past, present or future physical or mental health or condition of a client.

(e) "Licensed medical provider" shall mean a person licensed or otherwise authorized under the provisions of federal, state, or local law to provide medical services.

(f) "Limited services pregnancy center" shall mean a pregnancy services center, as defined in subsection (g) below, that does not directly provide or provide referrals to clients for abortions and/or does not directly provide or provide referrals to clients for emergency contraception.

(g) "Pregnancy services center" shall mean a facility, licensed or otherwise, and including mobile facilities, the primary purpose of which is to provide ser-

vices to women who are or may be pregnant, that either (1) offers obstetric ultrasounds, obstetric sonograms or prenatal care to pregnant women, or (2) has the appearance of a medical facility. A pregnancy service center has the appearance of a medical facility if two or more of the following factors are present:

(A) The facility offers pregnancy testing and/or pregnancy diagnosis;

(B) The facility has staff or volunteers who wear medical attire or uniforms;

(C) The facility contains one or more examination tables;

(D) The facility contains a private or semi-private room or area containing medical supplies and/or medical instruments;

(E) The facility has staff or volunteers who collect health information from clients; or

(F) The facility is located on the same premises as a state-licensed medical facility or provider or shares facility space with a state-licensed medical provider.

It shall be prima facie evidence that a facility has the appearance of a medical facility if it has two or more of the characteristics listed above.

(h) "Premises" shall mean land and improvements or appurtenances or any part thereof.

(i) "Prenatal care" shall mean services consisting of physical examination, pelvic examination or clinical laboratory services provided to a woman during pregnancy. Clinical laboratory services refers to the microbiological, serological, chemical, hematological,

biophysical, cytological or pathological examination of materials derived from the human body, for purposes of obtaining information, for the diagnosis,

SECTION 3. Violation.

(a) It is unlawful for any limited services pregnancy center, with intent directly or indirectly to perform pregnancy-related services (professional or otherwise), to make or disseminate or cause to be made or disseminated before the public in the City, or to make or disseminate or cause to be made or disseminated from the City before the public anywhere, in any newspaper or other publication, or any advertising device or in any other manner or means whatever, including over the Internet, any statement, concerning those services, professional or otherwise, or concerning any circumstance or matter of fact connected with the proposed performance or disposition thereof, which is untrue or misleading, whether by statement or omission, that the limited services pregnancy center knows or which by the exercise of reasonable care should know to be untrue or misleading.

(b) It is unlawful for any limited services pregnancy center, with intent directly or indirectly to perform pregnancy-related services (professional or otherwise), to make or disseminate or cause to be so made or disseminated any such statement identified in subsection (3)(a) as part of a plan or scheme with the intent not to perform the services expressly or impliedly offered, as advertised.

SECTION 4. Enforcement.

(a) The City Attorney may enforce the provisions of this Chapter through a civil action in any court of competent jurisdiction. Before filing an action under

this Chapter, the City Attorney shall give written notice of the violation to the limited services pregnancy center. The written notice shall indicate that the limited services pregnancy center has ten (10) days in which to cure the false, misleading, or deceptive advertising. If the limited services pregnancy center has not responded to the written notice within ten (10) days, or refuses to cure the false, misleading, or deceptive advertising within that period, the City Attorney may file a civil action.

(b) The City Attorney may apply to any court of competent jurisdiction for injunctive relief compelling compliance with any provision of this Chapter and correcting the effects of the false, misleading, or deceptive advertising. Such an injunction may require a limited services pregnancy center to:

(1) Pay for and disseminate appropriate corrective advertising in the same forum as the false, misleading, or deceptive advertising.

(2) Post a notice on its premises, in a location clearly noticeable from the waiting area, examination area, or both, stating:

(A) Whether there is a licensed medical doctor, registered nurse, or other licensed medical practitioner on staff at the center; and

(B) Whether abortion, emergency contraception, or referrals for abortion or emergency contraception are available at the center.

(3) Be placed on a Violator's List with other Limited Services Pregnancy Centers in violation of this same Section.

(4) Such other narrowly tailored relief as the

court deems necessary to remedy the adverse effects of the false, misleading, or deceptive advertising on women seeking pregnancy-related services.

(c) Upon a finding by a court of competent jurisdiction that a limited services pregnancy center has violated Section 93.4 of this Chapter, the City shall be entitled to recover civil penalties from each and every party responsible for the violation of not less than fifty dollars ($50) and not more than five hundred dollars ($500) per violation. In addition, if the City prevails it shall be entitled to reasonable attorney's fees and costs pursuant to order of the court.

(d) Nothing in this Chapter shall be interpreted as restricting or otherwise limiting the enforcement authority that state law or the Charter or Municipal Code vest in the City, its agencies, officers or employees or any state agency.

(e) Nothing in this Chapter shall be interpreted as creating a right of action for any party other than the City.

(f) Nothing in this Chapter shall be interpreted as restricting, precluding or otherwise limiting a separate or concurrent criminal prosecution under the Municipal Code or state law. Jeopardy shall not attach as a result of any court action to enforce the provisions of this Chapter.

SECTION 5. General Provisions.

(a) **Severability.** If any section, subsection, sentence, clause or phrase of this ordinance is for any reason held to be invalid or unconstitutional by decision of any court of competent jurisdiction, such decision shall not affect the validity of the remaining por-

tions of the Chapter. The City Council hereby declares that it would have passed this Ordinance and each section, subsection, clause or phrase thereof irrespective of the fact that one or more other sections, subsections, clauses or phrases may be declared invalid or unconstitutional.

(b) **No Conflict with State or Federal Law.** Nothing in this ordinance shall be interpreted or applied so as to create any requirement, power, or duty in conflict with any federal or state law.

(c) **Undertaking for the General Welfare.** In adopting and implementing this ordinance, the City of Oakland is assuming an undertaking only to promote the general welfare. It is not assuming, nor is it imposing in its officers and employees, an obligation for breach of which it is liable in money damages to any person who claims that such breach proximately caused injury.

SECTION 6. Effective Date. This ordinance shall become effective immediately on final adoption if it receives six or more affirmative votes; otherwise it shall become effective upon the seventh day after final adoption.

Introduction Date JUL 05 2016

1922012v1

IN COUNCIL, OAKLAND, CALIFORNIA, July 19, 2016

PASSED BY THE FOLLOWING VOTE:

AYES - BROOKS, CAMPBELL WASHINGTON, GALLO, GUILLEN, KALB, KAPLAN, REID AND PRESIDENT GIBSON MCELHANEY—8

NOES—0

ABSENT—0

ABSTENTION—0

ATTEST:
/s/ LATONDA SIMMONS
City Clerk and Clerk of the Council
of the City of Oakland, California

Date of Attestation: July 26, 2016

SAN FRANCISCO ORDINANCE

FILE NO 110899 ORDINANCE NO 212-11

[Administrative Code – False Advertising by Limited Services Pregnancy Centers]

Ordinance amending the San Francisco Administrative Code by adding Chapter 93, Sections 93.1 through 93.5, to prohibit limited services pregnancy centers from making false or misleading statements to the public about pregnancy-related services the centers offer or perform.

Be it ordained by the People of the City and County of San Francisco:

Section 1. The San Francisco Administrative Code is hereby amended by adding Chapter 93, Sections 93.1 through 93.5, to read as follows:

SEC. 93.1. TITLE. The Chapter shall be known as the Pregnancy Information Disclosure and Protection Ordinance.

SEC. 93.2. FINDINGS.

1. San Francisco serves as the medical provider of last resort for indigent individuals who need medical care. These individuals include women facing unexpected pregnancies.

2. A woman's right to choose whether to terminate a pregnancy is protected by both the federal and state Constitutions, and is protected from interference by third parties and the government.

3. Many people have deeply held religious and moral beliefs both supporting and opposing abortion, and

the City respects the right of individuals to express and promote such beliefs.

4. When a woman considers termination of a pregnancy, time is a critical f actor. Delays in deciding to terminate a pregnancy may mean that a less invasive option is no longer available or that the option to terminate a pregnancy is no longer available.

5. In recent years, clinics that seek to counsel clients against abortion have become common throughout California. These clinics are often referred to as crisis pregnancy centers ("CPCs"). Although some CPCs are licensed to provide various medical services to pregnant women, most CPCs are not licensed medical clinics.

6. Some CPCs openly acknowledge in their advertising and their facilities, that they do not provide abortions or emergency contraception or refer clients to other providers of such services. Some of these same CPCs also openly acknowledge that they believe abortion is morally wrong. Many CPCs, however, seek to mislead women contemplating abortion into believing that their facilities offer abortion services and unbiased counseling.

7. CPCs often purchase "pay per click" ads on online search services such as Google for terms such as "abortion," so that persons searching for abortion services will see a link and advertisement for the CPC at the top of the results page. In addition, many CPCs advertise on billboards, mass-transit facilities, and through websites.

8. Most clients do not come to CPCs as a result of a referral from a medical professional. Clients seeking information regarding options to terminate a preg-

nancy commonly are experiencing emotional and physical stress and are therefore especially susceptible to false or misleading elements in advertising by CPCs. These circumstances raise the need for regulation that is more protective of potential consumers of pregnancy center services.

9. Because of the time-sensitive and constitutionally protected nature of (the decision to terminate a pregnancy. false and misleading advertising by clinics that do not offer or refer clients for abortion or emergency contraception is of special concern to the City, When a woman is misled into believing that a clinic offers services that it does not in fact offer. she loses time crucial to the decision whether to terminate a pregnancy. Under these same circumstances a client may also lose the option to choose a particular procedure, or to terminate the pregnancy at all.

10. The City respects the right of limited services pregnancy centers to counsel against abortions, if the centers are otherwise operating in compliance with this Chapter, and the City does not intend by this Chapter to regulate, limit or curtail such advocacy.

11. However, if women who have chosen to terminate a pregnancy are misled and delayed by the false advertising of CPCs, the cost of providing more invasive and expensive options may fall upon City health facilities, which provide the medical services of last resort for the City's indigent population.

12. After carefully balancing the constitutionally protected right of a woman to choose to terminate her pregnancy, the right of individuals to express their religious and ethical beliefs about abortion. the harm to women worked by even slight delays that can be

caused by false advertising for pregnancy and/or abortion services, and the cost to the City that can accrue from such delay, the City has determined that there exists a need to regulate false and misleading advertising by pregnancy clinics offering limited services.

SEC. 93.3. DEFINITIONS.

For the purposes of this Chapter, the following terms shall have the following meanings:

(a) "Abortion" shall mean the termination of a pregnancy for purposes other than producing a live birth. "Abortion" includes, but is not limited to, a termination using pharmacological agents.

(b) "Client" shall mean an individual who is inquiring about or seeking services at a pregnancy services center.

(c) "Emergency contraception" shall mean one or more prescription drugs (1) used separately or in combination, to prevent pregnancy, when administered to or self-administered by a patient. Within a medically-recommended amount of time after sexual intercourse, (2) dispensed for that purpose in accordance with professional standards of practice, and (3) determined by the United States Food and Drug Administration to be safe for that purpose.

(d) "Health information" shall mean any oral or written information in any form or medium that relates to health insurance and/or the past, present or future physical or mental health or condition of a client.

(e) "Licensed medical provider" shall mean a person licensed or otherwise authorized under the provi-

sions of federal, state, or local law to provide medical services.

(f) "Limited services pregnancy center" shall mean a pregnancy services center, as defined in subsection (g), that does not directly provide or provide referrals to clients for the following services: (1) abortions; or (2) emergency contraception.

(g) "Pregnancy services center" shall mean a facility, licensed or otherwise, and including mobile facilities, the primary purpose of which is to provide services to women who are or may be pregnant, that either (1) offers obstetric ultrasounds, obstetric sonograms or prenatal care to pregnant women, or (2) has the appearance of a medical facility. A pregnancy service center has the appearance of a medical facility if two or more of the following factors are present:

(A) The facility offers pregnancy testing and/or pregnancy diagnosis;

(B) The facility has staff or volunteers who wear medical attire or uniforms;

(C) The facility contains one or more examination tables;

(D) The facility contains a private or semi-private room or area containing medical supplies and/or medical instruments;

(E) The facility has staff or volunteers who collect health information from clients; or

(F) The facility is located on the same premises as a state-licensed medical facility or provider or shares facility space with a state-licensed medical provider.

It shall be prima facie evidence that a facility has the appearance of a medical facility if it has two or more of the characteristics listed above.

(h) "Premises" shall mean land and improvements or appurtenances or any part thereof.

(i) "Prenatal care" shall mean services consisting of physical examination, pelvic examination or clinical laboratory services provided to a woman during pregnancy. Clinical laboratory services refers to the microbiological, serological, chemical, hematological, biophysical, cytological or pathological examination of materials derived from the human body, for purposes of obtaining information, for the diagnosis, prevention, or treatment of disease or the assessment of health condition.

SEC. 93.4. VIOLATION.

(a) It is unlawful for any limited services pregnancy center, with intent directly or indirectly to perform pregnancy-related services (professional or otherwise), to make or disseminate or cause to be made or disseminated before the public in the City, or to make or disseminate or cause to be made or disseminated from the City before the public anywhere, in any newspaper or other publication, or any advertising device or in any other manner or means whatever, including over the Internet, any statement, concerning those services, professional or otherwise, or concerning any circumstance or matter of fact connected with the proposed performance or disposition thereof which is untrue or misleading, whether by statement or omission, that the limited services pregnancy center knows or which by the exercise of reasonable care should know to be untrue or misleading.

(b) It is unlawful for any limited services pregnancy center, with intent directly or indirectly to perform pregnancy-related services (professional or otherwise), to make or disseminate or cause to be so made or disseminated any such statement identified in subsection (a) as part of a plan or scheme with the intent not to perform the services expressly or impliedly offered, as advertised.

SEC. 93.5. ENFORCEMENT.

(a) The City Attorney may enforce the provisions of this Chapter through a civil action in any court of competent jurisdiction. Before filing an action under this Chapter, the City Attorney shall give written notice of the violation to the limited services pregnancy center. The written notice shall indicate that the limited services pregnancy center has ten (10) days in which to cure the false, misleading, or deceptive advertising. If the limited services pregnancy center has not responded to the written notice within ten (10) days, or refuses to cure the false, misleading, or deceptive advertising within that period, the City Attorney may file a civil action.

(b) The City Attorney may apply to any court of competent jurisdiction tor injunctive relief compelling compliance with any provision of this Chapter and correcting the effects of the false, misleading, or deceptive advertising. Such an injunction may require a limited services pregnancy center to:

(1) Pay for and disseminate appropriate corrective advertising in the same for as the false, misleading, or deceptive advertising.

(2) Post a notice on its premises, in a location clearly noticeable from the waiting area, examination area, or both, stating:

(A) Whether there is a licensed medical doctor, registered nurse, or other licensed medical practitioner on staff at the center: and

(B) Whether abortion, emergency contraception, or referrals for abortion or emergency contraception are available at the center.

(3) Such other narrowly tailored relief as the court deems necessary to remedy the adverse effects of the false, misleading, or deceptive advertising on women seeking pregnancy-related-services.

(c) Upon a finding by a court of competent jurisdiction that a limited services pregnancy center has violated Section 93.4 of this Chapter. the City shall be entitled to recover civil penalties from each and every party responsible for the violation of not less than fifty dollars ($50) and not more than five hundred dollars ($500) per violation. In addition, if the City prevails it shall be entitled to reasonable attorney's fees and costs pursuant to order of the court.

[(d) omitted in original]

(e) Nothing in this Chapter shall be interpreted as restricting or otherwise limiting the enforcement authority that state law or the Charter or Municipal Code vest in the City, its agencies, officers or employees or any state agency.

(f) Nothing in this Chapter shall be interpreted as creating a right of action for any party other than the City.

(g) Nothing in this Chapter shall be interpreted as restricting, precluding or otherwise limiting a separate or concurrent criminal prosecution under the Municipal Code or state law. Jeopardy shall not attach as a result of any court action to enforce the provisions of this Chapter.

Section 2. General Provisions.

(a) **Severability.** If any section, subsection, sentence, clause, or phrase of this ordinance is for any reason held to be invalid or unconstitutional by a decision of any court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of the ordinance. The Board of Supervisors hereby declares that it would have passed this ordinance and each and every section, subsection, sentence, clause, or phrase not declared invalid or unconstitutional without regard to whether any portion of this ordinance would be subsequently declared invalid or unconstitutional.

(b) **No Conflict with State or Federal Law.** Nothing in this ordinance shall be interpreted or applied so as to create any requirement, power, or duty in conflict with any federal or state law.

(c) **Undertaking for the General Welfare.** In adopting and implementing this ordinance, the City and County of San Francisco is assuming an undertaking only to promote the general welfare. It is not assuming, nor is it imposing in its officers and employees, an obligation for breach of which it is liable in money damages to any person who claims that such breach proximately caused injury.

Section 3. Effective Date. This ordinance shall become effective 30 days from the date of passage.

APPROVED AS TO FORM:

DENNIS J. HERRERA, City Attorney

By: /s/Erin Bernstein
Deputy City Attorney

BOARD OF SUPERVISORS
7/29/2011

No. 16-1140

In the Supreme Court of the United States

NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES, dba NIFLA, *et al.*,
Petitioners,

v.

XAVIER BECERRA,
Attorney General of California, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* 41 FAMILY POLICY ORGANIZATIONS IN SUPPORT OF PETITIONERS

DAVID FRENCH
Counsel of Record
Senior Fellow
NATIONAL REVIEW INSTITUTE
19 West 44th Street
Suite 1701
New York, New York 10036
(931) 446-7572
dfrench@nationalreview.com

Counsel for Amici Curiae

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

Whether the disclosures required by the California Reproductive FACT Act violate the protections set forth in the Free Speech Clause of the First Amendment, applicable to the States through the Fourteenth Amendment.

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INTEREST OF AMICI CURIAE[1]

The 41 family policy councils and policy alliances listed below each work within their respective states to preserve religious liberty and rights of conscience from state overreach and government intrusion. They are nonprofits who advocate for free speech, religious liberty, and the rights of the unborn. They pursue their work in court, before legislatures, in governor's mansions, and in the court of public opinion. They are vitally concerned that the decision of the court below undermines a constitutional firewall against compelled speech and will set a precedent permitting states to coerce conformity even from those citizens who dissent from state-mandated orthodoxy on matters of "politics, nationalism, religion, or other matters of opinion." The complete list follows:

The Alaska Family Council, Center for Arizona Policy, Family Council of Arkansas, California Family Council, Capitol Resource Institute, Colorado Family Action, Family Institute of Connecticut, Delaware Family Policy Council, Family Policy Alliance, Family Policy Alliance of Georgia, Hawaii Family Forum, Family Policy Alliance of Idaho, The FAMiLY LEADER of Iowa, Family Policy Alliance of Kansas, The Family Foundation of Kentucky, Louisiana Family Forum, Christian Civic League of Maine, Massachusetts

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[1] Petitioners have submitted a blanket consent to the filing of amicus briefs in this case. Amici have contacted and obtained consent to file this brief from counsel for Respondents. Amici state that no counsel for a party authored this brief in whole or in part, and no person other than the amici or their counsel made any monetary contribution intended to fund the preparation or submission of this brief.

Family Institute, Michigan Family Forum, Minnesota Family Council, Montana Family Foundation, Nebraska Family Alliance, Nevada Family Alliance, Cornerstone Action of New Hampshire, New Jersey Family Policy Council, Family Policy Alliance of New Mexico, New Yorkers for Constitutional Freedoms, North Carolina Family Policy Council, NC Values Coalition, Family Policy Alliance of North Dakota, Citizens for Community Values of Ohio, Family Policy Institute of Oklahoma, Pennsylvania Family Council, Palmetto Family Council of South Carolina, South Dakota Family Heritage Alliance, Family Action Council of Tennessee, Texas Values, The Family Foundation of Virginia, Family Policy Institute of Washington, Family Policy Council of West Virginia, and Wisconsin Family Action.

SUMMARY OF ARGUMENT

For the second time in recent months this Court is called upon to consider and rule upon the most egregious form of First Amendment violation — the decision of the state to compel its citizens to express or support ideas they find repugnant.

In the first case, *Masterpiece Cakeshop v. Colorado Civil Rights Commission* (No. 16-11, Argued Dec. 5, 2017) the state at least offered the defense that custom design of a wedding cake was not a form of expression protected by the First Amendment. In this case, no such defense is available. In this case, the state knows full well that it is compelling speech, and it knows full well that it is compelling speech on matters of deep moral, religious, and political dispute.

The state here compels pro-life crisis pregnancy centers to advertise the availability of free or low-cost abortions. Given the belief of these pro-life citizens that the unborn child is a separate human life, equal in value to any other living person, the state is requiring these citizens to advertise the availability of free or low-cost means of facilitating death.

These beliefs are the soul motivating the embodied action of pro-life pregnancy centers: their staff and volunteers are moved by a desire to save the lives of unborn children and help mothers choose to give birth. The State of California directly interferes with their work by forcing them to post messages actively opposed to their lifesaving efforts. It is hard to imagine a greater imposition on individual conscience. It is hard to imagine a more repugnant form of forced speech.

And what is the state interest so vital that it permits California to conscript the private speech of pro-life citizens? The state is claiming that it wants to provide accurate information to young women. Women are "unaware of the public programs available to them," declares California. *National Institutes of Family and Life Advocates v. Harris*, 839 F.3d 823, 829 (9th Cir. 2016) (citing Assembly. Bill No. 775 Section 1(b)). Yet the state has enormous resources available to correct this alleged information gap. It can distribute literature, erect signs, run commercials, advertise on social media, and work with sympathetic community groups and activists to spread the word. Its own ability to speak is bounded only by its creativity and its funding.

But that's not enough for the state. It specifically chose to target pro-life pregnancy centers. It chose to use their access to their clients to spread the state's message. Why? Because the state openly and obviously despises the pro-life pregnancy centers' mission and purpose. The legislature explicitly condemns their efforts to "discourage and prevent women from seeking abortions." Assem. Comm. On Health, Analysis of Assembly Bill No. 775 at 3. It claims — without offering any specific findings about petitioners in this case — that pregnancy centers "interfere with women's ability to be fully informed and exercise their reproductive rights." *Id.*

The court below justified its holding that the state could indeed force crisis pregnancy centers to post a notice that California provides "immediate free or low-cost access" to abortion in part by describing the notice as mere "professional speech," as if speech by professionals on matters of public concern were entitled to less constitutional protection than speech by other private citizens.

Yet California's citizens, including professionals operating in their professional capacities, have a constitutional right to discourage women from seeking abortions. They have a constitutional right to remain silent about the availability of state-funded free abortions. They have a constitutional right to make the case for life, including by competently offering medical services that are designed not just to convey the truth about the humanity of the unborn child but also to ease the concerns and burdens of the pregnant mother.

The Ninth Circuit's decision undermines two of the Court's most important precedents, *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943) and *Wooley v. Maynard*, 430 U.S. 705 (1977). If California has its way, then a "fixed star in our constitutional constellation," will be erased from our nation's sky. *Barnette*, 319 U.S. at 642. No longer will it be the case that "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Id.*

If this court rules in favor of the respondents, it will send a clear message that, contrary to its former holding in *Barnette,* state governments may settle hotly debated moral questions by legislative fiat, and may compel dissenting citizens to speak in accordance with the government's preferences.

In forcing pro-life citizens to advertise for free or reduced-cost abortions, the state of California is making a demand every bit as intrusive as asking a Jehovah's Witness family to state that they intend to "live free or die." In *Maynard*, the Court squarely addressed the question "of whether the State may constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public." *Maynard*, 430 U.S. at 713. The court found that New Hampshire could not force citizens to turn their private automobiles into a "mobile billboard" for its "ideological message." *Id.* at 715.

Here, the state attempts to transform pro-life pregnancy centers into stationary billboards for a pro-abortion message. It commandeers pro-life citizens' platforms and resources to accomplish the state's pro-choice purpose. It introduces its approval of abortion into the pregnancy centers' relationships with their clients, including many clients who are themselves morally opposed to abortion.

During the *Masterpiece Cakeshop* oral argument, Justice Kennedy rightly noted that "tolerance is essential in a free society. And tolerance is most meaningful when it's mutual." Oral Arg. Tr. 62. Where is the tolerance in California's actions? The state scorns the marketplace of ideas. It rejects the notion that the cure for speech that it deems bad is more speech or better speech. Instead, it seeks to coerce dissenters into spreading the state's message and advancing the state's interests.

If anything, the law at issue here is more pernicious than the laws at issue in *Barnette* and *Maynard*. In those cases, the state was not specifically targeting the speech of Jehovah's Witnesses. The law in this case is specifically crafted to target pro-life citizens, as the legislative record shows. This is not tolerance. It is coercion, and it strikes at the heart of the First Amendment.

ARGUMENT

I. The State of California Is Conscripting Pro-Life Professionals Into its Pro-Choice Cause.

Let us be clear about California's actions in this case. It is using its defense of one constitutional right — the *Roe*-created right to abort a child — as a pretext for diminishing a second constitutional right, the First Amendment-protected freedom of speech. It has made the ideological decision to facilitate abortions even to the point of funding the procedure, and it is now requiring private citizens to communicate the state's ideological decision even when those citizens are strongly and sincerely opposed.

Moreover, the grounds for forcing these pro-abortion communications are thin to the point of pretext, demonstrating both hostility to the pro-life message and hostility to the pro-life messenger. As the Ninth Circuit relates in the decision below, the law was specifically aimed at addressing the alleged sins of pro-life pregnancy centers, but the legislature's indictment — especially when read in light of the statute at issue — is less than damning:

> The Legislature also found that the ability of California women to receive accurate information about their reproductive rights, and to exercise those rights, is hindered by the existence of crisis pregnancy centers (CPCs). CPCs "pose as full-service women's health clinics, but aim to discourage and prevent women from seeking abortions" in order to fulfill their goal of "interfer[ing] with women's ability

> to be fully informed and exercise their reproductive rights." Assem. Comm. on Health, Analysis of Assembly Bill No. 775 at 3. The Legislature found that CPCs, which include unlicensed and licensed clinics, employ "intentionally deceptive advertising and counseling practices [that] often confuse, misinform, and even intimidate women from making fully-informed, time-sensitive decisions about critical health care." *Id.*

Harris, 839 F.3d at 829.

Notably, there is no claim that any person is forced to enter a crisis pregnancy center. There is no claim that crisis pregnancy centers block access to information available through countless alternative sources. Women can do research on the internet, they can walk into other clinics, they can talk to friends and relatives. They can see commercials on television, hear ads on the radio, and talk to other mothers. While there may be women who lack information, it is not for lack of *access* to information.

Moreover, if the state feels that existing information channels are inadequate, it can directly address the deficiency through access to funds and communication outlets that dwarf the financial and media reach of crisis pregnancy centers. Instead, it has chosen to target one of the few spaces in the California community where the pro-life message is presented in a direct manner and in an undiluted form.

The state plainly does not like this pro-life message. It explicitly finds it "unfortunate[ ]" that these pregnancy centers "aim to discourage and prevent

women from seeking abortions." JA 84-85. The state's sweeping, undifferentiated animus is also obvious from its remedy. The statute does not take aim at individual pro-life pregnancy centers for engaging in proven misconduct. Instead, the state of California directs a shotgun blast at all pro-life pregnancy centers by directing them to advertise for free or low-cost abortions.

In other words, every pro-life pregnancy center is compelled to comply even if there is no proof that it has ever confused, misinformed, or intimidated a single client. Nor is the compelled speech an appropriate remedy for the alleged fraudulent behavior. An advertisement for low-cost abortion does nothing to correct the alleged "misimpressions" and "false information" of the clinics. Rather, the problem it redresses is apparently the bare fact that too few abortions are happening in the state of California.

In short, the state's admitted goals and the pro-life pregnancy centers' essential mission are in fundamental opposition. California is attempting to make sure that each and every pregnant woman in the state knows that they possess a right to an abortion and that the state will facilitate access to that right by providing low-cost or no-cost abortions to those who qualify. The pro-life pregnancy center is attempting to teach each client about the value of the human life in her womb and to persuade her to make the choice to deliver that child and either raise him herself or give him up for adoption.

The few medical services provided at pro-life pregnancy centers are provided *for the purpose* of facilitating the mission of the organization: pregnancy

tests inform a woman that she is a mother; ultrasounds provide her with visible and audible proof of her unborn child's existence, heartbeat, and humanity. These are the procedures offered in licensed clinics; and they serve the goal of encouraging a pregnant woman to embrace their own motherhood and choose to protect the precious life growing in her womb.

A pro-life pregnancy center is in many ways comparable to a public interest law firm, where the firm exists not merely to provide legal services but to advance a specific organizational mission and purpose. These firms are of course required by law to represent clients competently and professionally, but they are not for that reason required, as a condition for doing business, to advance any message inconsistent with their special organizational purposes.

The court below justified the state's imposition of special burdens on pro-life pregnancy centers by classifying the speech of these unique pro-life organizations as "professional speech" that enjoys far less stringent constitutional protection than other forms of speech — even to the point of permitting the state to compel speech contrary to the fundamental purpose of their professional activities.

The 9th Circuit, however, seems to confuse any speech uttered by a professional with "professional speech." There is no medical expertise or professional training required to post the state's advertisement. The fact that professionals work at crisis pregnancy centers does not mean that the state's simple notice enjoys any form of special status.

But even if the notice is held to be "professional speech" because it takes place in the context of a potential professional relationship, it is extraordinarily dangerous to presume that such speech should receive a lower level of constitutional protection, especially given the special status of professionals in public debate. In other words, professionals can and often should serve as advocates, even while providing professional services.

A ruling that renders all speech that occurs in a professional context a less-protected form of quasi-commercial speech (even when, as in this case, no money changes hands) opens Pandora's Box. Often the most effective advocates in the most contentious and consequential public controversies are professionals. Lawyers represent their clients and make arguments in the public square. Doctors and nurses present their own arguments — and are countered by other medical professionals who have reached different conclusions, often according to different value systems.

The so-called learned professions, *acting in their professional capacities*, are among our most valued participants in the marketplace of ideas. It is one thing to require professionals to exercise due care and competence in the provision of their services. It is another thing entirely to draft them to advance the ideological priorities of an activist state. By requiring pro-life professionals to advertise for free abortions, the state uses its immense power to undermine the very purpose of their professional work.

II. California Is Transforming Private Pro-Life Property Into Billboards for the Pro-Choice Cause

While *Barnette* is perhaps the seminal compelled speech case in Supreme Court history, *Maynard* should control. In *Maynard*, as this Court no doubt recalls, the State of New Hampshire required its citizens to equip noncommercial vehicles with license plates that proclaimed the state motto, "Live Free or Die." Jehovah's Witness citizens George and Maxine Maynard understandably objected to the use of their private property (in this case, their car) to advance a message that directly contradicted their religious beliefs.

Maynard framed his objection simply. He declared that he "refuse[d] to be coerced by the State into advertising a slogan which [he found] morally, ethically, religiously and politically abhorrent." *Maynard*, 430 U.S. at 713. It is against that backdrop that this Court framed the case as determining "whether the State may constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public." *Id.*

In its opinion, the Court noted that the First Amendment of course protects "both the right to speak freely and the right to refrain from speaking at all." *Id.* at 714. New Hampshire "force[d] an individual, as part of his daily life — indeed constantly while his automobile is in public view — to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable." *Id.* at 715.

In *Maynard*, just as in the present case, the state's purpose and the citizen's ideology were in direct conflict. The state wanted to promote "history, individualism, and state pride." *Id.* at 716. These citizens, however, did not share those values — or, to the extent they shared some of those values, they did not prioritize them as the state wished.

Nothing prevented the state from broadcasting its motto far and wide. Nothing prevented New Hampshire from making its motto a default option on license plates, so that the vast majority of citizens might serve as "mobile billboards" for its message without a moment's complaint. This Court ruled that the state could not, however, intrude upon what this Court called the "individual freedom of mind" to accomplish its purposes. *Id.* at 714.

If anything, the state measure in this case is even more intrusive. Pro-life professionals, as part of their daily lives, are forced not only to be messengers for an ideological point of view (that it is appropriate for the state to provide abortion access) but even to abet a course of *action* (calling the listed phone number) that can culminate in the death of an unborn child — the very thing that pro-life pregnancy centers exist to prevent.

The citizens of California — acting through their elected representatives — have chosen to use state resources to fund and facilitate abortion access. A mere 200 crisis pregnancy centers exist across the length and breadth of America's most populous state. They represent a point of view that lacks political power or legislative influence.

But popularity is not the measure of constitutional propriety. In *Maynard* the court held that the First Amendment "protects the right of individuals to hold a point of view different from the majority and to refuse to foster, in the way New Hampshire commands, an idea they find morally objectionable." *Id.* at 715.

Here, California commands that pro-life pregnancy centers not merely foster an idea, but cooperate in enabling a course of action which they find morally objectionable. This issue has been considered and decided by this Court in cases that have come before. The government of California simply does not possess the authority to compel its citizens to speak its message. Let it make its own case to the people of the state.

III. California's Intolerance Threatens to Exacerbate American Cultural Divide

There is no question that questions and debates about abortion are among the most emotional and divisive of all the questions that dominate American public life. Tens of millions of orthodox religious believers look at sacred texts that define life's beginning in the womb and feel both shock and horror that American law grants a right intentionally to kill a child. Many millions have examined the scientific facts of human growth and development and have determined that an unborn child is, in fact, a separate human life, and there is no rational basis for depriving it of the legal protections all other people enjoy.

Others, of course, have studied the issue of abortion and have come to a different conclusion. They view the unborn child as an extension of the mother, part of the

body that she controls. On this view, the unborn child is not human life but rather "potential life," and the right of abortion is indispensable to human autonomy and the liberation of women from traditional, subservient cultural status.

While the Founders could not anticipate the contours of an abortion debate that fully emerged almost two centuries after they drafted the Constitution and Bill of Rights, they could and did anticipate the enduring existence of debate and dissent over the most contentious of public controversies. After all, the founding generation was immersed in debates as consequential as the morality and legality of chattel slavery, an issue that would ultimately divide the United States and trigger our nation's deadliest military conflict.

No less a thinker than the great abolitionist Frederick Douglass expressed the view that free speech was "the great moral renovator of society and government." Frederick Douglass, "A Plea For Freedom of Speech in Boston" (Dec. 9, 1860). He blamed the persistence of slavery, in part, on the *lack* of free speech in antebellum America. "Slavery cannot tolerate free speech," he said. "Five years of its exercise would banish the auction-block and break every chain in the South." *Id.* Free speech is the "dread of tyrants. It is the right which they first of all strike down." *Id.*

Free speech threatens power. Free speech on matters of deep and profound public concern threatens power all the more. That is why — when given the opportunity — the powerful will seek to confine, limit, or (as in this case) coerce dissenting speakers. And that is why Justice Kennedy was right in his observation

during the *Masterpiece Cakeshop* oral argument when he asserted that "tolerance is essential in a free society. And tolerance is most meaningful when it's mutual." (Oral Arg. Tra. 62) A society in which pro-life clinics are constrained to direct women to a means of obtaining abortions is a society made less free.

Intolerance does not settle debates, it magnifies divisions. Intolerance does not create cultural or intellectual conformity, it generates seething resentment. In this case, California is demonstrating that it is so intolerant of disagreement that it will commandeer the speech of the most effective dissenters, the people who work most closely with young women who seek alternatives to abortion, the mothers who want to choose life.

A tolerant state is not an impotent state. California can and does deploy immense resources to advance its state interests. If it chose, it could deploy even more resources and flood targeted communities with its favored messages. It can properly punish medical professionals who violate standards of care. In other words, if California is made to protect the constitutional rights of pro-life citizens, it will not lack for pro-choice messages – or the resources to make those messages heard.

It is time for California to be tolerant. It is time for California to respect the liberties of all its citizens, including those citizens who stand opposed to its policies. Its coercion defies precedent. It cannot be allowed to stand.

CONCLUSION

Compelled speech is not the answer to cultural conflict. This court must not render professionals second-class citizens with diminished constitutional rights. It must not upset generations of case law protecting the "individual freedom of mind." *Maynard*, 430 U.S. at 714. There are few state actions more repugnant to the consciences of sincere, pro-life citizens than demanding that they advertise free or low-cost access to the deadly procedure they work so mightily to oppose. The judgment of the court below must be reversed.

Respectfully submitted,

DAVID FRENCH
Counsel of Record
Senior Fellow
NATIONAL REVIEW INSTITUTE
19 West 44th Street
Suite 1701
New York, New York 10036
(931) 446-7572
dfrench@nationalreview.com

Counsel for Amici Curiae

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No. 16-1140

IN THE
Supreme Court of the United States

NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES, D/B/A NIFLA, ET AL.,
Petitioners,

v.

XAVIER BECERRA, ATTORNEY GENERAL, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF FOUNDATION FOR MORAL LAW IN SUPPORT OF PETITIONERS

JOHN A. EIDSMOE
MATTHEW J. CLARK
Counsel of Record
FOUNDATION FOR MORAL LAW
One Dexter Avenue
Montgomery, AL 36104
(334) 262-1245
matt@morallaw.org

Counsel for *Amicus Curiae*

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INTEREST OF AMICUS CURIAE[1]

Amicus Curiae Foundation for Moral Law ("the Foundation"), is a national public-interest organization based in Montgomery, Alabama, dedicated to the defense of religious liberty and the strict interpretation of the Constitution as written and intended by its Framers.

The Foundation has an interest in this case because it believes that the legislation challenged in this case places an unconstitutional burden on the pro-life speech of crisis pregnancy centers. That speech arises from a belief that human life is a gift of God protected by the commandment "Thou shalt not kill." The Declaration of Independence also recognizes that life is an unalienable right endowed by the Creator, a right that is expressly protected in the Fifth and Fourteenth Amendments.

SUMMARY OF ARGUMENT

Because compulsory speech contrary to a person's beliefs is more offensive than enforced silence, compelled speech is an even more egregious First Amendment violation than prohibited speech.

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[1] Pursuant to Rule 37.3, all parties have consented to the filing of this brief. Pursuant to Rule 37.6, no party or party's counsel authored this brief in whole or in part, or contributed money that was intended to fund its preparation or submission; and no person other than the *amicus curiae*, its members, or its counsel, contributed money that was intended to fund the preparation or submission of this brief.

Furthermore, a waiting-room sign telling patients where they may obtain abortion information is a highly ideological message and not merely commercial or professional speech. Because there is no comparable requirement that abortion clinics post signs informing patients where and how they may obtain information about abortion alternatives, the mandated notice is both content-based and viewpoint-based. Accordingly, this compelled ideological speech should be subject to strict scrutiny.

Because freedom of speech is expressly protected by the First Amendment while the right to abortion is an extra-constitutional court-created right, any conflict between those rights should be resolved in favor of the enumerated right of freedom of speech.

ARGUMENT

I. Compelled Speech Is an Especially Egregious Violation of the First Amendment.

Suppose, for a moment, that you are a vehement opponent of President Donald Trump. You intensely dislike him personally, you find his style of leadership abhorrent, you consider his "tweets" repulsive, you consider his policies immoral and destructive, and you fervently hope he is not reelected. And you take it for granted that your right to express your opinion about him is protected by the First Amendment.

Suppose, then, that a law is enacted that prohibits you from saying or writing anything critical of President Trump, his style, or his policies, under severe legal penalties for violating this law. You would feel outraged, and rightly so, because your right of freedom of expression has been violated. But you might decide to grit your teeth and remain silent rather than face the penalties.

But suppose, instead, that the law is changed, and now requires you not just to remain silent but to affirmatively say: "I love President Trump, I admire his style, I love his tweets, I hope his policies are enacted, and, above all, I fervently hope he is reelected in 2020." You would then be doubly outraged. You might think: "I might begrudgingly keep my mouth shut about President Trump, but there's no way I'm going to speak his praises. I'll go to jail instead."

Viewed in this light, compelled speech is an even more egregious First Amendment violation than prohibited speech. Forcing someone to say what one does not believe is worse than forcing a person to remain silent, just as forcing someone to contribute to President Trump's campaign is more outrageous than prohibiting donations to his opponent. Appellants argue that "[c]ompelled speech is no more tolerable than compelled silence." Opening Brief, at 23. In fact, however, compelled speech is even less tolerable than compelled silence.[2]

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[2] As a classical example in which compelled speech was considered more egregious than prohibited speech, one is reminded of Sir Thomas More, the Lord High Chancellor of

Appellants have effectively presented the compelled speech argument. The Foundation will not repeat their reasoning but instead calls the Court's attention to a new appeals court decision based on a very similar fact pattern. On January 5, the Fourth Circuit held that a Baltimore ordinance requiring pregnancy clinics that do not offer or refer for abortion to disclose that fact through signs posted in their waiting rooms, violated the First Amendment. *Greater Baltimore Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Baltimore,* No. 16-2325, (4th Cir. Jan. 5, 2018)[3].

England, who in 1535 faced death by beheading for refusing to sign the Succession to the Crown Act by which he would acknowledge King Henry VIII as head of the Church of England. More was willing to remain silent, even understanding the legal maxim *qui tacet consentire videtur* ("one who keeps silent seems to consent"), but he would not affirm what he believed to be false. *Thomas More's Trial by Jury: A Procedural and Legal Review with a Collection of Documents* 22 *et seq.* (Henry Ansgar Kelly, Louis W. Karlin, Gerard Wegemer, eds., 2011).

[3] The Fourth Circuit's opinion states that their holding does not conflict with the Ninth Circuit's decision in *Harris,* noting that the California law received a lower level of scrutiny because it applied only to licensed facilities, and that the California law also required unlicensed clinics to post a notice that they were not licensed but that notice did not mention abortion. *Greater Baltimore,* at 20 n.3. Although the Fourth Circuit decision may not be directly relevant to the California notice required of unlicensed clinics, it is most relevant to the notice required of licensed clinics, because both specifically mention abortion.

The Fourth Circuit concluded that the Baltimore ordinance constitutes compelled speech because it "compel[s] a politically and religiously motivated group to convey a message fundamentally at odds with its core beliefs and mission." *Id.* at 5. The Court noted further that an integral component of freedom of expression is "the right not to utter political and philosophical beliefs that the state wishes to have said." *Id.* at 16 (citing *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)).

> This Court has in the past struck down attempts to compel speech from abortion providers. [*Stuart v. Camnitz*, 114 F.3d 238, 242 (4th Cir. 2014).] And today we do the same with regard to compelling speech from abortion foes. We do so in belief that earnest advocates on all sides of this issue should not be forced by the state into a corner and required essentially to renounce and forswear what they have come as a matter of deepest conviction to believe.

Greater Baltimore, slip op. at 20.

The Fourth Circuit concluded:

> Weaponizing the means of government against ideological foes risks a grave violation of our nation's dearest principles: "that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word

> or act their faith therein." *Barnette*, 319 U.S. at 642. It may be too much to hope that despite their disagreement, pro-choice and pro-life advocates can respect each other's dedication and principle. But, at least in this case, as in *Stuart*, it is not too much to ask that they lay down the arms of compelled speech and wield only the tools of persuasion. The First Amendment requires it.

Id. at 20-21.

II. Strict Scrutiny is the Proper Standard of Review for the Compelled Speech in This Case.

Although it recognized that the California law involved content-based discrimination, the Ninth Circuit chose to apply only intermediate scrutiny because it regarded the pregnancy center's communications as commercial or professional speech. But, as this Court's precedents and the Fourth Circuit's recent *Greater Baltimore* decision recognize, the offer and provision of free pregnancy services is neither commercial speech nor professional speech. The notice California requires licensed clinics to post in clear view of their patients telling them where to obtain abortion information is likely to be construed as the pregnancy center's message. That message certainly is not mere commercial or professional speech. Because it tells patients how to obtain information about a medical

procedure the Appellants regard as murder, it is a very serious ideological statement.

The Fourth Circuit stated in *Greater Baltimore* that "commercial speech is 'usually defined as speech that does no more than propose a commercial transaction.'" Slip op. at 9 (quoting *United States v. United Foods, Inc.*, 533 U.S. 405, 409 (2001)). The Court said further that to determine whether speech is commercial, one must ask "(1) is the speech an advertisement; (2) does the speech refer to a specific product or service; and (3) does the speaker have an economic motivation for the speech." *Greater Baltimore*, slip op. at 10 (quoting *Greater Baltimore Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Baltimore*, 721 F.3d 264, 285 (4th Cir. 2013) (en banc)).

Answering these questions, the Fourth Circuit noted that the pregnancy center is a non-profit Christian organization that does not charge for its goods or services. *Greater Baltimore*, slip op. at 5, 11. "A morally and religiously motivated offering of free services cannot be described as a bare 'commercial transaction.'" *Id.* at 10. Likewise, Appellants in this case offer free pregnancy services not for commercial gain but because of their sincere moral, ideological, political, and religious convictions. Opening Brief, at 2.

Even if money were involved, that does not necessarily invoke the commercial speech doctrine. A pro-abortion or anti-abortion speech or book is fully protected by the First Amendment. That protection

does not diminish merely because the speaker, author, publisher or bookseller receives financial remuneration. The commercial speech doctrine does not apply to messages that have significant moral, ideological, political, or religious implications.

The Foundation further reiterates its argument that compelled speech is an even more egregious First Amendment violation than prohibitions on speech. For this reason, if there is any doubt as to whether an instance of compelled speech is "pure speech" or commercial/professional speech, that doubt should be resolved in favor of applying strict scrutiny.

III. The FACT Act Discriminates on the Basis of Both Content and Viewpoint.

The Fourth Circuit's *Greater Baltimore* decision recognized that the signs required by the Baltimore ordinance were content-based and viewpoint-based.

> The compelled speech at issue here raises particularly troubling First Amendment concerns. At bottom, the disclaimer portrays abortion as one among a menu of morally equivalent choices. While that may be the City's view, it is not the Center's. The message conveyed is antithetical to the very moral, religious, and ideological reasons the Center exists. Its avowed mission is to "provid[e] alternatives to abortion." ... Its "pro-life

> Christian beliefs permeate all that the Center does."

Greater Baltimore, slip op. at 14-15.

The Fourth Circuit further stated:

> Particularly troubling in this regard is (1) that the ordinance applies solely to speakers who talk about pregnancy-related services but not to speakers on any other topic; and (2) that the ordinance compels speech from pro-life pregnancy centers, but not other pregnancy clinics that offer or refer for abortion.

Id. at 17-18. The court drove home its point: "A speech edict aimed directly at those pregnancy clinics that do not provide or refer for abortions *is neither viewpoint nor content neutral.*" *Id.* at 18 (emphasis added).

The signs required by California constitute much more egregious viewpoint discrimination than those required by Baltimore. The Baltimore signs say that the pregnancy center does not perform or refer for abortion. The California signs require that the pregnancy center affirmatively inform its visitors where they can obtain information about abortion. Such a compulsory statement can easily be understood as facilitating or expressly endorsing abortion.

Further, the mandatory signage requirement applies only to pro-life pregnancy centers. Abortion clinics and pregnancy centers that refer patients for abortions are not required to post signs telling patients where they may obtain pro-life counseling or information about fetal development and alternatives to abortion.

By requiring pro-life clinics to post signs telling patients where to find information about abortion clinics but not requiring abortion clinics to post signs telling patients where to find pro-life alternatives, the State of California has clearly taken sides in the abortion debate. This bias violates the neutrality required of government in the marketplace of ideas. Government has some limited flexibility to advance ideas and policies by what is called "government speech," but it may not advance those policies by prohibiting private speech, much less by compelling individuals to speak in support of the government's position. For example, the State of New Hampshire may adopt "Live Free or Die" as its motto and place that motto on license plates, but the State may not compel individuals to display that motto. *Wooley v. Maynard,* 430 U.S. 705 (1977) (holding that New Hampshire may not prohibit Maynard, a Jehovah's Witness, from covering the motto). Even if California has a compelling interest in informing women of the availability of abortion, it may fulfill that interest in many ways other than compelling pro-lifers to carry the pro-abortion message.

Two weeks before the grant of certiorari in this case, a California trial court enjoined the FACT Act

for violating the state constitution. *Scharpen Foundation, Inc. v. Harris*, No. RIC1514022 (Cal. Sup. Ct. Oct. 30, 2017), https://goo.gl/TQvKmX. The court noted that the state had made almost no effort to disseminate on its own the message that it commanded the crisis pregnancy centers to deliver under penalty of law. *Scharpen*, slip op. at 6-7. In fact, the Act requires no one except licensed pro-life pregnancy centers to display the pro-abortion message. Thus, one could reasonably surmise that the purpose of the legislation was not so much to deliver the state's message as to occlude and obstruct the pro-life message of the pregnancy centers. By enacting such one-sided legislation, California has demonstrated a clear animus against crisis pregnancy centers and persons of pro-life persuasion.

IV. Weighing the Right to Abortion Against the Right to Freedom of Speech

Although this case primarily addresses compelled speech about abortion and not this Court's abortion jurisprudence per se, the Foundation notes that the Ninth Circuit relied on the abortion decisions to justify its holding that the mandatory notice provision satisfied intermediate scrutiny. "California has a substantial interest in the health of its citizens, including ensuring that its citizens have access to and adequate information about *constitutionally-protected medical services like abortion*." *NIFLA v. Harris*, 839 F.3d 823, 841 (9th Cir. 2016) (emphasis added). Further, in justifying its holding that the statute was narrowly tailored, the Ninth Circuit explained that "many of the choices facing pregnant

women are time-sensitive, such as a woman's right to have an abortion before viability." *Id.* at 842 (citing *Planned Parenthood v. Casey*, 505 U.S. 833, 846 (1992)).

Thus, the relative weight of the abortion right when counterposed against the First Amendment right of freedom of speech is relevant to this Court's decision.

A. The Abortion "Liberty" Rests on Weak Legal Ground.

Because the purpose of the Fourteenth Amendment is to extend personhood to those previously considered non-persons, it cannot logically be construed to provide for the mass destruction of innocent human life. A central purpose of the Civil War amendments was to forbid any state from treating a human being as property that could be disposed of at the will of its owner. U.S. Const. amends. XIII-XV. Yet legalized abortion, supposedly a Fourteenth Amendment "liberty," treats unborn human life as disposable property. *See Casey*, 505 U.S. at 869 (stating that "implicit in the meaning of liberty" is a "woman's right to terminate her pregnancy before viability"). That the Civil War Amendments were ratified to authorize the slaughter of an entire class of innocent human beings is absurd. One scholar notes the contradiction in "insist[ing] that the Fourteenth Amendment, written to secure the fundamental rights of human nature to all persons, prohibited states from protecting one class of human beings from the private use of lethal force."

Justin Buckley Dyer, *Slavery, Abortion, and the Politics of Constitutional Meaning* 69-70 (2013). The concept that the "realm of personal liberty which the government may not enter," *Casey*, 505 U.S. at 847, includes the place where a hired doctor destroys an unborn child is equally ridiculous.

Furthermore, the Court should be aware that recent scholarship indicates that the abortion liberty declared in *Roe v. Wade*, 410 U.S. 113 (1973), was based upon a falsified history. Two premises of *Roe* were that abortion had historically been a common-law liberty and that the primary purpose of laws adopted in the mid-nineteenth century outlawing abortion was to protect the mother's health, not the child that she carried. Both were false. *See* Dyer, *supra*, at 105-132 (exposing the dishonest history that the Court relied upon to justify creation of the abortion right).

B. The Enumerated Right of Freedom of Speech Should Take Priority Over the Unenumerated Right to Abortion.

In contrast to the dubious abortion "liberty," the First Amendment expressly states that "Congress shall make no law ... abridging the freedom of speech." "[E]xpression on public issues 'has always rested on the highest rung of the hierarchy of First Amendment values.'" *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) (quoting *Carey v. Brown*, 447 U.S. 455, 467 (1980)). Thus, as a

Fourteenth Amendment limitation on state action,[4] the First Amendment inherently carries more weight than the conjured right to abortion. "It is one thing for the Court ... to invalidate legislation found to be in clear violation of an explicit constitutional command; it is quite another for the Court to claim the authority to invalidate legislation based on rights not mentioned in the Constitution." David Smolin, *Fourteenth Amendment Unenumerated Rights Jurisprudence: An Essay in Response to* Stenberg v. Carhart, 24 Harv. J. L. & Pub. Pol'y 815, 817 (2001).

V. The Spiritual Root of the Attack on Pro-Life Pregnancy Centers

The California law implicitly equates abortion with child birth as a health service. But giving life to a child is a qualitatively different act than killing a child.

The abortion industry is a money-making enterprise. Planned Parenthood, the behemoth of the industry,[5] sets abortion quotas for its affiliates[6] and,

---

[4] Rep. John Bingham (R-OH), the drafter of the relevant portion of the Fourteenth Amendment, stated that "the privileges or immunities of citizens of the United States" referenced in the amendment included "the personal rights guarantied and secured by the first eight amendments of the Constitution." *Cong. Globe*, 39th Cong.,1st Sess. 2765 (1866).

[5] "Planned Parenthood has become an abortion behemoth, the nation's largest abortion chain ....", Randall K. O'Bannon, *40 Years: Planned Parenthood Becomes Abortion Empire*, Nat'l Right to Life News (Winter 2013), https://goo.gl/Ro5vpt.

[6] "Every center had a goal for how many abortions they would do ... needed to do." Alliance Defending Freedom, *Does*

to augment its bottom line, apparently traffics in the organs of the babies it kills.[7] Crisis pregnancy centers are anathema to the abortion industry not only because they impact the bottom line by diverting customers away from the suction-machine solution, but also because their very existence constitutes a godly rebuke to the evil performed in the name of "women's rights."

As abortion has continued with constitutional protection, millions of women have engaged in the practice, in part because the exercise of a constitutional right has always been deemed a privilege of American citizenship. Although the Constitution does not mention abortion, many trust that what the law protects is also moral, only to awaken after the experience to a lifetime of remorse,

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Planned Parenthood Have Abortion Quotas? (Jan. 17, 2014) (interview of former clinic manager Sue Thayer), https://goo.gl/zzV639; "We were told on a regular basis: 'You have a quota to meet to keep this clinic open.'" Live Action, *Planned Parenthood's Abortion Quotas* (Feb. 16, 2017) (interview of former Planned Parenthood nurse, Marianne Anderson), https://goo.gl/CqVy3F. *See* Bradford Richardson, *Planned Parenthood Sets 'Abortion Quotas,' Former Employees Say*, Washington Times (Feb. 7, 2017), https://goo.gl/xgfJ4c.

[7] *See Human Fetal Tissue Research: Context and Controversy*, S. Doc. No. 114-27, at 35 (2016) (detailing that a tissue-procurement middleman, who paid Planned Parenthood $60 for an aborted baby, separately resold the brain, eyes, liver, thymus, and lungs for over $2,000); *Final Report of the House Select Investigative Panel of the Energy & Commerce Committee*, at 297-352 ("Case Studies of the Fetal Tissue Industry – Planned Parenthood"), 352-60 ("Changing the Method of Abortion Procedure to Obtain More Fetal Tissue") (Dec. 2016), https://goo.gl/BbZcbT.

shame, and horror as their maternal nature recoils at the crime committed against their own posterity.[8]

To evade this emotional nightmare, many seek to justify the deed by becoming ardent supporters of the practice.[9] Thus, "most who defend the underlying practice become self-righteous, overly defensive, or clinically detached from the underlying brutality ...." Smolin, *supra*, at 838. *See* Erin Lawson, *Yesterday I Had an Abortion*, Elephant Journal (Feb. 8, 2017), https://goo.gl/rUpP4f (stating that "I have not learned to be ashamed of my choice. On the contrary, my choice has empowered me ....").[10] Ms. Lawson is

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[8] *See, e.g.*, Priscilla K. Coleman, et al., *Women Who Suffered Emotionally from Abortion: A Qualitative Synthesis of Their Experiences*, 22 J. Amer. Physicians & Surgeons (Winter 2017); Elizabeth Ring-Cassidy & Ian Gentles, *Women's Health After Abortion: The Medical and Psychological Evidence* (2003); Theresa Burke, *Forbidden Grief: the Unspoken Pain of Abortion* (2002); Bill & Sue Banks, *Ministering to Abortion's Aftermath* (1982).

[9] Cecile Richards had an abortion before becoming President of Planned Parenthood. *See* Cecile Richards, *Ending the Silence That Fuels Abortion Stigma*, Elle (Oct. 16, 2014), https://goo.gl/xb7K18. Jane Bovard, who managed the first abortion facility in Fargo and later opened her own, aborted her fifth child in 1974. Robin Huebner, *Abortion protesters, proponents reflect on decades of Fargo clinic struggles as nation marks 40 years of* Roe v. Wade, The Forum (Jan. 20, 2013).

[10] On the other hand, some women who have been deeply involved in abortion have later become ardent pro-lifers. Norma McCorvey, the "Jane Roe" of *Roe v. Wade*, repented of being the face of the abortion industry and became ardently pro-life. Her encounter with the almost aborted seven-year-old daughter of a pro-lifer that befriended her changed her heart. "I was forever changed by this experience," she wrote. "Abortion was no longer an 'abstract right.' It had a face now, in a little girl named

entitled to be proud of her choice. But she is not entitled to force pro-life crisis pregnancy centers to echo her choice with state-compelled messages, which is exactly what California seeks to do here.

CONCLUSION

The State of California has deliberately targeted pro-life crisis pregnancy centers by compelling them to display a highly ideological message informing their patients where to obtain information about an operation that they consider to be murder. Because this compelled ideological speech is neither content-neutral nor view-point neutral, it must be accorded strict scrutiny.

By upholding the FACT Act, the Ninth Circuit has elevated the alleged right to abortion above the constitutionally enumerated First Amendment right of freedom of speech.

Accordingly, the judgment of the Ninth Circuit should be reversed.

Emily." Norma McCorvey with Gary Thomas, *Roe v. McCorvey*, http://www.leaderu.com/common/roev.html.

Respectfully submitted,

JOHN A. EIDSMOE
MATTHEW J. CLARK
Counsel of Record
FOUNDATION FOR
MORAL LAW
One Dexter Avenue
Montgomery, AL 36104
(334) 262-1245
matt@morallaw.org

Counsel for *Amicus Curiae*

No. 16-1140

In the Supreme Court of the United States

NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES, dba NIFLA, *et al.*,
Petitioners,

v.

XAVIER BECERRA,
Attorney General of California, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF FREEDOM X AND CRISIS PREGNANCY CLINIC OF SOUTHERN CALIFORNIA AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Mitchell Keiter
Keiter Appellate Law
The Beverly Hills Law Building
424 South Beverly Drive
Beverly Hills, CA 90212
(310) 553-8533
Affiliated Counsel
with Freedom X

William J. Becker, Jr.
Counsel of Record
FREEDOM X
11500 Olympic Blvd.
Suite 400
Los Angeles, CA 90064
(310) 636-1018
FreedomXLaw@gmail.com

Counsel for Amici Curiae

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

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INTERESTS OF AMICI CURIAE[1]

Amicus Freedom X is a public interest law firm dedicated to protecting the freedom of religious, political and intellectual expression. Freedom X and its donors and supporters are vitally interested in the outcome of this case inasmuch as they believe that the California Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act (the FACT Act or the Act) requires pregnancy centers to promote a message counter to their raison d'etre – protecting the lives of the unborn, discouraging abortion and fostering a respect for the right to life enshrined in America's founding principles. The FACT Act burdens the expressive rights of pregnancy centers regarding one of America's most contentious political and religious policy issues by compelling them to promote by words and action the very evil they are established to counter. This is precisely the type of attack on political and religious expression Freedom X works to resist.

Amicus Crisis Pregnancy Clinic of Southern California (CPCSC), the first established clinic of its kind in the state, is registered with the IRS as a 501(c)(3) charitable non-profit operating facilities in Hollywood and Glendale, California. CPCSC exists to

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[1] Counsel for all parties received at least 10 days notice of the intent to file this brief. Petitioners have submitted blanket consent to the filing of amicus briefs in this case. Respondents have granted consent to amici curiae for the filing of this brief. No counsel for a party authored this brief in whole or in part. No person, other than amici curiae, their members, or their counsel, made a monetary contribution that was intended to fund preparing or submitting this brief.

provide alternatives to women with unplanned pregnancies free of charge. CPCSC provides women with tens of thousands of dollars annually in maternity and healthcare financial assistance. The outcome of this case will have a direct impact on CPCSC's ability to help women successfully carry their pregnancies to term. The FACT Act prevents CPCSC from demonstrating results necessary to raise donations to finance its operations and conflicts with its mission statement and deeply held religious and philosophical beliefs.

STATEMENT OF THE CASE

Amici incorporate by reference the Statement of the Case presented in the Brief for the Petitioners.

SUMMARY OF ARGUMENT

Our political system and cultural life rest upon the ideal that each person should personally decide which ideas are worth expressing and adopting, and the State may not hinder or aid parties in their efforts to move public opinion and achieve their goals. *Knox v. Serv. Emp. Int'l Union, Local 1000*, 567 U.S. 298, 322 (2012); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994). But laws requiring private parties to present a state-preferred message risk governmental manipulation of the marketplace of ideas. *Turner*, at 641. By placing the government's thumb, if not its fist, on the scale of debate regarding the moral legitimacy of abortion, the FACT Act violates the First Amendment.

Compelling speech infringes individual conscience as much as forbidding it, if not more. *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633 (1943). The state therefore may not force unwilling students to

salute the flag, or force drivers to disseminate a message they oppose on their private property "for the express purpose that it be observed and read by the public." *Id.* at 642; *Wooley v. Maynard*, 430 U.S. 705, 713 (1977). This is precisely what the FACT Act forces centers to do. The instant compulsion is worse than that in *Wooley*. Because all New Hampshire drivers received a license plate from the state, they knew the message was the state's and not the driver's own. But only the centers receive the script from the state, so visitors will reasonably perceive the message to be the center's own. The Ninth Circuit could uphold the Act only by completely ignoring the two most apposite compelled speech precedents: *Barnette* and *Wooley*.

The Act effects viewpoint discrimination, which is impermissible unless the government is the speaker. *Matal v. Tam*, 137 S. Ct. 1731, 1768 (2017) (Kennedy, J., concurring). The Ninth Circuit categorized the Act as viewpoint-neutral because it applied to "all clinics, regardless of their stance on abortion or contraception." *NIFLA v. Harris*, 839 F.3d 823, 836 (9th Cir. 2016). But viewpoint neutrality mainly concerns *what is said*, not *who says it*. This Court invalidated the laws in *Barnette* and *Wooley*, even though they applied to all students and drivers, regardless of their stance on the flag and freedom. Under the Ninth Circuit's reasoning, it would be viewpoint-neutral to force all drivers to display a sticker saying, "President Trump is Making America Great Again," so long as the law compelled Democrats, Republicans, and Independents alike, "regardless of their stance" on the president's performance.

Courts review apply strict scrutiny to even viewpoint-neutral regulations that are content-based, like the FACT Act. *Reed v. Town of Gilbert, Arizona*, 135 S. Ct. 2218, 2226 (2015). Courts may apply a lesser level of review to speech in a professional context, but that exception applies where there is a pecuniary motive (*In re Primus*, 436 U.S. 412, 430 (1978)) or a fiduciary nexus, so the professional exercises judgment in light of the client's individual needs and circumstances. *Lowe v. SEC*, 472 U.S. 181, 232 (1985) (White, J. concurring). Neither applies here; the centers act *pro bono* to advance the idea of protecting life rather than to make money, and the notices present a standardized script to all visitors, regardless of their individual needs and circumstances.

California further creates an unconstitutional election, conditioning the centers' exercise of one constitutional right on their forfeiting another. By exempting from its compelled speech requirement those centers that prescribe all FDA-approved contraceptive devices, it forces centers wishing to exercise their right not to prescribe all contraceptives to forfeit their right to free speech, or, alternatively, forces centers to forfeit their right not to prescribe in order to preserve their right to control their message. Either way, the Act unconstitutionally burdens the exercise of a constitutional right.

The Compelled Abortion Referral also operates as an unconstitutional penalty on speech by imposing the obligation to advertise state-funded abortions only as a consequence of (and effective penalty for) centers' engaging in their own pro-life speech. However "effective" the Act may be in ensuring pregnant

women's awareness of abortion options, the state may not burden a speaker's own expression by forcing it to convey an opposing message as a consequence, even where -- unlike here -- it is clear it is the opposing viewpoint. *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256 (1974). As the state may not burden speech by compelling speakers to subsidize opponents' messages; a fortiori, it may not compel unwilling speakers to express the message themselves. *Arizona Free Enterprise Club's Freedom PAC v. Bennett*, 564 U.S. 721, 742 (2011); see also *Pac. Gas & Elec. v. Pub. Utils. Comm'n of Cal*, 475 U.S. 1, 15 (1986) [provision "forces the speaker's opponent — not the taxpaying public — to assist in disseminating the speaker's message."]

The FACT Act thus violates centers' free speech, both directly, by compelling speech, and indirectly, by requiring centers to forfeit their right not to prescribe contraception, and to refrain from their own affirmative pro-life speech, as conditions for avoiding the Compelled Abortion Referral.

The Act cannot survive strict, or even intermediate scrutiny. The goal of providing contraceptive access did not justify compelling unwilling actors to subsidize such access in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 [189 L. Ed. 2d 675]. The instant interest is even weaker than that in *Burwell*; whereas some women may have been unable to obtain the contraception absent insurance, the instant case concerns only information about how and where to obtain an abortion, which may be found easily through an internet search within minutes.

Because the government can more easily regulate conduct than speech, a finding that a pregnant woman's access to abortion justifies compelling a pro-life center to engage in *speech* facilitating it would necessarily compel the conclusion that her interest in access justifies compelling pro-life individuals to engage in the *conduct* of performing abortions directly. This would radically redefine the nature of constitutional "rights." Protecting rights has traditionally placed distance between the individual and the government, whereas here the state "inserts itself into the private and sensitive relationship between a woman and her physician." *The Scharpen Found., Inc. v. Harris,* No. RIC1514022 (Cal. Super.Ct. Oct. 30, 2017) 15.[2] An individual's right to buy firearms or pornographic videos does not create on an unwilling vendor a duty to provide them — or to post on her door information about where one can find them.

ARGUMENT

I. The Ninth Circuit's decision ignored the two most apposite compelled speech precedents: *Barnette* and *Wooley*.

This Court has long recognized that forcing a speaker to express a message violates the First Amendment as much as forbidding a message, if not more. See *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633 (1943), holding "involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence." *Barnette* thus invalidated a West Virginia law compelling students to salute the

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[2] The opinion appears in the Petitioner's Brief as an addendum.

flag, and governed the decision in *Wooley v. Maynard*, 430 U.S. 705, 714-15 (1977), which struck down a New Hampshire law compelling drivers to display the message "Live Free or Die." That law required drivers to use their private property as a "billboard" for the state-prescribed message. *Id.* at 715. The FACT Act does the same, and is likewise unconstitutional. The Ninth Circuit's opinion could uphold the Act **only by completely ignoring both *Barnette* and *Wooley*** -- the two most apposite precedents.

Compelling speech, which "invades the sphere of intellect and spirit," produces an effect more injurious than restricting it. *Wooley*, 430 U.S. at 715, quoting *Barnette*, 319 U.S. at 642. If New Hampshire had simply forbidden Maynard from driving with a license plate indicating "Slavery is Better than Death," and thereby denied him the chance to express his preferred viewpoint, it would still have left him with the opportunity to use his vehicle to express other messages. But Maynard, like the centers in this case, was forced to affirmatively disseminate a message he found "morally, ethically, religiously and politically abhorrent." *Wooley*, 430 U.S. at 713. Restricting speech cannot create a comparable injury, where the message that the individual must present externally contradicts the one he believes internally.

The instant compulsion is even less defensible than that in *Wooley*, because here reasonable people will attribute the compelled message to the centers and not to the government. In *Wooley*, *every New Hampshire driver* received the license plate from the state, so they all knew it was a state-prescribed message; no one thought Mr. Maynard played any role in its creation.

But only pregnancy centers receive the script from the state, and thus know it is a state-generated message. A reasonable visitor to a center will perceive the message is the center's own. The instant law, as a state court reviewing the law under the California Constitution observed, "forces the clinic to point the way to the abortion clinic and can leave patients with the belief they were referred to an abortion provider by that clinic." *Scharpen*, at 13-14.

II. The compelled speech was viewpoint-discriminatory.

Only in the narrow context of government speech is viewpoint discrimination permissible. *Matal v. Tam*, 137 S. Ct. 1731, 1768 (2017) (Kennedy, J., concurring). Because the script compelled by the FACT Act was not government speech, the Ninth Circuit could not uphold its constitutionality unless it found it was viewpoint-neutral rather than viewpoint-discriminatory. The court's opinion thus focused first on trying to refute the viewpoint-discrimination description and categorize the law as viewpoint-neutral. *Harris*, 839 F.3d 834-36. Its effort was unpersuasive.

In denying there was viewpoint-discrimination, the Ninth Circuit cited the law's universal application, noting it "applies to all clinics, regardless of their stance on abortion or contraception." *Harris*, 839 F.3d at 836. But viewpoint discrimination turns on *what* is said, not *who* says it. Universal application did not save the compulsory flag-salute in *Barnette*, even though it applied to all students, regardless of their stance on the flag. It did not save the compulsory license display in *Wooley*, even though it applied to all drivers, regardless of their stance on freedom. Under

the Ninth Circuit's reasoning, it would be viewpoint-neutral for the federal government to require all drivers to display a sticker affirming, "President Trump is Making America Great Again," so long as it applied to all drivers, Democrats, Independents, and Republicans alike, "regardless of their stance" on the president's performance.

As viewpoint discrimination concerns the content of the speech more than the identity of the speaker, universal application does not establish viewpoint neutrality, as the Ninth Circuit itself recognized in *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002). *Conant* struck down, as viewpoint-discriminatory, a law forbidding speech that expressed a specific viewpoint (marijuana could be therapeutic), even though the law applied to all doctors, regardless of their stance on marijuana. *Id.* at 637. The only meaningful difference is that *Conant* involved compelled silence and *Harris* involves compelled speech, but the First Amendment opposes both. *Knox*, 567 U.S. 298, 309.

The Ninth Circuit also tried to refute the concern of viewpoint discrimination by asserting the Act "does not convey any opinion" because it does not imply a "preference" for any specific service (e.g. abortion). *Harris*, 839 F.3d at 836. But speech may express a "viewpoint" even without signaling a "preference." The "Live Free or Die" message in *Wooley* did not express a *preference* for dying; it simply referenced the prospect with less abhorrence than Mr. Maynard felt, or wished to communicate. The FACT Act likewise presents abortion not so much as a "preference" but as a legitimate option for consideration, contrary to the

centers' position. See *Greater Baltimore Ctr. for Pregnancy Concerns, Inc. v. Mayor of Baltimore,* No. 16-2325, 2018 WL 298142 at *5 (4th Cir. Jan. 5, 2018) at 14 (*Greater Baltimore*): "[T]he disclaimer portrays abortion as one among a menu of morally equivalent choices. While that may be the City's view, it is not the Center's."

Regardless of whether the Compelled Abortion Referral describes abortion as an equally legitimate option (as childbirth) or as just a sufficiently legitimate option, it remains a viewpoint, even though the legal availability of abortion may be characterized as not an "opinion" but a "fact." The First Amendment bars compelled expression of either. *Rumsfeld v. Forum for Acad. and Institutional Rights, Inc.*, 547 U.S. 47, 61-62 (2006). The speaker's right to choose her own speech extends "not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid." *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, 515 U S. 557, 573 (1995). The state therefore may not compel a speaker favoring a government project to describe cost overruns for past projects, or compel a speaker favoring an incumbent candidate to report the candidate's travel budget. *Riley v. National Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 798 (1988). Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech. *Id.* at 795.

Accordingly, effective speech requires that speakers and not the government decide both what to say and how to say it. *Riley*, 487 U.S. at 791. Like our adversarial system of litigation, our adversarial system of public debate works best when all debate

participants can present their best case to the public. The FACT Act hindered the centers from doing that. *Knox*, 567 U.S. 298, 322.

Because the compelled message was not viewpoint-neutral, it violated the First Amendment. *Matal*, 137 S. Ct. 1731, 1768 (Kennedy, J., concurring.)

III. Even if the FACT Act were a content-based, viewpoint-neutral regulation, strict scrutiny must apply.

Laws that compel speakers to utter or distribute speech bearing a particular message are subject to the "most exacting scrutiny." *Turner Broad.*, 512 U.S. 622, 642. Strict scrutiny governs the FACT Act because it is a content-based regulation, even if it is viewpoint-neutral. *Reed v. Town of Gilbert, Arizona*, 135 S. Ct. 2218, 2226 (2015).

Just as the Ninth Circuit failed to perceive the strict scrutiny imperative in reviewing a content-based regulation in *Reed v. Town of Gilbert, Arizona*, 707 F.3d 1057 (9th Cir. 2013), *rev'd*, *Reed v. Town of Gilbert, Arizona*, 135 U.S. 2218, it failed to perceive the strict scrutiny imperative in reviewing the content-based FACT Act. The Circuit cited its own decision in *United States v. Swisher*, 811 F.3d 299 (9th Cir. 2016) (en banc), to support its assertion that "not all content-based regulations merit strict scrutiny." *Harris*, 839 F.3d at 837. But *Swisher*'s examples of content-based speech that don't merit strict scrutiny were forms of speech that merit no constitutional protection at all (e.g. fraud, child pornography, true threats). *Swisher*, at 313. That some forms of speech fall outside the protective reach of the First Amendment offers no basis

for reducing the level of scrutiny for speech lying within it.

The Ninth Circuit then concluded the compelled notices warranted only intermediate scrutiny because they concern "professional speech." *Harris*, 839 F.3d at 839-41. But not all speech by professionals receives reduced protection. This Court has permitted greater regulation of professional speech where there is a *pecuniary motive* and/or a *fiduciary nexus*. As to the former consideration, the Court has distinguished between providing professional service *pro bono*, "to express personal political beliefs," and professional service offered to "derive financial gain." *In re Primus*, 436 U.S. 412, 422 (1978). As to the latter, the Court has focused on whether there is a "personal nexus" between the professional and client, such that the level of review depends on whether the professional exercises judgment based on the individual needs and circumstances of a client with whose circumstances he is directly acquainted. *Lowe v. SEC*, 472 U.S. 181, 232 (1985) (White, J. concurring). But the instant speech involves neither a pecuniary motive nor a fiduciary nexus, and thus requires strict scrutiny.

A. The centers have no pecuniary motive.

This Court has contrasted the reduced protection available for professional speech made with a pecuniary motive with the fuller protection available for speech expressed "to advance 'beliefs and ideas.' " *Primus*, 436 U.S. 412, 438 n.32. An attorney there advised a woman she could contact the ACLU for free representation in possible litigation regarding her sterilization. *Id.* at 414-16. The state disciplined the attorney for the referral. *Id.* at 417-21. The precedent

is remarkably apposite, right down to the subject matter; both the attorney in *Primus* and the pregnancy center staff here acted to oppose the state's role in suppressing human life.

The Court decided *Primus* along with a companion case, which applied intermediate scrutiny to attorneys' in-person solicitation of professional employment. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978). *Ohralik* authorized tighter regulation of such speech due to the inherent risk that counsel with a financial motive will subordinate the client's best interests to his own pecuniary interests. *Id.* at 461 n.19. But *Primus* involved *pro bono* representation, which the Court found materially affected the permissible level of state regulation. *Primus*, 436 U.S. at 422.

> Appellant was communicating an offer of free assistance by attorneys associated with the ACLU, not an offer predicated on entitlement to a share of any monetary recovery. And her actions were undertaken to *express personal political beliefs* and to advance the civil-liberties objectives of the ACLU, rather than to *derive financial gain*.

Primus, 436 U.S. at 422 (emphasis added).

Public interest organizations like the ACLU and NAACP differ from firms that exist "for the primary purpose of financial gain." *Primus*, 436 U.S. at 431. The pregnancy centers, which do not charge clients, and operate to foster respect for human life rather than generate revenue, resemble the former, not the latter. *Primus* prescribed disparate levels of review for pro bono speech to "express personal political beliefs,"

made "in the context of political expression and association," and for-profit speech, which "simply 'proposes a commercial transaction,' " and is expressed to "derive financial gain." *Id.* at 422, 437-38. Although reduced scrutiny governs speech expressed for the "advancement of one's own commercial interests," strict scrutiny applies to "expression intended to advance 'beliefs and ideas.'" *Id.*, at 438, n.32, citing *Ohralik*, 436 U.S. 447 (1978).

The speech at issue here deserves such protection. Just as the ACLU was not "motivated by considerations of pecuniary gain" but by "its widely recognized goal of vindicating civil liberties," the centers here are motivated by their widely recognized goal of protecting unborn human life. See *Primus*, 436 U.S. at 430. The Ninth Circuit unpersuasively rejected reliance on *Primus*, first observing "Appellants have positioned themselves in the marketplace as pregnancy clinics." *Harris*, 839 F.3d at 841. Of course, the centers did not position themselves in the *marketplace* at all, as they do not charge for their work.[3]

The Ninth Circuit actually noted the centers had no pecuniary motive, but, contrary to *Primus*, found that meaningless. It concluded the centers are not, like the ACLU, "engaged in 'political expression and association' " and their "non-profit status does not change the fact that they offer medical services in a

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[3] If the Circuit meant to note the centers might have attracted clients who otherwise might have visited other clinics, this would not differ from *Primus*, where the sterilized women also might have contacted other counsel but for Primus's referral. *Primus*, 436 U.S. at 416.

professional context." *Harris*, 839 F.3d at 841. This in no way distinguishes *Primus*, as the ACLU offered legal "services in a professional context." The centers here, like the ACLU in *Primus*, express personal political beliefs, to advance a public objective (fostering respect for life and promoting childbirth), rather then derive pecuniary gain. *Primus*, 436 U.S. at 422. This case differs from *Primus* only in that the ACLU litigated to oppose sterilization and the centers counsel to oppose abortion.

B. There was no fiduciary nexus.

The fiduciary nature of the professional-client relationship also justifies greater state regulation. *Lowe v. SEC*, 472 U.S. 181. Petitioner Lowe had been convicted of financial misconduct; to protect the public from further harm, he was not allowed to work as, or associate with, an investment advisor. *Id.* at 183-84. Lowe and others published a newsletter, which included commentary about investment markets, reviewed market indicators, and offered specific recommendations to buy, sell, or hold certain stocks. *Id.* at 185. The Court distinguished the circumstances under which an investment adviser could publish freely and those subjecting him to professional regulation. Resolving the case on statutory grounds, the Court held the law properly regulated advisers who provided "personalized advice attuned to a client's concerns," but could not limit advisers who did "not offer individualized advice attuned to any specific portfolio or to any client's particular needs." *Id.* at 208.

A three-justice concurrence determined this distinction was constitutional in nature. *Lowe*, 472 U.S. 181, 211 (White, J., concurring). Though it

recognized the state's legitimate role in regulating the practice of the professions, "At some point, a measure is no longer a regulation of a profession but a regulation of speech or of the press; beyond that point, the statute must survive the level of scrutiny demanded by the First Amendment." *Id.* at 230. The concurrence distinguished those cases where the adviser's speech was the (regulatable) practice of a profession and those where it enjoyed the highest level of protection.

> One who takes the affairs of a client personally in hand and purports to exercise judgment on behalf of the client *in the light of the client's individual needs and circumstances* is properly viewed as engaging in the practice of a profession. . . Where the personal nexus between professional and client does not exist, and a speaker does not purport to be *exercising judgment* on behalf of *any particular individual with whose circumstances he is directly acquainted*, government regulation ceases to function as legitimate regulation of professional practice with only incidental impact on speech; it becomes regulation of speaking or publishing as such, subject to the First Amendment's command that "Congress shall make no law ... abridging the freedom of speech, or of the press."

Lowe, 472 U.S. at 232 (White, J. concurring) (emphasis added).

The core distinction thus concerned the "nexus" between the "professional and client." Advice concerning a "client's individual needs and circumstances" was professional speech subject to state

regulation, but advice unrelated to "any particular individual with whose circumstances he is directly acquainted" was protected by the full force of the First Amendment, notwithstanding its relation to professional practice.

The *Harris* court misapplied the *Lowe* concurrence in citing just the first sentence of the above quotation: "One who takes the affairs of a client personally in hand and purports to exercise judgment on behalf of the client in the light of the client's individual needs and circumstances is properly viewed as engaging in the practice of a profession." *Harris*, 839 F.3d at 839, citing *Lowe*, 472 U.S. at 232 (White, J. concurring). This is the opposite of the speech at issue here, which is developed by the state, not a professional purporting to "exercise judgment on behalf of the client," and applies automatically, identically, and immediately to all visitors, regardless of their "individual needs and circumstances."

Instead of carefully applying the *Lowe* distinction, the Ninth Circuit drew a seemingly absolute rule that speech does not enjoy the broadest level of protection when it occurs "within the clinics' walls." *Harris*, 839 F.3d at 839-40. Ironically, this differed from the conclusion the Circuit drew regarding physician speech on marijuana, where it cited "the core First Amendment values of the doctor-patient relationship." *Conant v. Walters*, 309 F.3d 629, 637. But the speech at issue there, a recommendation that marijuana could help a particular patient, was actually more properly subject to regulation, as the doctor would provide it only to those patients "with whose circumstances he [was] directly acquainted."

That direct acquaintance likewise distinguishes the instant notices from the "informed consent" procedures, cited by the Circuit, which were reviewed in *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992), and its progeny.[4] These cases addressed disclosures made in the course of a personal, doctor-patient relationship to pregnant women considering an abortion. Truthfully advising one's patient, with whom the doctor is directly acquainted and on whose behalf the doctor exercises judgment, about the risks and consequences of a specific procedure resembles the unexceptional requirement that a doctor describe a drug's side effects before prescribing it. Such a requirement bears little relation to a compulsory notice, broadcast to anyone who enters a clinic, regardless of her "individual needs and circumstances." Courts have thus assumed and/or applied a higher level of scrutiny to state-prescribed notices like the one at issue here. See *Greater Baltimore*, 2018 WL 298142 at *6; *Evergreen Ass'n, Inc. v. City of New York*, 740 F.3d 233, 249-50 (2d. Cir. 2014); *Centro Tepeyac v. Montgomery Cnty.*, 722 F.3d 184, 189 (4th Cir. 2013); *Scharpen* at 14.

Though *Harris* cited *King v. Governor of N.J.*, 767 F.3d 216 (3d. Cir. 2014), to justify reduced protection for the centers, the Third Circuit there followed the same distinction governing *Lowe*, so speech to "the public at large" (or a personal opinion to a client) received full First Amendment protection, and only

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[4] *Stuart v. Camnitz*, 774 F.3d 238 (4th Cir. 2014); *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570 (5th Cir. 2012); *Planned Parenthood Minn. v. Rounds*, 530 F.3d 724 (8th Cir. 2008).

speech "based on the professional's expert knowledge and judgment" did not. *Id.* at 232; see also *Locke v. Shore*, 634 F.3d 1185, 1191 (11th Cir. 2011): "There is a difference, for First Amendment purposes, between regulating professionals' speech to the public at large versus their direct, personalized speech with clients." The notices compelled by the FACT Act, dictated by the state, are not personalized, as they provide the same information to every visitor. See *Edwards v. District of Columbia*, 755 F.3d 996, 1000 n.3 (D.C. Cir. 2014). Nor do they derive from a professional's "expert knowledge and judgment"; to the contrary, a high school could intern could satisfy the FACT Act by posting the notice on the wall with no more "expert knowledge" than needed to use scotch tape.

The Fourth Circuit thus synthesized the "fiduciary" and "pecuniary" strands of professional speech in a case concerning personalized service to a paying client. *Moore-King v. Cnty. of Chesterfield, Virginia*, 708 F.3d 560, 569 (4th Cir. 2013). *Moore-King* actually added a third consideration: "the relevant inquiry to determine whether to apply the professional speech doctrine is whether the speaker is providing [1] *personalized* advice [2] in a *private* setting [3] to a *paying* client or instead engages in public discussion and commentary." (emphasis added). None of these "3P's" appeared below.

C. The centers help form public opinion.

The state's role in regulating speech depends on its function. Presaging the *Primus* concern, Justice Jackson recognized "The modern state owes and attempts to perform a duty to protect the public from those who seek for one purpose or another to obtain its

money." *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J. concurring). But this protection does not extend to permit a state "guardianship of the public mind" through speech regulation: "[E]very person must be his own watchman for truth." *Id.* The free trade of ideas guaranteed by the First Amendment "means free trade in the opportunity to persuade to action," which, in this case was the opportunity to persuade visitors to deliver rather than abort their unborn children. *Thomas*, at 537.

The centers' speech thus deserved the highest level of protection. As Justice Breyer observed last term in *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144 (2017), speech enjoys protection in relation to its function. *Id.* at 1152 (Breyer. J. concurring). In this framework, the lowest level of scrutiny should apply to compelled disclosure of "purely factual and uncontroversial information," intermediate scrutiny to a law that "restricts the 'informational function' provided by truthful commercial speech," and strict scrutiny should govern those "government regulations [that] negatively affect[] the processes through which political discourse or public opinion is formed or expressed." *Id.* A pregnancy center's speech regarding abortion and its alternatives falls into this last category; it helps form public opinion: "[T]he context is a public debate over the morality and efficacy of contraception and abortion," demanding the highest level of review. *Evergreen*, 740 F.3d 233, 249, citing *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982).

Observing that speech in some cases may be incidental to conduct, thus permitting compelled

disclosure, *Expressions Hair Design* offered the example of a law prescribing restaurants charge ten dollars for sandwiches, which would regulate conduct, even though it would likely produce the speech by which the restaurant would inform diners of that price. *Expressions Hair Design*, 137 S. Ct. at 1150-51. But it held a law permitting vendors to describe a cash "discount" but not a credit card "surcharge" was "different," as it regulated speech, not conduct. *Id.* at 1151.

The FACT Act is also different, regulating centers' speech even more intrusively than New York regulated how vendors could describe their prices. To continue the sandwich analogy, the case resembles not so much whether a vendor may charge credit-using customers more than cash-using customers, or even how the vendor may refer to the price disparity. The instant infringement on conscience more closely resembles a hypothetical vegan who opened a restaurant to convince diners to adopt a plant-based diet — but the state forced her to post on her door directions to the nearest McDonald's and Burger King.

The analogy could apply to other recognized protected rights. A sporting goods store that preferred not to sell firearms could be forced to direct customers to the nearest gun store. A video store that declined to sell pornographic materials could be forced to tell customers where they could buy them. These examples would involve not the " 'information function' provided by truthful commercial speech" but the "process[] through which . . . public opinion is formed or expressed." But the same right to proselytize religious, political, and ideological causes also protects the

concomitant right to decline to participate. *Wooley v. Maynard*, 430 U.S. at 714. The right to say "yes" includes the right to say "no."

The Ninth Circuit's real objection to the centers' self-description as "pregnancy clinics" may have been that the centers do not present each visitor with abortion in their menu of pregnancy responses. But just as self-positioning as a "restaurant" does not represent one sells meat, self-positioning as a "sporting goods store" does not represent one sells guns, and self-positioning as a video store does not represent it sells X-rated ones, nothing in the description "pregnancy center" involves an offer to terminate one. The decision not to — and to counsel against such termination — is the essence of "the processes through which political discourse or public opinion is formed or expressed." *Expressions Hair Design*, 137 S. Ct. at 1552 (Breyer J., concurring); see also *Primus*, 436 U.S. at 431.

Even if the FACT Act is viewpoint-neutral, it must be reviewed through strict scrutiny.

IV. The FACT Act cannot survive strict — or even intermediate — scrutiny.

The Act cannot survive strict scrutiny, which requires the regulation further a compelling state interest and is the least restrictive means available to achieve that interest. *McCullen v. Coakley*, 134 S. Ct. 2518, 2530 (2014). This Court's conclusion in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), that the asserted interest in access to certain forms of contraception did not justify forcing objecting parties to provide it, precludes a finding the FACT Act passes

strict scrutiny. Application of even intermediate scrutiny will invalidate the Act.

Burwell's analysis precludes finding here that the Act passes strict scrutiny. The Court evaluated whether the law requiring plaintiffs to subsidize insurance for contraceptive products furthered the interest (a woman's cost-free access to specific contraceptives) through the least restrictive means. *Burwell*, 134 S. Ct at 2780. The Court assumed the interest, thus defined, was compelling, though the interest here might not be. *Id.* Here the state already provides subsidies for contraception – and abortion – so there is no comparable inaccessibility. The missing element that the centers must provide is only the *information* regarding the availability of such subsidized services. As typing a few words into a search engine can yield the location of nearby abortion providers and the services they offer, it is doubtful that the lack of information here, unlike the funds in *Burwell*, prevents the women's access.

But *Burwell*'s analysis regarding the means applies here. The Court noted that if the interest in cost-free access were so compelling, the state itself could pay the subsidies. *Burwell*, 134 S. Ct. at 2780-81. Likewise, the state here could disseminate the desired information through a public advertising campaign. *Evergreen*, 740 F.3d 233, 250; *Centro Tepeyac*, 722 F.3d 184, 190.

A California trial court, in reviewing the FACT Act under the California Constitution, offered specific options.

> It may purchase television advertisements as it does to encourage Californians to sign up for [subsidized health insurance] or to conserve water. It may purchase billboard space and post its message directly in front of [plaintiff's pregnancy center]. It can address the issue in its public school as part of sex education.

Scharpen at 19.

But instead of purchasing billboard space, it instead chose to "use the wall of the physician's office as a billboard." *Id.* at 17. This violated the First Amendment, which bars the state from forcing individuals to "use their private property as a 'mobile billboard' for the State's ideological message. *Wooley v. Maynard*, 430 U.S. 705, 715. Compelled advertising of the state's message is no more permissible when the billboard stays put.

Despite the asserted significance of the interest, the state did very little. The court observed that only two of the sixteen (one state and fifteen county) governmental websites even used the word "abortion," and the information was hidden behind other information regarding flossing, hazardous waste, and other topics. *Scharpen* at 8. But the state has no need to improve its presentation if it can conscript pregnancy centers to do its job for it. Accordingly, the court concluded the Act could not pass even intermediate scrutiny. *Id.* at 16.

The Second Circuit is in accord. *Harris* distinguished the Second Circuit's *Evergreen* decision, which invalidated a compelled message, on the grounds that *Evergreen* applied strict scrutiny. *Harris*, 839 F.3d

at 842.[5] But the Second Circuit actually concluded the directive could not survive "under either strict scrutiny or intermediate scrutiny." *Evergreen*, 740 F.3d 233, 249-50.

It is easier for the government to regulate conduct than speech. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 510-514 (1996); see also *Expressions Hair Design v. Schneiderman*, 137 S. Ct. at 1150. A finding that a pregnant woman's access to abortion *information* justifies compelling a pro-life center to engage in *speech* facilitating it would necessarily compel the conclusion that her interest in access to abortion itself justifies compelling pro-life medical professionals to engage in the *conduct* of performing abortions directly. But the state's ability to impress free citizens into state service must be limited. *Scharpen* at 15.

The Act cannot survive strict or intermediate scrutiny.

V. The FACT unconstitutionally conditions the exercise of one constitutional right on a party's forfeiting another.

As explained above, the Constitution protects the right to express one's own message. E.g. *Riley*, 487 U.S. 781, 791. The Constitution likewise protects individual autonomy regarding contraception, both to use and/or prescribe, and the reciprocal right *not to use and/or prescribe*. *Griswold v. Connecticut*, 381 U.S.

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[5] The New York message required centers to disclose they did not provide abortions or referrals for abortions, but did not require them to affirmatively assist women in obtaining them. *Evergreen*, 740 F.3d at 238.

479, 496-97 (1965) (Goldberg, J. concurring); see also *Burwell*, 134 S. Ct. 2751. But the FACT Act unconstitutionally forces centers into an election, where they must forfeit one constitutional right to exercise the other.

The doctrine of unconstitutional conditions applies when a party must desist from exercising a constitutional right in order to obtain a governmental benefit. See e.g. *Agency for Intern. Development v. Alliance for Open Society Intern, Inc.*, 570 U.S. 205, ___, 133 S. Ct. 2321, 2328 (2013). The principle that the state may not burden the exercise of a constitutional privilege is not limited to First Amendment speech. *Griffin v. California*, 380 U.S. 609, 614 (1965). As the state may not condition even an economic benefit (to which the party is not otherwise entitled) on foregoing the exercise of a constitutional right, *a fortiori*, the state may not condition the exercise of another constitutional right on such forfeiture. Accordingly, as criminal defendants have both a right to counsel and a right to jury trial, the state may not force an election, so that defendants enjoy the right to counsel only if they waive jury trial, or may go to trial only if they waive counsel.

But California forced such an election through the FACT Act. The Act exempts from its compelled speech provisions clinics that participate in the Family PACT program. Cal. Health & Safety Code § 123471 (c)(2). Participation requires providing all FDA-approved birth control methods, including those at issue in *Burwell*, 134 S. Ct. 2751, 2762. See Cal. Welf. & Inst. Code, §§ 24005(c), 24007(a)(2). Therefore, to participate, clinics must forfeit their right not to

prescribe, but if they don't participate, they forfeit control over their speech. In sum, they must forfeit their constitutional right to free speech in order to preserve their right not to prescribe, or must forfeit their right not to prescribe to preserve their right to free speech. Either way, this forced election unconstitutionally burdens the exercise of a constitutional right.

The FACT Act creates unconstitutional conditions on the exercise of constitutional rights.

VI. The Act burdens the centers' own speech.

In addition to unconstitutionally compelling the centers to express the government's message, and conditioning the right to control their message on centers' forfeiting their right not to prescribe contraception, the Act is further invalid because it penalizes the centers for their own affirmative expression. Even if valid reasons justified the compelled disclosure, the Act has the special vice of imposing the disclosure burden only as a consequence of (and effective penalty for) the centers' engaging in protected speech.

However important the state interest in notifying the public about the availability of state-funded abortion and related services, the obligation to provide this information does not fall upon the taxpaying public or medical profession generally – only on those who operate centers counseling pregnant women with a pro-life message. See *Pac. Gas & Elec. v. Public Utilities Comm'n of Cal.*, 475 U.S. 1, 15 (1986) [considering provision that "forces the speaker's opponent — not the taxpaying public — to assist in disseminating the

speaker's message."] The obligation to post the disclosures (which counter the centers' pro-life message) is specifically triggered, inter alia, by a center's providing or advertising sonograms (*Harris*, 839 F.3d at 830), an expressive act enjoying First Amendment protection. *Stuart v. Camnitz*, 774 F.3d 238, 245. This has the effect of burdening, and chilling, the centers' own message.

A. Print Cases: *Miami Herald* and *Pacific Gas*.

The Supreme Court described this burden in *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974). The challenged law required newspapers that engaged in protected speech (criticizing political candidates) to provide the criticized candidate with an opportunity to reply in the newspaper's pages. *Id.* The law mandated the newspaper provide the reply free of charge "in as conspicuous a place and in the same kind of type" as the newspaper's initial criticism. *Id.* at 244.

The Florida law resembles the FACT Act in significant ways. The "same kind of type" requirement resembles the FACT Act's prescriptions regarding the size and placement of the notices directing women toward subsidized abortions. *Harris*, 839 F.3d at 830. The Florida mandate that the newspaper use its own pages to disseminate a contrary message resembles the FACT Act's requirement that pregnancy centers use their own walls to display the required notices. *Id.* And the justification offered for the Florida law, "an electorate informed about the issues," (*id.* at 260, (White, J. concurring)), resembles the justification offered below: "to ensure that women are able to

receive . . . accurate information about [family planning] services." *Harris*, 839 F.3d at 830.

But however great the interest in an informed electorate, the State could not burden the newspaper with providing such information in an unwanted manner. *Miami Herald*, 418 U.S. at 256. The twofold penalty on speech identified in *Miami Herald* applies here too. The tangible penalty concerned physical resources; the Florida law required newspapers to allocate space in the paper (and funds required for printing) to the unwanted message, which otherwise could have been devoted to "other material the newspaper may have preferred to print." *Id.* Likewise, the FACT Act requires pregnancy centers to devote some of their wall space and printing budget to display the required notices, which otherwise could have promoted their preferred message.

Miami Herald also identified an intangible penalty; the right-of-reply rule could deter the newspaper from publishing the criticism in the first place. *Miami Herald*, 418 U.S. at 257. "Government-enforced right of access inescapably 'dampens the vigor and limits of the variety of public debate.'" *Id.*, quoting *N.Y. Times v. Sullivan*, 376 U.S. 254, 279 (1964). The FACT Act has a similar effect. The law imposes no obligations on the public, or even specific individuals. Individuals are thus free to express privately their position on subjects like abortion without government interference. But if they operate a pregnancy center to communicate their message more effectively (and display sonograms in so doing), the state compels them to express an unwanted message, and promote the very conduct they seek to prevent. Individuals who prefer not to advertise

abortions (and thereby facilitate them) might well desist from operating centers to avoid the obligation imposed by the Act. This would chill pro-life speech.

The newspaper that initially published the criticism of the candidate was undoubtedly the most effective medium for rebuttal, but this did not justify the First Amendment burden in *Miami Herald*. Accordingly, the California Legislature's finding the Act was the "most effective way" to present the information to those lacking it could not justify the First Amendment infringement below. *Harris*, 839 F.3d at 830.

Miami Herald's principles extend beyond the press. Although Justice White's *Miami Herald* concurrence distinguished newspapers from public utilities, the Supreme Court extended the *Miami Herald* rule to a public utility twelve years later. *Pac. Gas*, 475 U.S. 1 (1986); *Miami Herald*, 418 U.S. 241, 259 (White J., concurring). The application of *Miami Herald* to a public utility guarantees its application *a fortiori* to private individuals' pro bono speech about the morality of abortion, which rests on the highest rung of First Amendment values. *Primus*, 436 U.S. 412, 438 n. 32; *Evergreen, Inc. v. City of New York*, 740 F.3d 233, 249; see also *Expressions Hair Design*, 137 S. Ct. 1144, 1152. (Breyer J., concurring).

Pacific Gas concerned the utility's monthly billing envelope, which included a newsletter covering matters ranging from political editorials to energy conservation tips and "straightforward" billing information. *Pac. Gas*, 475 U.S. 1, 5, 8-9. California's Public Utilities Commission ordered the utility to present the speech of an organization with which the utility disagreed. *Id.* at 4. *Pacific Gas* found a First Amendment violation

based on the same concerns present in *Miami Herald*, even though the Commission's order required the opponent's message to appear in the envelope rather than the newsletter itself. *Id.* at 11 and n. 7.

Pacific Gas' summary of the *Miami Herald* holding fully applies here. "The constitutional difficulty with the right-of-reply statute was that it required the newspaper to disseminate a message with which the newspaper disagreed." *Pac. Gas*, 475 U.S. at 18. The state could not force citizens' private property to be a " 'billboard' for the State's ideological message." *Id.* at 17, quoting *Wooley v. Maynard*, 430 U.S. 705, 715 (1977).[6] The Court further condemned the asymmetry whereby the utility had to help present the views of its opponents, who had no corresponding obligation to present the utility's position. *Pacific Gas*, 475 U.S. at 14. Such "favoritism" "necessarily burdens the expression of the disfavored speaker." *Id.* at 14-15.

The FACT Act involves the same vice; it requires a pregnancy center to "use *its* property as a vehicle for spreading a message with which it disagrees." *Pacific Gas*, 475 U.S. 1, 17. And by compelling the posting of only information inimical to the center's position, and not compelling any speech from those more favorably

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[6] The Court has distinguished *Miami Herald* and *Pacific Gas*, and required a party to facilitate another's speech, in contexts where presenting the other's speech would not interfere with its own message or be construed as reflecting its own views. *Rumsfeld v. Forum for Acad. and Institutional Rights, Inc.*, 547 U.S. 47, 63-65; *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 88 (1980). But as the FACT Act requires pregnancy centers to distribute the notices, which facilitate an activity the centers seek to discourage, this exception does not apply.

inclined toward abortion, the FACT Act "is not content neutral." *Id.* at 13-14.

B. Campaign Finance Cases: *Davis* and *Arizona Free Enterprise.*

The same principle has emerged more recently in campaign finance cases. The Court has invalidated regulations, like the one in *Pacific Gas*, designed to abridge a speaker's rights to enhance the relative voice of its opponents. *Pac. Gas*, 475 U.S. at 14. The first case concerned a disincentive to candidate speech; the candidate's spending beyond a certain limit would asymmetrically exempt opponents from spending restrictions, which would have operated had the candidate spoken less. *Davis v. FEC*, 554 U.S. 724, 729 (2008). The Court found the law's authorizing fundraising advantages for one's opponents acted as an "unprecedented penalty" on the robust exercise of First Amendment rights. *Id.* at 739. Candidates needed either to limit their speech or endure discriminatory legal treatment. *Id.* at 740. *Davis* thus recalled *Pacific Gas*' "finding infringement on speech rights where if the plaintiff spoke it could 'be forced . . . to help disseminate hostile views.'" *Davis*, 554 U.S. at 739, quoting *Pacific Gas*, 475 U.S. 1, 14.

The Court considered an even more direct infringement in *Arizona Free Enterprise Club's Freedom PAC v. Bennett*, 564 U.S. 721 (2011). The challenged law burdened a candidate's speech not merely by exempting opponents asymmetrically from otherwise applicable restrictions; it *required the speaker to fund them directly*. For every 1000 dollars that a privately-funded candidate spent, all opponents would receive 940 for their own use. *Id.* at 728-32.

This rule, by which "each personal dollar spent by the privately financed candidate results in an award of almost one additional dollar to his opponent," imposed an even more "constitutionally problematic" "penalty" on speech than that imposed in *Davis*, as candidate speech produced "a direct and automatic release" of funds to possibly several opponents. *Id.* at 737.

Arizona Free Enterprise cited *Miami Herald* and *Pacific Gas* in rejecting this speech deterrent. The Court recalled how the challenged law in *Miami Herald* "purported to advance free discussion" but actually "penalized the newspaper's own expression," and found the state's argument that the law promoted free and robust discussion no more persuasive than it was in *Miami Herald*. *Arizona Free Enterprise*, 564 U.S. at 742, internal citations omitted. The Arizona law likewise resembled the *Pacific Gas* mandate that the utility "help disseminate hostile views." *Arizona Free Enterprise*, 564 U.S. 721, 742 n. 8, quoting *Pacific Gas*, 475 U.S. 1, 14. After a candidate spoke beyond a limit, the law forced him to disseminate hostile views "in a most direct way — his own speech triggers the release of state money to his opponent." *Arizona Free Enterprise*, 564 U.S. at 742 n. 8.

The FACT Act forces the dissemination of hostile views in an even more direct way. It does not merely trigger funding for a contrary message; it *forces pregnancy centers to express it themselves*.

The FACT Act asymmetrically forces pro-life professionals to disseminate a hostile message, and does so as a "penalty" for exercising their own speech rights. *Davis*, 554 U.S. at 739. This compulsion unconstitutionally burdens the centers' own speech.

Arizona Free Enterprise, 564 U.S. at 742; *Miami Herald*, 418 U.S. at 256-57.

CONCLUSION

Political polarization has created intense social friction, and cases like this and *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272 (Colo. 2015), *cert. granted*, 137 S. Ct. 2290 (June 26, 2017) (No. 16-111), threaten to aggravate the problem. Historically, the recognition of a right shaped how that activity was treated by the government – not other private individuals. A recognition that conduct warranted constitutional protection constrained the state from prohibiting the activity.

But the acceptance of such a right has not entitled those exercising the right to conscript dissenters into implementing it. The right to send one's child to a religious school does not compel atheists (or public school supporters) to refer children to such schools. The right to buy pornography does not compels newsstands and video stores to carry it, or facilitate its purchase. The right to buy a gun does not create a corresponding duty to sell one.

Abortion rights therefore cannot force opponents to facilitate – or perform – one. The state's "ability to impress free citizens into State service must be limited." *Scharpen* at 15. By forcing pro-life pregnancy centers to present a message, and facilitate conduct they profoundly oppose, the FACT Act violates their freedom of mind. *Wooley*, 430 U.S. 705, 715; *Barnette*, 319 U.S. at 637. It further burdens their own speech by penalizing its presentation. *Arizona Free Enterprise*, 564 U.S. 721, 742; *Miami Herald*, 418 U.S. 241, 256-57.

As the First Amendment protects not only the speaker but also the audience, it is not only the centers but also pregnant women, and public debate itself, which lose when the state manipulates the marketplace of ideas to produce a specified result. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641. California's pregnancy centers compete in the marketplace of ideas with other organizations taking a more favorable view of abortion. Though this debate often occurs in legislatures and courts, the most important audience is the hearts and minds of pregnant women. The FACT Act unconstitutionally invades that personal debate, forcing the centers to refer visitors to organizations like Planned Parenthood without any countervailing burden on those organizations to advertise for pro-life pregnancy centers. *Pacific Gas*, 475 U.S. at 14-15.

Although the government speaking in its own voice may express a viewpoint, it may not impose one on private speakers. *Matal v. Tam*, 137 S. Ct. 1744, 1757. "The First Amendment creates a forum in which all may seek, without hindrance or aid from the State, to move public opinion and achieve their political goals." *Knox*, 567 U.S. 298, 322. By forcing pregnancy centers to present a message facilitating abortions, the FACT Act coerces speech and distorts public debate. It violates the First Amendment.

Respectfully submitted,

William J. Becker, Jr.
Counsel of Record
FREEDOM X
11500 Olympic Blvd., Suite 400
Los Angeles, CA 90064
(310) 636-1018
FreedomXLaw@gmail.com

Mitchell Keiter
Keiter Appellate Law
The Beverly Hills Law Building
424 South Beverly Drive
Beverly Hills, CA 90212
(310) 553-8533
Affiliated Counsel with Freedom X

Counsel for Amici Curiae

No. 16-1140

IN THE

Supreme Court of the United States

NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES, D/B/A NIFLA, ET AL.,

Petitioners,

v.

XAVIER BECERRA, ATTORNEY GENERAL, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF HEARTBEAT INTERNATIONAL, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

DANIELLE M. WHITE
HEARTBEAT INTERNATIONAL, INC.
5000 Arlington Centre
Suite 2277
Columbus, Ohio 43220
(614) 885-7577
dwhite@heartbeat international.org

JAMES C. RUTTEN
Counsel of Record
ADAM P. BARRY
MUNGER, TOLLES & OLSON LLP
350 South Grand Avenue
50th Floor
Los Angeles, California 90071
(213) 683-9100
james.rutten@mto.com
adam.barry@mto.com

Counsel for Amicus Curiae Heartbeat International, Inc.

QUESTION PRESENTED

Whether the disclosures required by the California Reproductive FACT Act violate the protections set forth in the Free Speech Clause of the First Amendment, applicable to the States through the Fourteenth Amendment.

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INTEREST OF *AMICUS CURIAE*[1]

Heartbeat International, Inc. ("Heartbeat") is uniquely positioned to provide relevant factual background and legal argument in this case. Founded in 1971, Heartbeat is an IRC § 501(c)(3) non-profit, interdenominational Christian organization whose mission is to support the pro-life cause through an effective network of affiliated pregnancy help centers. Heartbeat serves approximately 2,400 pro-life centers, maternity homes, and non-profit adoption agencies in over 50 countries—making Heartbeat the world's largest such affiliate network. Heartbeat's network of affiliates includes approximately 71 pregnancy help centers in California (including Petitioner Fallbrook Pregnancy Resource Center), 33 of which provide medical services.

Heartbeat requires affiliated pregnancy centers to agree to its "Commitment of Care and Competence," which includes, *inter alia*, commitments: (i) to provide "accurate information about pregnancy, fetal development, lifestyle issues, and related concerns"; (ii) to ensure that all "advertising and communication are truthful and honest and accurately describe the services

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[1] No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *Amicus Curiae* or its counsel, make a monetary contribution to the preparation or submission of this brief. Petitioners consented to the filing of this brief through a blanket consent filed with the Court on November 20, 2017. Respondents consented in e-mails from their respective counsel on December 13, 2017.

[offered]"; and (iii) not to "offer, recommend or refer for abortion or abortifacients."[2]

Heartbeat also operates a 24/7 toll-free telephone and web-based help line called Option Line, which individuals facing unintended pregnancies can contact for information and referrals to nearby pro-life centers. In 2017, Heartbeat's Option Line handled approximately 350,000 contacts, including phone calls, e-mails, instant messages, and online chats in English and Spanish. Heartbeat also operates an online news service called Pregnancy Help News. In 2016, Pregnancy Help News stories had 162,537 unique page views. Heartbeat is funded almost entirely by private contributions; it receives no public funding.

California's Reproductive FACT Act, Cal. Health & Safety Code §§ 123470–123473 (the "Act"), substantially impacts Heartbeat's California affiliates because, among other things, it compels them to speak a message not only with which they profoundly disagree, but which directly contravenes their very reason for existence. Heartbeat therefore has a direct interest in the outcome of this case. Given its network of affiliated pregnancy centers, Heartbeat is uniquely well-positioned to provide information and argument to the Court regarding how the Act untenably constricts the speech of such centers, and why the Act's requirements cannot withstand First Amendment scrutiny.

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[2] *Available at* https://www.heartbeatinternational.org/about-us/commitment-of-care.

SUMMARY OF ARGUMENT

Speech, not abortion, is the fundamental issue in this case. The speech in question in this particular case happens to concern abortion, but the First Amendment would apply in largely the same manner if the speech concerned any other controversial topic—immigration, tax policy, or LGBTQ rights, to name a few. In a speech case like this one, the question is not which side of a contested issue is right, but, rather, whether and to what extent each side shall be free to advocate its views without government putting its thumb on the scales of the debate. The Free Speech Clause's protections are at their zenith when government seeks to regulate "the expression of editorial opinion on matters of public importance," *FCC v. League of Women Voters*, 468 U.S. 364, 375 (1984)—and whatever one might think about abortion, there can be no question that it is a matter of enormous public importance.

California's Reproductive FACT Act impermissibly intervenes in the abortion debate, imposing State-mandated speech on one viewpoint, and thereby weakening the advocacy work surrounding that viewpoint. Though the Act purports to apply broadly and neutrally to a wide array of medically licensed and unlicensed facilities, in actuality, by dint of its carefully structured exemptions, it applies to essentially no one except pregnancy centers on the pro-life side of this contentious public debate. It impermissibly regulates the protected speech of such centers in at least three ways.

First, the Act requires medically licensed pro-life pregnancy centers to dilute their message with pro-abortion speech, and indeed, to engage in pro-abortion advocacy with their clients. It requires them: (i) to tell their clients that "California has public programs that provide immediate or low-cost access to ... abortion"; and (ii) to direct their clients, in *imperative language*, to "contact the county social services office" at a particular telephone number "[t]o determine whether you qualify." Cal. Health & Safety Code § 123472(a)(1). The Act's required statements are anathema to the convictions of the people who are forced to speak them—people who, as explained below, have dedicated themselves to the pro-life cause out of religious or moral conviction, and, often, based on acutely personal abortion-related life experiences. Because the Act's required statements violate the convictions of the people compelled to speak them, the Act contravenes the most basic of all First Amendment principles: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics ... or other matters of opinion or force citizens to confess by word or act their faith therein." *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943); *accord Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 573 (1995) (outside the commercial speech context, government "may not compel affirmance of a belief with which the speaker disagrees").

Second, the Act chills the constitutionally protected speech of staff and volunteers of medically licensed pregnancy centers. It provides that when

such a center engages in its speech-based work, it triggers a statutory obligation to provide information and a directive that many staff and volunteers cannot provide without violating their deeply held religious beliefs or moral convictions. The Act thus places pregnancy centers' staff and volunteers, or those considering becoming such, on the horns of a dilemma: either convey a message and a directive that violate their convictions, or refrain from the underlying speech that triggers that obligation—*i.e.*, refrain from working or volunteering at a pregnancy center. The latter is the only choice for those seeking to live in accordance with their consciences. Because the Act suppresses them from speaking and advocating their pro-life convictions in their setting of choice, it runs afoul of core First Amendment principles. *See Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 794 (1988) (striking down a fundraising regulation because the regulation's "chill and uncertainty" might discourage professional fundraisers from engaging in fundraising in the first place).

Third, the Act drowns out the message of non-medically licensed pregnancy centers in a sea of burdensome, expensive, and unnecessary disclosures. The statute requires them literally to meet their clients at the door with a warning that the center is "not licensed as a medical facility by the State of California and has no licensed medical provider"—a not-so-subtle way of saying, "You should go somewhere else." Cal. Health & Safety Code § 123472(b)(1). The statute requires the same disclosure to appear in any advertising in as many as 13 different languages. Under the Act, if a center

wanted to take out a simple seven-word advertisement, or even place a notice in a local church bulletin, it could have to bury its chosen message in *hundreds* of additional words calculated to *discourage* people from responding to the advertisement or notice. And the Act requires the centers to foot the bill for these exponentially larger advertising spots—or more accurately, anti-advertising spots—which will be cost-prohibitive for these non-profit organizations offering their services free of charge. This, too, contravenes basic First Amendment principles: "[C]ompelling the publication of detailed ... information that would fill far more space than the advertisement itself[] would chill the publication of protected ... speech and would be entirely out of proportion to the State's legitimate interest in preventing potential deception." *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 663–64 (1985) (Brennan, J., concurring in part, concurring in the judgment in part, and dissenting in part).

Unquestionably, "the Act is a content-based regulation"; indeed, the Court of Appeals below so held. *Nat'l Inst. of Family & Life Advocates v. Harris*, 839 F.3d 823, 834 (9th Cir. 2016). "A law that is content based on its face is subject to strict scrutiny." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2228 (2015). The Act also is viewpoint-based, in that its exemptions are gerrymandered such that the Act targets *only* pregnancy centers on the pro-life side of the abortion debate; indeed, the drafter of the bill, in describing its purpose, pejoratively called the very existence of such centers "unfortunate[]." (Joint Appendix ("J.A.") at 39.) And when some California

legislators subsequently proposed a reciprocal bill that would have required abortion providers to post information about life-affirming resources (including Heartbeat's Option Line telephone number), their bill failed even to make it out of committee.[3] The statute is subject to strict scrutiny for this reason as well: "The First Amendment requires heightened scrutiny whenever the government creates a regulation of speech because of disagreement with the message it conveys ... ." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 566 (2011) (internal quotation marks and citation omitted).

The Act cannot satisfy strict scrutiny, or for that matter, even intermediate scrutiny. There is insufficient evidence that pregnant women in California are unaware of their range of reproductive options or of the availability of state funding, or that they are confused about the type of facility they are visiting. Nor are the Act's means of accomplishing the State's stated objectives sufficiently tailored. The State can disseminate its desired message about abortion and abortion resources through any number of means. For example, it can take out a billboard campaign, require disclosures in sex education classes in public schools, and make information available on the internet. What the State may *not* do, particularly given the availability of these other options, is impress free citizens into its service, and force them to mouth words with which they profoundly disagree.

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[3] *See* https://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml?bill_id=201520160AB2775.

The Act's requirements are unconstitutional, and the decision below should be reversed.

ARGUMENT

Because the constitutional question presented is informed by the context in which it arises, Heartbeat describes below (i) the work of pregnancy centers; (ii) typical characteristics of the men and women who work or volunteer there; and (iii) the specific ways in which the Act commandeers their speech. Heartbeat then explains why, in light of those background facts, the Act's requirements cannot survive First Amendment scrutiny.

I. THE WORK OF PREGNANCY CENTERS

Pregnancy centers rightly could be called the service arm of the pro-life movement. When laws banning abortion began to loosen in the 1960s, pro-life activists responded by organizing "alternatives-to-abortion" services. *See* Heartbeat International, *A Generation Making a World of Difference*, at 3 (2016) [hereinafter *World of Difference*].[4] The Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973), galvanized the movement and spurred further organization. Eager to help women in the midst of unexpected or difficult pregnancies, pro-life individuals in the infancy of the movement took pregnant women into their own homes, started hotlines for women in crisis, and organized local centers to respond to the needs of women in their own communities. *See* Margaret H. Hartshorn, *Foot*

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[4] *Available at* https://www.heartbeatinternational.org/pdf/HeartbeatHistoryBrochure.pdf.

Soldiers Armed With Love 13, 19 (2014). The pregnancy help community began as, and continues to be, a grassroots movement designed to ensure that no woman ever feels forced to choose abortion because of lack of support or practical alternatives.

As pregnancy centers sprang up around the nation, they recognized a need for operational standards, training resources, networking, a directory of pregnancy help organizations, and a hotline to connect women with such organizations. To satisfy this need, several individuals founded Alternatives to Abortion Incorporated (later renamed Heartbeat International, Inc.), a federation of independently governed, locally funded community pregnancy centers, including maternity homes, pregnancy resource centers, pregnancy medical centers, and non-profit adoption agencies. *See World of Difference* at 11–12.

Today, there are some 2,750 pregnancy centers in the United States that collectively serve roughly 1.5 million clients per year. *See* Heartbeat International, *Life Trends Report* at 2–3 (2018).[5] These include nearly 200 centers in California, approximately 71 of which are Heartbeat affiliates. The California centers divide into two categories of relevance to this case.

First, some centers (including approximately 33 Heartbeat affiliates) are medical facilities licensed under § 1204 or another provision of the California Health and Safety Code. These centers have licensed

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[5] *Available at* https://www.heartbeatinternational.org/pdf/ltr2018.pdf.

medical personnel who provide various medical services, such as medical-grade pregnancy testing, ultrasounds to confirm a viable pregnancy and to rule out a dangerous ectopic pregnancy, sexually transmitted disease testing, and/or prenatal care. *See* Family Research Council, *A Passion To Serve* 6–11 (2d ed. 2010).[6] Licensed centers typically also provide an array of non-medical services, such as pregnancy options information, referrals to adoption agencies, adoption support, parenting and childbirth classes, fatherhood programs, post-abortion support groups, and material assistance such as diapers, clothes, baby formula, and car seats. *See id.* at 20–21.

Second, other California centers (including approximately 38 Heartbeat affiliates) are not licensed medical facilities and are legally precluded from providing medical services. *See* Cal. Bus. & Prof. Code § 2052. Accordingly, they necessarily confine their activities to the sort of non-medical services described above (options information, referrals to adoption agencies, etc.). *See* Family Research Council, *supra*, at 20–21. Although they may make pregnancy test kits available, the clients administer the tests themselves. *See* Heartbeat International, *Are We a Medical Clinic?*[7] These facts refute the California Legislature's finding that the Act's requirements applicable to unlicensed centers are necessary so that "pregnant women in California

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[6] *Available at* http://downloads.frc.org/EF/EF12A47.pdf.

[7] *Available at* https://www.heartbeatservices.org/are-we-a-medical-clinic.

know when they are getting *medical care* from licensed professionals." (J.A. 71 (emphasis added).)

Pregnancy centers, medically licensed or not, are non-profits and provide all or a vast majority of their services free of charge. They overwhelmingly are faith-based and, in California, typically operate as public benefit corporations for a religious purpose pursuant to California's Nonprofit Public Benefit Corporation Law, Cal. Corp. Code §§ 5110–6910. They seek to advance the pro-life cause out of religious and moral conviction; religious perspectives on life and compassion call the faithful to help those facing decisions that have profound consequences. They are funded almost entirely by private donations from pro-life individuals who want to help provide practical alternatives to abortion. A center's annual budget averages $282,000. *See* Heartbeat International, *Life Trends Report* at 4 (2018).[8]

Most pregnancy centers have a small paid staff. The majority of their executive directors hold at least a bachelor's degree, and nearly one-quarter hold a graduate degree. *See id.* at 3. Because pregnancy centers have limited funds and small staffs, they rely heavily on volunteers looking for practical ways to live out their pro-life convictions. In 2017, some 81,360 women and men volunteered in centers around the nation—contributing 6.5 million volunteer hours. *See id.* at 4.

The pregnancy help community is guided by a core set of ethical principles in their operations—

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[8] *Available at* https://www.heartbeatinternational.org/pdf/ltr2018.pdf.

from the content of their advertising, to the accuracy of the information they provide to clients, to the nature of the options they recommend. Heartbeat's affiliates, for example, must agree to its written "Commitment of Care and Competence,"[9] which includes commitments:

- To provide "advertising and communication [which] are truthful and honest and accurately describe the services [offered]";
- To provide "accurate information about pregnancy, fetal development, lifestyle issues, and related concerns"; and
- To refrain from "offer[ing], recommend[ing] or refer[ring] for abortion or abortifacients."

These commitments belie the criticisms sometimes leveled at pregnancy centers that they mislead women to prevent them from choosing abortion. Pregnancy centers, and certainly Heartbeat's affiliates, invariably strive to provide accurate information about *all* options, while refraining from encouraging abortion, and instead educating, equipping, and empowering their clients to choose life.

In summary, for more than five decades, tens of thousands of volunteers, staff, professionals, and donors with deeply held religious or moral

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[9] *Available at* https://www.heartbeatinternational.org/about-us/commitment-of-care.

convictions have come together as a caring and supportive pregnancy help community. They seek to be a safety net for women and men experiencing unexpected or challenging pregnancies, and to help them make life-affirming choices. To the members of the pregnancy help community, the notion that the State of California is forcing them to speak a pro-abortion message, or to drown out their pro-life message with mandated disclosures designed to deter their clients from seeking their help, is profoundly objectionable.

II. THE STAFF AND VOLUNTEERS OF PREGNANCY CENTERS

To appreciate why members of the pregnancy help community find it so objectionable, it is important to understand the convictions of the people who work and volunteer at the centers. Although broad generalizations besides "pro-life" are impossible, many staff and volunteers are motivated by more than just an abstract religious belief or an academic moral code. Rather, they have had acutely personal life experiences that impel them to live out their pro-life convictions and never to encourage or facilitate abortion.

Lori Berg, for example, had an abortion when she was 19. *See* Foothills Pregnancy Resource Ctr., *Lori's Story* [hereinafter *Lori's Story*].[10] She told "[l]ess than a handful of people." *Id.* She went on to a successful career as a producer, on-air host, and reporter for National Public Radio, and was named a

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[10] *Available at* http://www.foothillsprc.org/LorisStroy.pdf.

"Woman of the Year" by the Los Angeles County Commission for Women. *See* Jay Hobbs, *These 5 Women Left Successful Careers to Save Lives in Pregnancy Centers*, Pregnancy Help News (Dec. 19, 2017).[11] She described herself, however, as "[u]nknowingly ... repress[ing] a hurt and shame." *Lori's Story*. She eventually reached out to Foothills Pregnancy Resource Center in Duarte, California because "[p]ost-abortion support was one of the free and confidential services [it] provided." *Id.* Lori relished the help she received, retired from journalism, and today lives out her pro-life convictions by serving as executive director of that center.

Kathy Gibson was a 17-year-old pastor's daughter in small town Oklahoma when she found herself unexpectedly pregnant. *See* Jay Hobbs, *Pressured to Abort, Gibson Now Dedicated to Hometown Choice*, Pregnancy Help News (Mar. 28, 2016).[12] Kathy feared that her father would lose his job if her pregnancy were revealed. Feeling ashamed and alone, and tremendous pressure to abort, she did so. Now, Kathy is the executive director of First Choice Pregnancy Center in Weatherford, Oklahoma. She considers it her mission to ensure that no woman in her hometown ever feels so alone that she feels compelled to turn to abortion. *See id.*

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[11] *Available at* https://pregnancyhelpnews.com/these-5-women-left-successful-careers-to-save-lives-in-pregnancy-centers.

[12] *Available at* https://pregnancyhelpnews.com/pressured-to-abort-gibson-now-dedicated-to-hometown-choice.

Valerie Millsapps also experienced a teenage pregnancy that motivates her work as the executive director of Pregnancy Resource Center of Blount County, Tennessee. *See* Kimberly Bender, *Former Teen Mom Pushing To Reach More Abortion-Minded Clients*, Pregnancy Help News (Mar. 9, 2016).[13] Though she was pressured by her baby's father to abort, Valerie chose to raise her daughter. Valerie remarked: "When I got to see her face, it was all worth it. But it was hard. If there had been [a] pregnancy center, it could have helped me through the struggles." *Id.* Her message for the women who come to her center is clear: "You don't have to be in this alone." *Id.*

Latasha Thomas began volunteering with New Life Crisis Pregnancy Center in Leesville, Louisiana in 2007. *See* Rachel Leigh, *Her Life Is a Gift—See How This RN Gives Back*, Pregnancy Help News (Mar. 21, 2016).[14] Her pro-life convictions come, in part, from knowing that both she and her husband were almost aborted. After she completed her associate degree in 2010 and became a registered nurse, she became the center's executive director. Latasha is focused on a mission: "[I]f you only talked to one woman and her life was changed, it's worth it all." *Id.*

These individuals are among the tens of thousands who work or volunteer at pregnancy

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[13] *Available at* https://pregnancyhelpnews.com/former-teen-mom-pushing-to-reach-more-abortion-minded-clients.

[14] *Available at* https://pregnancyhelpnews.com/her-life-is-a-gift-see-how-this-rn-gives-back.

centers based on their passionate devotion to the pro-life cause. They clearly have decided which side of the issue they are on: Rightly or wrongly, they believe that abortion is "nothing short of an act of violence against innocent human life." *Planned Parenthood v. Casey*, 505 U.S. 833, 852 (1992). They have dedicated themselves to speaking their pro-life message and living out their convictions by doing what they believe is preserving life and helping women in need. Yet they are the very individuals compelled by the Act to speak the State's pro-abortion message.

III. THE ACT'S IMPACT ON SPEECH

A. The Act Compels Medically Licensed Pregnancy Centers To Speak Words With Which They Profoundly Disagree

The Act compels medically licensed pregnancy centers to say two related things to their clients, both of which are antithetical to the convictions, mission, and reason for existence of such centers. First, the statute requires them to advertise that "California has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women." Cal. Health & Safety Code § 123472(a)(1). Second, the statute compels the centers to give the following directive—not a disclosure of fact, but an affirmative urging in imperative language: "To determine whether you qualify, *contact the county social services office* at

[insert the telephone number]." *Id.* (brackets in original; emphasis added).

The disclosure about the availability of state funding, even standing alone, facilitates abortion and therefore is not a disclosure a pro-life center or its staff and volunteers can make in good conscience. Facts are advertised for a reason, and in this case, the reason can be none other than to encourage women and men facing unintended pregnancies to consider, or more seriously consider, abortion, and to facilitate their access to abortion funding. Whether the advertisement is factual does not change its perniciousness from the perspective of a pro-life speaker; the "general rule[] that the speaker has the right to tailor the speech[] applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid." *Hurley*, 515 U.S. at 573; *accord Riley*, 487 U.S. at 797–98 ("[C]ases [striking down laws compelling speech] cannot be distinguished simply because they involved compelled statements of opinion while here we deal with compelled statements of 'fact': either form of compulsion burdens protected speech.").

Further, the directive to "contact the county social services office" is not a disclosure of fact. It is outright advocacy—*i.e.*, "'[t]he act of pleading for, supporting, or recommending,'" or an "urging to action." *Gitlow v. New York*, 268 U.S. 652, 665 (1925) (quoting Century Dictionary); *see also* Black's L. Dictionary 55 (6th ed. 1990). Specifically, it is pro-abortion advocacy, perversely extracted from pro-life speakers. *See Wooley v. Maynard*, 430 U.S. 705, 713

(1977) (government may not "constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public."); *id.* at 715 ("The First Amendment protects the right of individuals ... to refuse to foster ... an idea they find morally objectionable."). The directive specifically urges the clients to take an action that is designed to carry them down the road to an abortion. Indeed, it is very close to a referral for abortion—something that is unthinkable to a pro-life pregnancy center. As noted above, Heartbeat's affiliates expressly pledge not to "offer, recommend or refer for abortion or abortifacients."

Moreover, the Act requires the centers to speak these words at the very outset of the client relationship (sometimes even before the formation of the relationship), ensuring that the centers direct their clients and prospective clients to abortion resources *before* the centers can speak their message of hope, support, and encouragement for a woman to choose life. Specifically, the statute requires the centers to make the disclosure and to provide the directive in a "public notice posted in a conspicuous place where individuals wait," in a "printed notice distributed to all clients," or in a "digital notice ... that can be read at the time of check-in or arrival." Cal. Health & Safety Code § 123472(a)(2). The statute thus requires the centers to speak the government's message first, before communicating their own.

The Act commandeers not only the message, but also the "voice," of the centers' speech, in that the disclosure and directive are not even attributed to the State. The mandated language is written as if the center itself is the one that chose to advertise the availability of abortion resources. The Act thus compels pro-life centers to adopt *as their own words* the State's pro-abortion message—notwithstanding that "the choice of a speaker not to propound a particular point of view ... is presumed to lie beyond the government's power to control." *Hurley*, 515 U.S. at 575.

If a client acts on the required information and directive, and as a result, has an abortion that she otherwise would not have had, the pro-life pregnancy center would have encouraged and facilitated an abortion. Indeed, it would be a "but for" cause of the abortion. For a pregnancy center devoted to the pro-life cause, it is difficult to imagine anything more morally repugnant.

B. The Act Chills Constitutionally Protected Speech Of Medically Licensed Pregnancy Centers' Staff And Volunteers

The Act also chills speech that the First Amendment protects. It defines a "licensed covered facility" to which it applies, in part, as a medically licensed facility that "offers counseling about[] contraception or contraceptive methods" and "offers to provide ... pregnancy options counseling." Cal. Health & Safety Code § 123471(a). The statute thus makes constitutionally protected speech a trigger for the requirements of further, pro-abortion speech.

As discussed, this further, compelled speech violates the deeply held religious beliefs and/or moral convictions of the staff and volunteers of pro-life centers. Consequently, many staff and volunteers will find themselves unable to engage in the mandated speech without violating their consciences. They have only one way out of this conundrum besides outright disobedience to the law: do not engage in the antecedent speech in the first place, *i.e.*, do not work or volunteer at a medically licensed pregnancy center.

This is not mere speculation. In a survey of 2,865 faith-based medical professionals, fully 91% said they would rather stop practicing medicine than have to violate their convictions. Specifically, 77% of respondents reported they "strongly agree," and an additional 14% said they "somewhat agree," with the statement, "I would rather stop practicing medicine altogether than be forced to violate my conscience." Mem. to Office of Public Health and Science, Dept. of Health and Human Servs. from Christian Med. Ass'n, at 5 (Apr. 2009).[15]

It is, of course, impossible to know how many staff and volunteers of California pregnancy centers will resign if the Act's requirements are upheld, or how many people who otherwise *would* have worked or volunteered at a center will refrain from doing so. That is inherent in the chilling of speech; the effects often are unmeasurable because it is hard to measure something that does *not* happen. But if

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[15] *Available at* https://www.cmda.org/library/doclib/cma-survey-analysis-for-hhs.pdf.

91% of faith-based physicians and other medical professionals would rather sacrifice their livelihoods than violate their consciences, it stands to reason that actual or prospective staff and volunteers of non-profit pregnancy centers offering services for free likewise would choose to do something different with their time. They work and volunteer at pregnancy centers for the *very purpose* of living out their pro-life convictions; if trying to do so requires them to convey the State's pro-abortion message, the choice for many will be clear. *See Riley*, 487 U.S. at 794 (striking down a statute that created "chill and uncertainty [that] might well drive professional fundraisers out of North Carolina, or at least encourage them to cease engaging in certain types of fundraising ... , all of which will ultimately reduce the quantity of expression") (internal quotation marks, brackets, and citation omitted); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 257 (1974) (striking down a statute that compelled speech upon the occurrence of antecedent speech; the targets of the statute "might well conclude that the safe course is to avoid controversy").

C. The Act Fundamentally Alters—Indeed, Outright Precludes—Constitutionally Protected Speech Of Non-Medically Licensed Pregnancy Centers

Because the Act "[m]andate[s] speech that" pregnancy centers "would not otherwise make," it "necessarily alters the content of the[ir] speech." *Riley*, 487 U.S. at 795. This is true not only for medically licensed centers as discussed above, but for

non-medically licensed centers as well. Indeed, the statute alters the constitutionally protected advertising of unlicensed centers so dramatically that it effectively precludes many of them from advertising at all.

The statute requires unlicensed centers to state that they are unlicensed in 48-point type "in the entrance of the facility and at least one additional area where clients wait to receive services." Cal. Health & Safety Code § 123472(b)(2). It requires the same disclosure in "any print and digital advertising materials." *Id.* § 123472(b). It requires these disclosures in both English and "the primary threshold languages for Medi-Cal beneficiaries as determined by the State Department of Health Care Services for the county in which the facility is located." *Id.* Those additional languages range from one to 12 depending on the county; in Los Angeles County, the most populous, the additional languages are Spanish, Arabic, Armenian, Cambodian, Cantonese, Farsi, Korean, Mandarin, Russian, Tagalog, Vietnamese, and something the State vaguely calls "Other Chinese." Cal. Dept. of Health Care Servs., Research & Analytic Studies Division, *Frequency of Threshold Language Speakers in Medi-Cal Population by County for January 2015*, at 4–5 (Sept. 2016).[16] Further, the statute requires that in any advertising, the disclosures be "in larger point type than the surrounding text"; "of the same size" type if in a "contrasting type, font, or color"; or "set off from the surrounding text of the same size by

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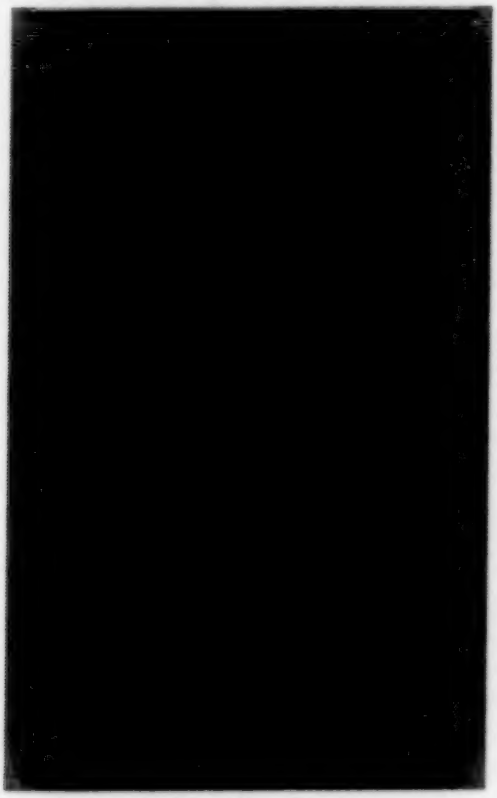
[16] *Available at* http://www.dhcs.ca.gov/dataandstats/statistics/documents/threshold_language_brief_sept2016_ada.pdf.

symbols or other marks to call attention to the language." Cal. Health & Safety Code § 123472(b).

The required signage at the entrance to the facility is a not-so-subtle way of saying, "Are you sure you want to come here? Maybe you'd be better off going somewhere else." It inherently tends to drive clients away—potentially before they even step through the door. If they do proceed into the office, they then are encouraged to leave as they stare at the additional sign in the waiting room while waiting for their appointments. *Cf. Riley*, 487 U.S. at 800 (disclosure requirement for fundraisers violated First Amendment where "if the potential donor is unhappy with the [disclosed fact], the fundraiser will not likely be given a chance to explain [it]; the disclosure will be the last words spoken as the donor closes the door"). The statute thus tends to prevent the centers from speaking their life-affirming message to clients *at all*. At a minimum, it will change the nature of any ensuing conversation, thus "necessarily alter[ing] the content of the [centers'] speech." *Id.* at 795.

The related advertising disclosures, moreover, are at least as draconian as the disclosures in *Riley* because they drown out the advertisement they are meant to accompany. To illustrate, a simple advertisement in Los Angeles County looking like this:

would have to mushroom into something like *this* to comply with the statute:



The Act thus buries an advertisement intended to encourage people to contact the center with lengthy discursives on why they should think twice before doing so. The statute therefore alters the content of the centers' advertising, which is itself constitutionally protected speech. And it does so in a way that will deter prospective clients from contacting the centers, thus chilling the centers' ability to speak their pro-life message to their clients. Further, because the statute requires an

otherwise short advertisement to effectively become a message *against* contacting the center (especially in counties where the disclosure must appear in several languages), the statute effectively precludes such advertising altogether; no center is going to pay to advertise against itself.

Additionally, even if advertising somehow remained desirable after the Act, it would be cost-prohibitive for most, if not all, centers. The short advertisement above would cost a mere $299 for a 28-day run in January 2018 in the "service directory" portion of the Los Angeles Times' classified section.[17] The long version complying with the Act would cost exponentially more—$9,058. And that is for a mere classified advertisement; most other forms of advertising cost substantially greater amounts. Advertising that complies with the Act simply will be out of reach for most pregnancy centers. *Cf. Miami Herald*, 418 U.S. at 257 ("[I]t is not correct to say that, as an economic reality, a newspaper can proceed to infinite expansion of its column space to accommodate [the government's speech requirement]."). The absurdity of the disclosure and its chilling effect on speech are further exemplified by considering, for example, the inclusion of such a disclosure on the back of a local church bulletin.

The Act thus illustrates precisely what Justice Brennan wrote in one of the Court's seminal speech cases: "[C]ompelling the publication of detailed ...

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[17] The prices can be generated by inputting the information at https://placeanad.latimes.com/classified-service-directory-listing.

information that would fill far more space than the advertisement itself[] would chill the publication of protected ... speech and would be entirely out of proportion to the State's legitimate interest in preventing potential deception." *Zauderer*, 471 U.S. at 663–64 (Brennan, J., concurring in part, concurring in the judgment in part, and dissenting in part).

IV. THE ACT IS UNCONSTITUTIONAL

A. The Act Is Subject To Strict Scrutiny

1. The Act Is Content-Based

Because the Act requires pregnancy centers to engage in speech on a particular subject matter via the required notices, it is a content-based regulation—as the Court of Appeals below held. *See Reed*, 135 S. Ct. at 2227; *NIFLA*, 839 F.3d at 834. As such, it is "presumptively unconstitutional and may be justified only if the government proves that [it is] narrowly tailored to serve compelling state interests." *Reed*, 135 S. Ct. at 2226; *see also United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000) ("If a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling Government interest."). This is so even if, unlike here, "the government[] [has a] benign motive, content-neutral justification, or lack of animus toward the ideas contained in the regulated speech." *Reed*, 135 S. Ct. at 2228 (internal quotation marks and citation omitted).

Although this Court occasionally has subjected content-based regulations to a lesser level of scrutiny, it has done so only with "certain well-defined and narrowly limited classes of speech." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942). "These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which ... are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Id.*; *see also United States v. Alvarez*, 567 U.S. 709, 717 (2012) (plurality opinion) (acknowledging that content-based restrictions on speech have been permitted "only when confined to the few historical and traditional categories of expression long familiar to the bar") (internal quotation marks omitted). Plainly, no such category is presented here, and the Act therefore is subject to strict scrutiny.

2. The Act Is Viewpoint-Based

The Act is not just content-based, but also viewpoint-based, and subject to strict scrutiny for this reason as well. *See Sorrell*, 564 U.S. at 566. The statute's structure and history demonstrate that it was designed to impact disproportionately the speech of pregnancy centers because of their pro-life message.

Although the Act does not explicitly exclude from its scope reproductive health care providers that do not share pregnancy centers' pro-life stance, the effect of the Act's broad exemptions is precisely that. As shown in Petitioners' opening brief, the

exemptions are gerrymandered such that the Act applies to virtually no one *except* pro-life centers. (*See* Br. for Petitioners at 9–10, 13–14, 32–34, 36.) This Court long has recognized that such statutory "exemption[s] from a[] ... regulation of speech may represent a governmental 'attempt to give one side of a debatable public question an advantage in expressing its views to the people.'" *City of Ladue v. Gilleo*, 512 U.S. 43, 51 (1994) (quoting *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 785–86 (1978)).

The Act's legislative history confirms that that is the case here. The bill's author, in explaining the "purpose of this bill," called the very existence of pro-life pregnancy centers "unfortunate," in part because they "aim to discourage and prevent women from seeking abortions." (J.A. 84–85 (capitalization omitted).) Also, in the Legislative Counsel's Digest to the Act, the Act's sponsor emphasized "a woman's right to choose or obtain an abortion" (Pet. Cert. App. at 75a), whereas earlier California laws, such as the Reproductive Privacy Act, have emphasized what they called "a woman's fundamental right to choose *to bear a child or to choose to obtain an abortion*." Cal. Health & Safety Code § 123462(c) (emphasis added). The absence of any discussion in the Act's legislative history of a woman's right to choose to bear a child underscores that the Act was calculated to increase access to abortion by burdening the very speakers who believe that abortion, though legal, is not a morally legitimate choice. *Cf. Hill v. Colorado*, 530 U.S. 703, 787 (2000) (Kennedy, J., dissenting) ("Laws punishing speech which protests the lawfulness or morality of the government's own

policy are the essence of the tyrannical power the First Amendment guards against.").

The State's animus towards pregnancy centers' pro-life message is further underscored by the fate of a bill introduced shortly after the Act passed. Some California legislators, evidently believing turnabout to be fair play, introduced a reciprocal bill (AB 2775) that would have required "facilities that offer abortion services" to disseminate to clients an onsite notice stating:

> If you are considering continuing your pregnancy, nonprofit pregnancy centers can provide services at no cost to you, that may include consultation, pregnancy testing, ultrasound services, support groups, parenting programs, material assistance, and sexually transmitted disease or sexually transmitted infection (STD/STI) testing. To find a center near you, call 1-800-712-HELP.

Report, Cal. Assembly Comm. on Health, at 1 (Apr. 19, 2016).[18] If enacted, AB 2775 would have furthered the State's *professed* purpose in passing the FACT Act—"ensur[ing] that California residents make their personal reproductive health care decisions knowing their rights and the health care services available to them." (Pet. Cert. App. at 78a.) The bill died in committee, however, with opponents

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[18] *Available at* https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201520160AB2775.

arguing that "the phone number abortion clinics would be required to post is Option Line, run by an umbrella organization for CPCs [Heartbeat], the sole purpose of which is to prevent women from accessing abortions." Report, Cal. Assembly Comm. on Health, at 5 (Apr. 19, 2016).[19] AB 2775's demise further shows that the State viewed pregnancy centers' speech as thwarting women's access to abortion, and therefore sought to dampen the persuasiveness of such speech by requiring additional government-mandated disclosures (and in the case of medically licensed centers, an affirmative directive to call a number to find out about abortion resources).

This Court's "precedents ... apply the most exacting scrutiny to regulations," like the Act, that "suppress, disadvantage, or impose differential burdens upon speech because of its content." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994). This is because such regulations "pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion." *Id.* at 641; *accord Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 812 (1985) (holding that even "facially neutral" speech restrictions with "valid justifications" cannot be saved if they are "in fact based on the desire to suppress a particular point of view"). Because that is

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[19] *Available at* https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201520160AB2775.

the case here, the Act constitutes viewpoint discrimination and is subject to strict scrutiny.[20]

B. The Act Fails Strict Scrutiny

1. The Requirements Imposed on Medically Licensed Centers Fail Strict Scrutiny

The State has attempted to justify the requirements applicable to medically licensed centers by contending that California women are "in need of publicly funded family planning services, contraception services and education, abortion services, and prenatal care and delivery," but are "unaware of the public programs" available to them. (Pet. Cert. App. at 76a–77a.) Neither the State's purported interest, nor the means chosen of achieving it, pass muster.

First, the State has provided no *evidence* that California women are in fact unaware of such matters or of the availability of state funding. This is despite the Legislature's unsupported claim that "thousands of women remain unaware of the public programs available to them." (J.A. 57.) In fact, at

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[20] Petitioners show in their opening brief that (i) as the Court of Appeals below held, *see NIFLA*, 839 F.3d at 834 n.5, the Act does not regulate commercial speech; and (ii) contrary to what the Court of Appeals held, *see id.* at 838–41, the Act also does not regulate "professional speech." (*See* Br. for Petitioners at 17, 21–22, 40–46.) Petitioners also show that, regardless, the Act is subject to strict scrutiny. (*See id.* at 41–42, 44–46).

the district court level, the State's only factual support for its purported governmental interest was the Act's legislative history, which is devoid of facts concerning the number of California women who are *actually* unaware of the public reproductive-related programs available to them. (J.A. 30–87.) The State therefore has failed to "demonstrate that the recited harms are real" or "that the regulation will in fact alleviate these harms in a direct and material way." *Turner*, 512 U.S. at 664.

Second, the requirements applicable to medically licensed centers are woefully under-inclusive for addressing the purported problem the State identifies—which "raise[s] doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint." *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1668 (2015) (internal quotation marks omitted); *accord Reed*, 135 S. Ct. at 2232 ("[A] law cannot be regarded as protecting an interest of the highest order ... when it leaves appreciable damage to that supposedly vital interest unprohibited."). For one thing, the Act's requirements do not apply to a wide variety of facilities where women go for pregnancy testing and pregnancy-related information, such as the offices of primary care physicians or obstetrician-gynecologists in private practice, student health centers, or clinics run by employers or operating as outpatient divisions of hospitals. (*See* Br. for Petitioners at 32 (analyzing the Act's exemptions).)

Moreover, although the State asserts that the Act was intended to increase awareness of public

programs relating to "contraception, health education and counseling, family planning, prenatal care, abortion, *or delivery*" (Pet. Cert. App. at 77a (emphasis added)), the mandated disclosure mentions only programs supporting "family planning services," "contraception," "prenatal care," and "abortion." Cal. Health & Safety Code § 123472(a)(1). Notably absent is any disclosure about public programs supporting child "delivery," despite the State's contention that women are also unaware of these programs. The Act's under-inclusiveness, particularly in this critical respect, underscores that the State is simply disfavoring the pro-life view, and impermissibly requiring pro-life speakers to convey a pro-abortion message.

Third, the Act's requirements are not remotely the least restrictive means of achieving the State's purported objective. The State is, of course, free to formulate its policy position on abortion and other reproductive matters. The State is also free to support its position with public programs. And the State is free to "get the word out" about such programs through any number of alternative, legitimate means besides using the walls of private pregnancy centers as the State's billboards.

For example, the State could "purchase California-based media [spots], including multi-ethnic and multi-language television, radio, print, billboard and social media [advertisements]," as it does to make people aware of health insurance options under the federal Affordable Care Act. Covered Cal., *Report by the California Health Benefit Exchange to the Governor and Legislature* at 16 (Nov.

2013).[21] The State could promote its message on freeway signs, as it does to encourage Californians to conserve water. *See* Cal. Dept. of Transp., *Caltrans Activates Signs to Urge Drivers to Save Water* (Feb. 11, 2014).[22] It could require disclosures in sex education classes offered in public schools, as it does on a wide variety of other topics. *See* Cal. Educ. Code §§ 51933, 51934. And the State could disseminate the relevant information on its own websites, which, according to a California court's post-trial Statement of Decision in a case challenging the Act under State law, the State makes essentially no effort to do. *See Scharpen Found. Inc. v. Harris*, Cal. Super. Ct. Case No. RIC1514022, slip op. (Oct. 30, 2017) (Addendum to Br. of Petitioners at 8a–9a) ("In most of the[] websites the services are merely described as 'family planning' or by a similar euphemism. The word 'abortion' appears only on 2 county websites. ... [T]he State does not require counties or other political entities to make any significant efforts to inform women of the availability of family planning services.").

The *Scharpen* court held the Act unconstitutional under the California constitution for precisely such reasons:

> The State ... may purchase television advertisements as it does to encourage Californians to sign up for Covered

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[21] *Available at* https://www.coveredca.com/PDFs/2013_leg_report.pdf.

[22] *Available at* http://www.dot.ca.gov/hq/paffairs/news/pressrel/14pr018.htm.

> California or to conserve water. It may purchase billboard space and post its message directly in front of [a pregnancy] clinic. It can address the issue in public schools as part of sex education. ... Th[e] statute compels the clinic to speak words with which it profoundly disagrees when the State has numerous alternative methods of publishing its message. In this case, however virtuous the State's ends, they do not justify the means.

Id. (Addendum to Br. of Petitioners at 19a).[23]

In short, if the State wants to get its preferred message out, it should start by actually *speaking* the message rather than mandating that others do so on its behalf. Particularly given the State's many options for doing so, it cannot constitutionally conscript private citizens on the pro-life side of the debate into its service, and compel them to advertise the State's abortion resources.

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[23] *Scharpen* was not a class action. The *Scharpen* court's injunction against the Act protects only the one plaintiff in that case. *See id.* Its injunction also applies only to "the Attorney General, the County Counsel of Riverside County, and the City Attorney of the City of Temecula," *id.*, not to the many other local authorities throughout the State that are vested with authority to enforce the Act. *See* Cal. Health & Safety Code § 123473(a).

2. The Requirements Imposed on Non-Medically Licensed Centers Fail Strict Scrutiny

The Act's disclosure requirements for unlicensed centers also fail strict scrutiny.

First, the State's stated interest—ensuring that "pregnant women in California know when they are getting medical care from licensed professionals"—is simply illogical in this context. (J.A. 71.) As noted in Part I above, centers that are not licensed as medical facilities do not—and legally cannot—provide medical care.

Second, the State has, in any event, failed to proffer any evidence that clients cannot distinguish between a lay center and a medical facility. *Cf. Peel v. Attorney Registration & Disciplinary Comm'n*, 496 U.S. 91, 103 (1990) (striking down a restriction on an attorney advertising his certification as a trial specialist, where there was no finding that prospective clients were likely to be confused about whether the certification constituted a government endorsement). Nor has the State proffered evidence that women are likely to be confused into thinking they are visiting a facility that offers abortions. Indeed, many California pregnancy centers have names that clearly connote their pro-life stance, such as Heartbeat's affiliates Life Choices (Poway, California), Call for Life Pregnancy Center (Hesperia, California), and Life Centers of Orange County.

Third, the required disclosure for unlicensed centers is so onerous that it effectively eliminates

their ability to advertise. As shown above, the Act's requirement that unlicensed centers disseminate the notice in English and the applicable primary threshold languages for Medi-Cal beneficiaries drowns out and increases the costs of the centers' advertising—in some counties, exponentially so. This disclosure requirement is the very essence of an "imposition of a disproportionate burden calculated to drive 'certain ideas or viewpoints from the marketplace.'" *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 587 (1998) (quoting *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991)).

Fourth, if the State is concerned that unlicensed centers somehow hold themselves out as medical facilities, it has proffered no cogent evidence of that, and it would contravene the Commitment of Care and Competence that Heartbeat requires its affiliates to adopt. *See supra*, Part I. In any event, the State has less restrictive means of stopping any such conduct, including:

- California's False Advertising Law, which prohibits "any person, firm, corporation, or association ... with intent ... to perform services ... to make or disseminate ... in any newspaper or other publication, or any advertising device, ... or in any other manner or means whatever, ... any statement, concerning ... those services ... which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be

untrue or misleading," Cal. Bus. & Prof. Code § 17500;

- California's Unfair Competition Law, which broadly prohibits "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." *id.* § 17200; and

- California's Medical Practice Act, which makes it a crime for "any person [to] ... hold[] himself or herself out as practicing [medicine], without having at the time of so doing a valid ... certificate [to practice medicine]," *id.* § 2052(a).

See Village of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 637 (1980) ("The Village's legitimate interest in preventing fraud can be better served by measures less intrusive than a direct prohibition on solicitation. Fraudulent misrepresentations can be prohibited and the penal laws used to punish such conduct directly.").

Moreover, the false advertising law and Unfair Competition Law are not limited to after-the-fact remedies, nor are any of these statutes limited to private enforcement. Rather, the false advertising law and Unfair Competition Law provide for injunctive relief, *see* Cal. Bus. & Prof. Code § 17203, and, much like the FACT Act, for enforcement "by the Attorney General or a district attorney or [in some circumstances] by a county counsel ... [or] a city attorney." *Id.* § 17204.

For these reasons and those briefed by Petitioners, the disclosure requirement for unlicensed centers cannot withstand strict scrutiny.

C. The Act Fails Even Intermediate Scrutiny

Even if the Court concludes that the Act is subject to only intermediate scrutiny, the State still has failed to meet its burden. The State still "must show at least that the [provisions] directly advance ... a substantial governmental interest and that the measure[s] [are] drawn to achieve that interest. There must be a fit between the legislature's ends and the means chosen to accomplish those ends." *Sorrell*, 564 U.S. at 572 (internal quotation marks and citation omitted). "The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised." *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 391 (2000).

Much of the strict scrutiny discussion above applies equally under an intermediate scrutiny analysis. In the case of medically licensed centers, this includes (i) the State's failure to show that meaningful numbers of California women are unaware of the public programs available to them; (ii) the lack of "fit" between the purported problem and the means chosen to address it, which raises the specter that the State's true, or at least primary, purpose is to stifle the pro-life viewpoint; and (iii) the plethora of other options available to the State to disseminate its message, which obviates any perceived reason for compelling pro-life speakers to

convey the State's pro-abortion message. *See supra*, Part IV.B.1. In the case of unlicensed centers, it includes (i) the fact that the State's professed purpose for requiring unlicensed centers to state that they are not medical clinics is illogical, because unlicensed centers do not provide medical care; (ii) the State's failure to show that meaningful numbers of California women are confused about the type of center they are visiting; (iii) the Act's onerous and unjustified impact on the ability of unlicensed centers to advertise; and (iv) the significant number of other, less burdensome options the State has to address any perceived problem—which demonstrates that the Act does not substantially advance an important state interest. *See supra*, Part IV.B.2.

For these reasons and those briefed by Petitioners (*see* Br. for Petitioners at 60–62), the Act fails even intermediate scrutiny.

CONCLUSION

The Act's disclosure requirements violate the Free Speech Clause of the First Amendment. The ruling below should be reversed.

Respectfully submitted,

JAMES C. RUTTEN
Counsel of Record
ADAM P. BARRY
MUNGER, TOLLES & OLSON LLP
350 South Grand Avenue
50th Floor
Los Angeles, California 90071
(213) 683-9100
james.rutten@mto.com
adam.barry@mto.com

DANIELLE M. WHITE
HEARTBEAT
INTERNATIONAL, INC.
5000 Arlington Centre
Suite 2277
Columbus, Ohio 43220
(614) 885-7577
dwhite@heartbeat
international.org

JANUARY 16, 2018 *Counsel for Amicus Curiae*
Heartbeat International, Inc.

No. 16-1140

In the Supreme Court of the United States

NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES, D/B/A NIFLA, ET AL., *PETITIONERS*,
v.
XAVIER BECERRA, ATTORNEY GENERAL, ET AL.,
RESPONDENTS,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR HUMAN COALITION AS AMICUS CURIAE FOR PETITIONERS

JONATHAN D. CHRISTMAN
Counsel of Record
DANIEL W. YAGER
Fox Rothschild LLP
10 Sentry Parkway, Suite 200
P.O. Box 3001
Blue Bell, PA 19422
(610) 397-6500
jchristman@foxrothschild.com

Counsel for Amicus Curiae Human Coalition

QUESTION PRESENTED

Whether the disclosures required by the California Reproductive FACT Act violate the protections set forth in the Free Speech Clause of the First Amendment, applicable to the States through the Fourteenth Amendment?

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INTEREST OF *AMICUS*[1]

Amicus is Human Coalition ("HuCo"), a Texas nonprofit 501(c)(3) corporation formed in 2009 that is committed to rescuing children, serving families, and ending abortion by reaching abortion-determined women with a specially-crafted, objectively-measured, life-affirming message and tangible, individualized services. In addition to providing life-affirming marketing approaches for several dozen affiliated nonprofit pregnancy centers in 14 states across the country and running a contact center for women considering abortion, HuCo also operates its own specialized women's care clinics in four major cities (Atlanta, Georgia; Raleigh, North Carolina; Pittsburgh, Pennsylvania; and Dallas, Texas), with plans to expand beyond those locations to many of the largest U.S. cities (including locations in California). Through its contact center, care clinics, church and marketing outreach, and continuum of care program, HuCo continually tests and optimizes its practices and messaging so that HuCo listens to and serves the abortion-determined community with greater effectiveness. *Amicus* submits this brief in support

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[1] The parties consented to the filing of this *amicus curiae* brief pursuant to S. Ct. R. 37.3(a), the Petitioners through a blanket consent form filed with the Clerk and the Respondents through separate writings. Pursuant to Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for any party authored this brief in whole or part, and no person or entity, other than *amicus* and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

of Petitioners, National Institute of Family and Life Advocates d/b/a NIFLA, *et al.*

HuCo is interested in this case because vital free speech principles are at stake in this Court's review of the California Reproductive FACT Act (hereinafter, the "Act"). The Act impermissibly commandeers the unique message of private organizations who disagree with the government on a contentious public issue. In addition to diluting the disfavored speech of disfavored speakers, California compels those pro-life speakers to become a mouthpiece for a message contrary to their origins and purposes. This far-reaching law, versions of which have been adopted in other jurisdictions and locales across the country, sets a dangerous precedent and must be struck down under the Free Speech Clause of the First Amendment.

A. HuCo's specially-crafted and objectively-measured life-affirming message to, and care clinics for, abortion-determined women.

HuCo's abortion-ending strategy and messaging fuses strategic technology, data analysis, best practices, medically-accurate information, and short-term and long-term tangible help to reach, communicate with, and compassionately serve women who are inclined to terminate their pregnancies. In its work, HuCo has learned tone and content—even the most minute details—matter.

In America, the abortion-determined population, approximately 1.2 million women

annually, is an unreached and underserved group, with many of them facing unplanned pregnancies and suffering from systemic social and economic challenges. For such women, a pregnancy often induces fear and panic leading many to conclude an abortion, while often not desired, is the only solution.[2] When they contact HuCo, clients are often in a state of high anxiety, fear, and distress. In such situations, details—from word choice to vocal intonation to the topic and content of messaging—make a material difference in a woman's decision-making process.

To better serve its clients, HuCo meticulously measures and tests numerous variables to vigilantly track both its impact and its success in its efforts to connect with and serve abortion-determined women—testing everything from the number of persons clicking on an online marketing outreach to the number of women who chose life after coming into contact with HuCo.

Through qualitative research, HuCo observed that women who felt calm during their appointment were more likely to choose to continue their pregnancy, whereas women who felt anxiety during their appointment were more likely to obtain an abortion. In other words, methods,

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[2] However, most of this group (about 97%) will never come in contact with a pro-life organization and will instead head straight to an abortion clinic—a void HuCo seeks to close, and is closing. In fact, more than 86% of the women who come in contact with HuCo qualify as abortion-determined women, and, on average, its care clinics connect with substantially more abortion-determined women (about 78 times as many) than the average pro-life pregnancy center.

processes, and procedures that give a client security and support are more successful, whereas strategies that induce fear and uncertainty are counterproductive. This learning has driven testing and optimization at every stage of HuCo's operations.

For instance, in its contact center (which receives between 1,800 and 2,100 communications each month), HuCo has engaged in enterprising and statistically significant testing on various scripts used by its agents responding to texts, calls, and messages from prospective clients. This testing has demonstrated that what is said, when it is said, and how it is said affect whether callers schedule and keep appointments at one of HuCo's care clinics or affiliated pregnancy centers. By constantly assessing and reassessing how best to communicate, in the past five years, the rate at which abortion-determined women who connected with HuCo's contact center and went to a pregnancy center has more than doubled.

Moreover, in its life-affirming care clinics (which provide free pregnancy testing, ultrasounds, consultations, counseling, case management, and material assistance), HuCo has similarly engaged in quantitative and qualitative testing regarding atmospherics. The goal was to examine how physical and environmental conditions inside these locations affect clients' responses to counseling and, ultimately, the decisions they make. Based upon research showing that physical environment—from light temperature to wall color to furniture arrangement—can affect perceptions and thus actions, HuCo redecorated one of two

counseling rooms in its Dallas clinic and measured the results of counseling in that room compared to counseling in the originally-decorated room. Women counseled in the re-designed room were 37.5% more likely to choose to continue their pregnancy. HuCo repeated the test in its Pittsburgh clinic, where women counseled in the re-designed room were nearly 17% more likely to choose to continue their pregnancy. In short, the decisions HuCo makes about the appearance of the rooms at its care clinics are guided by the impact those rooms have on the experience of abortion-determined women. This is how HuCo chooses what to display on the walls or in the entrance and waiting areas of its clinics.

HuCo's observations about clients' decision-making has also affected how it serves clients. HuCo developed an adaptive, proprietary decision guide that allows counselors to work with clients to identify and address the unique obstacles each client perceives to her pregnancy. The decision guide fosters a collaborative, rather than adversarial, counseling experience. In addition, HuCo has developed proprietary counseling material, such as descriptive videos, that are designed to describe abortion procedures accurately without engaging in fear-mongering or graphic descriptions of the procedure. These processes are all designed to serve the client while avoiding unintentionally triggering a client's anxiety over her pregnancy.

All of the testing is designed to, and demonstrates, the effectiveness of messaging and tailored approaches, with the goal of improving

HuCo's effectiveness with its target population—*i.e.*, increasing the appointments scheduled, women served, and decisions for life numbers among abortion-determined population in major U.S. cities. The results of this precision measurement and testing demonstrate that in clinics where HuCo has applied its techniques and approaches, the number of abortion-determined women who decided to keep their babies increased by between 1,960% and 5,420%. Since its inception, HuCo is responsible for saving nearly 8,000 babies whose mothers were abortion-determined women. And since its inception, HuCo continues to adjust its messaging and approaches to improve its engagements with abortion-determined women, increase the number of babies saved, and to eventually make abortion unthinkable.

B. The Act would curtail and undermine HuCo's life-affirming care clinics if located in California.

In light of the above marked and decided impact, HuCo seeks to expand its life-affirming message throughout the country and bring its care clinics to many of the U.S. cities with the highest population (including locations in California).[3]

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[3] Eight of the top-50 largest cities by population, including three in the top-10, are located within California: Los Angeles, San Diego, San Jose, San Francisco, Fresno, Sacramento, Long Beach, and Oakland. U.S. Census Bureau, Population Div., "Annual Estimates of the Resident Population for Incorporated Places of 50,000 or More, Ranked by July 1, 2016 Population: April 1, 2010 to July 1, 2016" (Release Date May 2017), *available at* https://factfinder.census.gov/faces/tableservices/jsf/pages/prod

That distinct message, however, is stymied and seriously burdened by this Act, which forces both licensed and unlicensed pro-life facilities whose "primary purpose" involves providing "pregnancy-related services" to refer clients for abortions or discredit their life-affirming message. The legislative committee report accompanying the Act described that pro-life message as "unfortunate[]" because it "aim[s] to discourage and prevent women from seeking abortions." JA84-85.[4]

The Act forces licensed pro-life facilities to conspicuously state on-site that "California has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women. To determine whether you qualify, contact the county social services office at [insert the telephone number]." CAL. HEALTH & SAFETY CODE § 123472(a)(1)-(2). This public notice is to be printed in "no less than 22-point type" and is to be

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uctview.xhtml?pid=PEP_2016_PEPANNRSIP.US12A&prodType=table (last accessed Jan. 15, 2018).

[4] The Act exempts from its coverage any clinics operated by the United States, as well as any "licensed primary care clinic that is enrolled as a Medi-Cal provider and a provider in the Family Planning, Access, Care, and Treatment Program," the latter of which (Family PACT) is California's program for family planning and "reproductive health care" in which participating clinics provide the "full scope" of "family planning services," including contraceptives and abortifacients. *See* CAL. HEALTH & SAFETY CODE § 123471(c)(1)-(2); *see also* CAL. HEALTH & SAFETY CODE §§ 14132, 24005(c), 24007(a)(2).

disseminated in as many as thirteen different languages. *Id.*[5]

The Act also forces unlicensed pro-life facilities to conspicuously state on-site in multiple locations (including the entrance and at least one waiting area) and in all advertising materials (including websites) that "This facility is not licensed as a medical facility by the State of California and has no licensed medical provider who provides or directly supervises the provision of services." CAL. HEALTH & SAFETY CODE § 123472(b)(1)-(2). The on-site public notice is to printed in "no less than 48-point type," while the advertising notice must be distinguished from its surrounding text by "larger point type" or otherwise contrasted with, or set off from, the rest of the advertising to "call attention" to the compelled disclaimer; whether on-site or in advertising material, the notice must be

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[5] This compelled disclosure applies to facilities licensed under California law "whose primary purpose is providing family planning or pregnancy-related services" and which satisfy two of the following: "(1) The facility offers obstetric ultrasounds, obstetric sonograms, or prenatal care to pregnant women. (2) The facility provides, or offers counseling about, contraception or contraceptive methods. (3) The facility offers pregnancy testing or pregnancy diagnosis. (4) The facility advertises or solicits patrons with offers to provide prenatal sonography, pregnancy tests, or pregnancy options counseling. (5) The facility offers abortion services. (6) The facility has staff or volunteers who collect health information from clients." CAL. HEALTH & SAFETY CODE § 123471(a).

disseminated in as many as thirteen different languages. *Id.*[6]

The penalty for noncompliance with the Act is a $500 civil fine for a first offense and a $1,000 fine for each subsequent offense. CAL. HEALTH & SAFETY CODE § 123473(a). The Act, which is enforceable by the Attorney General of California, city attorney, or county counsel, provides a 30-day window to "correct the violation" after a covered facility is provided "reasonable notice of noncompliance." *Id.*

Irrespective of whether one of HuCo's care clinics would qualify as licensed or unlicensed under the Act, its care clinics—through their free pregnancy testing, ultrasounds, consultations, counseling, and case management services—provide the kind of "pregnancy-related services" encompassed by the Act. HuCo also speaks the kind of life-affirming message that is specifically targeted by the Act's compelled disclosures, and its life-affirming existence and purpose prevent it from qualifying for the Act's exemptions. As a

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[6] This compelled disclosure applies to unlicensed facilities in California which do "not have a licensed medical provider on staff or under contract who provides or directly supervises the provision of all of the services, whose primary purpose is providing pregnancy-related services" and that also satisfies two of the following: "(1) The facility offers obstetric ultrasounds, obstetric sonograms, or prenatal care to pregnant women. (2) The facility offers pregnancy testing or pregnancy diagnosis. (3) The facility advertises or solicits patrons with offers to provide prenatal sonography, pregnancy tests, or pregnancy options counseling. (4) The facility has staff or volunteers who collect health information from clients." CAL. HEALTH & SAFETY CODE § 123471(b).

result, HuCo cannot further extend its specifically-crafted and objectively-measured life-affirming message and care clinics to abortion-determined women in California, without being bound in some way by the Act's forced speech code that violates the First Amendment.

SUMMARY OF ARGUMENT

For decades the issue of abortion has been in the foreground of the public's political, electoral, legal, medical, social, cultural, moral, and spiritual attention. During that time, the issue has also been at the center, or lurking in the shadows, of many of this Court's most controversial decisions. It is, undeniably, a public issue fraught with controversy, and laced with deeply-held convictions and competing views among citizens.

The Act, which requires either compelled abortion referrals or discrediting disclaimers by pro-life organizations, is only the latest battle in that undeclared war. But for First Amendment advocates of any persuasion, it is one California must lose. Fortunately, to resolve this clash, this Court need not actually pick a side between abortion advocates and abortion foes. Instead, non-controversial, unifying, and bedrock First Amendment principles mandate the outcome. Otherwise, this Court will set in motion across the country a bevy of private speech regulations on hotly contested public issues by those who control the levers of governmental power and deem the most efficient means of distributing their own message to be compelling speech from their adversaries. Thus, the nationwide First

Amendment implications of the Act are at once startling and dangerous—and not merely for those who subscribe to pro-life views.

California wants to transmit a message to abortion-determined women (the same population targeted by HuCo): the state offers free or low-cost abortions. On its face and in its design and application, the content of the law is ideological in both purpose and kind on the disputed public issue of abortion. California is entitled to its own view; but so is everyone else, and especially those (like HuCo) who disagree with the government's view on abortion and offer alternatives. Incredibly, however, the carriers California has chosen for its message fundamentally disagree with abortion and would not exist but for that disagreement.

With pro-life organizations in its crosshairs, the Act intentionally dilutes, distorts and damages the message of private organizations both inside and outside their pro-life facilities. The compelled disclosures are neither subtle nor innocuous. As detailed above, HuCo has evaluated how seemingly benign matters affect the decisions made by abortion-determined women regarding their pregnancies. Such changes have measurable effects, which explains why HuCo has honed and refined its life-affirming message with exacting precision. Compelled alterations to that message—such as those required by the Act—can have a detrimental effect on that message, meaning fewer decisions for life are ultimately made.

By commandeering private speakers to be the mouthpiece for the state's preferred messages and

views on the contentious public issue of abortion, California has eviscerated vital free speech principles. Among said principles, the Free Speech Clause protects private speakers' decisions to say and not say what they want. Private speakers also have a right not to spread a state-sponsored message with which they fundamentally disagree, and their speech cannot be conditioned on proclaiming the government's view. Nor may government use private speech restrictions to dilute and disadvantage disfavored views at the behest of promoting its own. The Act therefore demands but cannot survive this Court's most exacting scrutiny. In fact, sanctioning the Act under such First Amendment scrutiny would gravely undermine and undercut a bedrock constitutional principle: "that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). The Act is thus antithetical to our constitutional jurisprudence, and must be struck down as violating the Free Speech Clause.

ARGUMENT

I. Government cannot commandeer private speakers on public issues to carry the state's preferred messages and views.

The First Amendment "does not countenance governmental control over the content of messages expressed by private individuals." *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 641 (1994). The

freedom of speech "prohibits the government from telling people what they must say." *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l*, 133 S. Ct. 2321, 2327 (2013). In a remarkable step nowhere permitted in this Court's constitutional jurisprudence, the Act attempts to tell private organizations what to say on one of the most contentious public issues of our day: abortion. *Snyder v. Phelps*, 562 U.S. 443, 452 (2011) ("[S]peech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.") (citation omitted).[7]

A. The Free Speech Clause protects private speakers' decisions to say and not say what they want.

"The First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and how to say it." *Riley v. Nat'l Fed. of the Blind of North Carolina, Inc.*, 487 U.S. 781, 790-91 (1988). Moreover, this guarantee of the freedom of speech necessarily includes "the decision of both what to say and what *not* to say." *Id.* at 796-97 (emphasis in original); *see also Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 573 (1995) ("Since *all* speech inherently involves choices of what to say and what to leave unsaid, one

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[7] Nonprofit organizations, like individuals, possess First Amendment rights. *Citizens United v. F.E.C.*, 558 U.S. 310, 342-43 (2010) (free speech rights); *cf. Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2768-69 (2014) (collecting cases entertaining nonprofits' free exercise rights).

important manifestation of the principle of free speech is that one who chooses to speak may also decide what not to say.") (internal citations and quotations omitted; emphasis in original).

This Court has long held that such speech protection—the "right to speak and the right to refrain from speaking" are "complementary components of the broader concept of 'individual freedom of mind.'" *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (citation omitted). To secure citizens' rights "to proselytize religious, political, and ideological causes" they must also be guaranteed the "concomitant right to decline to foster such concepts." *Id.* Thus, "[a]t the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence. Our political system and cultural life rest upon this ideal." *Turner*, 512 U.S. at 641.

Exercising these fundamental rights, HuCo expends significant time, energy, and resources in crafting, developing, and testing (and re-testing) its messages through quantitative studies and qualitative metrics. It has designed and tailored what it says and how it says what it says to its audience of abortion-determined women. These are delicate conversations where mothers' futures and unborn babies' lives hang in the balance. One

change in HuCo's message can have significant, life-altering consequences.[8]

In short, HuCo requires freedom and flexibility to deliver its life-affirming message to rescue families and to increase the number of appointments scheduled, women served, and decisions for life among abortion-determined women in the communities HuCo serves. It must have this freedom under the Free Speech Clause to pick-and-choose what it says without adherence to California's opinion on the topic of abortion.

B. Private speakers have a right not to spread a state-sponsored message with which they fundamentally disagree.

Well-established constitutional principles also bar government from forcing or compelling private speakers to promote or facilitate a message with which they fundamentally disagree. Compelled speech forces "an individual, as part of his daily life indeed constantly" to "be an instrument for fostering public adherence to an ideological point of view he finds unacceptable." *Wooley*, 430 U.S. at 715. But the First Amendment protects the right of persons "to hold a point of view different from the majority" and "to refuse to foster" an idea "they find morally objectionable." *Id.* Indeed, "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion,

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[8] HuCo rescued 2,503 babies in 2017. A change that decreased HuCo's effectiveness by as little as 2% would have irrevocably affected the lives of 50 women and 50 babies.

or other matters of opinion, or force citizens to confess by word or act their faith therein." *Barnette*, 319 U.S. at 642.

Forcing compelled disclosures upon pro-life organizations penalizes them for their own expression. *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 257 (1974) ("[g]overnment-enforced right of access inescapably 'dampens the vigor and limits the variety of public debate.'") (citation omitted). Indeed, the Act forces pro-life organizations to affirm and validate "in one breath that which they deny in the next." *Pac. Gas & Elec. Co. v. Public Utilities Comm'n of Cal.*, 475 U.S. 1, 16 (1986) (plurality op.). Licensed pro-life facilities providing pregnancy-related services, for instance, must become forced advertisers and referral agencies for abortion providers. Such double-speak interferes with these life-affirming messages and undermines the purpose of these organizations.[9]

Not only that, the Act is an unconstitutional governmentally-induced condition on private organizations who wish to speak a life-affirming message to abortion-determined women. *Alliance for Open Soc'y*, 133 S. Ct. at 2327 (stating that government policy conditioning funding on agreement to express a message—if enacted as a

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[9] Under the Act, unlicensed pro-life facilities providing pregnancy-related services must issue a government disclaimer both on-site and in their advertising material, before uttering their life-affirming message. This is a costly and consequential burden on their message and effectiveness, and is one uniquely placed upon these pro-life pregnancy clinics opposed to abortion (as compared to other unlicensed facilities who also serve pregnant women).

direct speech regulation—would "plainly violate the First Amendment"). Government cannot, as a condition to speaking on the issue of abortion, mandate that pro-life organizations foster a concept and promote a practice with which they fundamentally disagree.

C. Government cannot use restrictions on private speech to promote its own favored view.

The government "may not burden the speech of others in order to tilt public debate in a preferred direction." *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 578-79 (2011). There is "no more certain antithesis" to the Free Speech Clause than government's usage of private speech restrictions to produce "thoughts and statements" it deems "acceptable" to the public. *Hurley*, 515 U.S. at 579; *see also United States v. Alvarez*, 132 S. Ct. 2537, 2547 (2012) ("Our constitutional tradition stands against the idea that we need Oceania's Ministry of Truth."). A central purpose of the First Amendment is "to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion." *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring), and prevent government from placing "restraints on the way in which the information [possessed by private speakers] might be used' or disseminated." *Sorrell*, 564 U.S. at 568 (citation omitted).

Yet that is precisely what California has sought to accomplish here. The Act is a confiscatory speech regime seizing upon private speakers' property,

resources, and messages to promote the government's view on abortion and funnel abortion-determined women to abortion providers. The effect of the compelled disclosures is for private organizations to "use their private property" as a fixed "billboard" for California's "ideological message or suffer a penalty"—in this case repeating civil fines for each month the compelled disclosures are not made. *Wooley*, 430 U.S. at 715. However, "[g]overnment action that stifles speech on account of its message, or that requires the utterance of a particular message favored by the Government, contravenes this essential right. Laws of this sort pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion. These restrictions 'rais[e] the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace.'" *Turner*, 512 U.S. at 641 (citation omitted); *see also Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995) ("In the realm of private speech or expression, government regulation may not favor one speaker over another.").[10]

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[10] The speech at issue does not trigger this Court's commercial speech doctrine. Nothing offered by the private organizations "propose[s] a commercial transaction." *United States v. United Foods, Inc.*, 533 U.S. 405, 409 (2001). Instead, they offer free information, counseling, and services with no economic motivation for their speech. Not only that, this Court has struck down, under heightened scrutiny, regulations of speech that evinces a commercial character (such as charitable solicitation) because that speech was

Here, the "specter" of concern accompanying prior speech regulations that this Court has considered in past First Amendment decisions is a fully-grown, fully-realized fact. California has unambiguously dictated what private organizations who oppose abortion must say and coerced them to either issue an introductory disclaimer or become abortion referral agencies. The goal is not merely to minimize their message; it is to discredit the messenger and drive their life-affirming message away from their intended audience and the public debate.[11]

HuCo's life-affirming message targets the same population sought to be reached by California through its enactment of the Act – abortion-determined women – but from an entirely different viewpoint. A burdensome and viewpoint-discriminatory message mandated by the state, such as these compelled disclosures, could cloud conversations with abortion-determined women and lead to fewer scheduled appointments, fewer women served, and ultimately fewer decisions for life. The kind of mandatory and conspicuous disclosure required by the Act "will be the last

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"inextricably intertwined with otherwise fully protected speech." *Riley*, 487 U.S. at 796.

[11] This Court has said that "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). The opposite is equally true, and foundational: government may not require the expression of an idea simply because society finds the idea itself acceptable and agreeable.

words spoken" as the abortion-determined woman leaves a care clinic "or hangs up the phone." *Riley*, 487 U.S. at 800. Thus, this forced speech code erects an obstacle that will have a noticeable and negative effect on life-affirming messages.

It is of no consequence to the First Amendment analysis that the government argues that the compelled disclosures are factual statements. Compelled statements of "fact" and compelled statements of opinion equally burden protected speech. *Id.* at 797-98; *see also Hurley*, 515 U.S. at 573 (private speaker's right to tailor non-commercial speech involving "expressions of value, opinion, or endorsement" apply equally to "statements of fact the speaker would rather avoid"). HuCo's speech would nonetheless be altered by the Act's compelled disclosures. And its message would be no less undermined since the compelled disclosures would either stoke anxiety and distraction in its targeted population, or posit abortion as a viable alternative, which is contrary to its existence and purpose.

II. Government cannot target for dilution messages and views it disfavors.

It is well established under the Free Speech Clause that "[t]he government may not regulate ... based on hostility—or favoritism—towards the underlying message expressed." *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 386 (1992). Content-based restrictions on private speech, particularly in the abortion context, allow government officials to "effectively drive certain ideas or viewpoints from the marketplace." *Simon & Schuster, Inc. v.*

Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 116 (1991). The Act's compelled disclosures plainly detract from private speakers' lawful messages in a blatant attempt to regulate the marketplace of ideas on abortion by controlling the words communicated to abortion-determined women. California has enacted a targeted speech regulation of a particular group—which, by operation, manifestly consists of those opposed to that state government's viewpoint on abortion. As such, the Act represents both content-based and viewpoint discrimination.

A. The Act is a content-based speech regulation.

"Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech." *Riley*, 487 U.S. at 795. "Lawmakers may no more silence unwanted speech by burdening its utterance than by censoring its content." *Sorrell*, 564 U.S. at 566. "Government's content-based burdens must satisfy the same rigorous scrutiny as its content-based bans." *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 812 (2000). The Act undeniably forces pro-life organizations to utter speech they would not otherwise make—indeed, speech that can and will detract from their mission and ultimately lead to fewer decisions for life.

Moreover, "[t]he government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger*, 515 U.S. at 829. "Just as the

'inevitable effect of a statute on its face may render it unconstitutional,' a statute's stated purposes may also be considered." *Sorrell*, 564 U.S. at 565 (citing *United States v. O'Brien*, 391 U.S. 367, 384 (1968)). Here, the passage of the Act demonstrates that California has "adopted a regulation of speech because of disagreement with the message it conveys." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *see also Rosenberger*, 515 U.S. at 828 ("Discrimination against speech because of its message is presumed to be unconstitutional.").

The Act "on its face burdens disfavored speech by disfavored speakers," making it a content-based speech regulation. *Sorrell*, 564 U.S. at 564; *see also Turner*, 512 U.S. at 643 ("As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based."). The Act compels licensed pregnancy-related clinics to intrusively advertise—in multiple languages—California's "public programs that provide immediate free or low-cost ... contraception ... and abortion for eligible women." CAL. HEALTH & SAFETY CODE § 123472(a)(1). The Act is also content-based because it applies only to clinics providing qualifying pregnancy-related services—which are uniformly provided by pro-life organizations opposed to abortion—but not all health-related facilities who may have contact with pregnant women.[12]

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[12] For instance, doctors in private practice, primary care clinics, and various other medical facilities (*e.g.*, student health centers) are excluded from the Act. *See* Pet.Br.32-33 (collecting additional examples).

Even though the Act's mandatory disclaimers for unlicensed facilities both on-site and in all advertising material may not have the word "abortion" in its state-mandated script, it does not mean the compelled disclosures are "not designed to favor or disadvantage speech of any particular content." *Turner*, 512 U.S. at 652. They are. These compelled disclosures must be printed in at least 48-point font within the facility and "in a font larger than the surrounding text" on all public advertisements outside the facility. CAL. HEALTH & SAFETY CODE § 123472(b)(2)-(3). The compelled disclosures are also limited to pro-life clinics, even though various other centers and facilities are similarly unlicensed but not subject to the Act's speech burdens.[13] This further evidences the obvious intent to regulate the speech of only certain centers and facilities that are opposed to abortion—which is conceded by the Act's legislative record deeming the pro-life message "unfortunate[]" because it "aim[s] to discourage and prevent women from seeking abortions." JA84-85.

B. *Reed v. Town of Gilbert* mandates that courts apply strict scrutiny when examining any content-based speech laws.

Content-based speech laws are subject to strict scrutiny review. *Reed v. Town of Gilbert*, 135 S. Ct.

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[13] The Act allows any other unlicensed facility offering health-related services or collecting health-related information but not "providing pregnancy-related services" to refrain from notifying clients when they are using a facility that has not satisfied licensing standards set by the state. CAL. HEALTH & SAFETY CODE § 123471(b).

2218, 2228 (2015). In *Reed*, this Court determined that municipal regulations over the manner in which outdoor signs were displayed were content-based and, therefore, subject to strict scrutiny. 135 S. Ct. at 2227-31. Importantly, however, in reaching that unanimous decision, this Court squarely addressed arguments that the regulations should not be subject to strict scrutiny "because the Town 'did not adopt this regulation of speech based on disagreement with the message conveyed,' and its justification for regulating temporary directional signs were 'unrelated to the content of the sign.'" *Id.* at 2227 (citations omitted). This Court plainly rejected the government's argument in *Reed*. Instead, the Court emphasized:

> A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of "animus toward the ideas contained" in the regulated speech. We have thus made clear that "[i]llicit legislative intent is not the *sine qua non* of a violation of the First Amendment," and a party opposing the government "need adduce 'no evidence of an improper censorial motive.'" Although "a content-based purpose may be sufficient in certain circumstances to show that a regulation is content based, it is not necessary." In other words, an innocuous justification cannot transform a facially content-

> based law into one that is content neutral.

Id. at 2228 (internal citations omitted). In fact, this Court emphasized that it has "repeatedly considered whether a law is content neutral on its face *before* turning to the law's justification or purpose" because a facially content-based law is automatically subject to strict scrutiny regardless of whether the law is viewpoint neutral. *Id.* (emphasis in original; citations omitted).

Moreover, the government in *Reed* "seize[d]" on the idea that its regulations should pass constitutional muster "because its treatment of temporary directional signs does not raise any concerns that the government is endorsing or suppressing ideas or viewpoints, and the provisions for political signs and ideological signs are neutral as to particular ideas or viewpoints within those categories." *Id.* at 2229 (internal citations and quotations omitted). This Court quickly dispatched that notion, explaining that the "analysis conflates two distinct but related limitations that the First Amendment places on government regulation of speech." *Id.* at 2229-30. This Court explained:

> Government discrimination among viewpoints—or the regulation of speech based on "the specific motivating ideology or the opinion or perspective of the speaker"—is a "more blatant" and "egregious form of content discrimination." But it is well established that "[t]he First Amendment's hostility to content-

> based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic."
>
> Thus, a speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter.

Id. at 2230 (internal citations omitted); *see also Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993) (this Court's precedents have repeatedly "rejected the argument that 'discriminatory ... treatment is suspect under the First Amendment only when the legislature intends to suppress certain ideas.'").

In this matter, the Ninth Circuit correctly found that the Act was a content-based speech regulation. Pet.App.22a. That should have resolved which level of scrutiny to apply. But the court concluded that strict scrutiny was "inappropriate" because the Act "does not discriminate based on the particular opinion, point of view, or ideology of a certain speaker," and proceeded to apply intermediate scrutiny to the compelled disclosure requirements for licensed facilities. Pet.App.22a, 28a-36a.[14] In doing so, the Ninth Circuit declined to follow this Court's unambiguous holding in *Reed* that "a law that is content based on its face is subject to strict

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[14] The Ninth Circuit concluded that the compelled disclosure requirements for unlicensed facilities satisfied even strict scrutiny (Pet.App.36a-38a)—an erroneous holding addressed in Section III, *infra*.

scrutiny," 135 S. Ct. at 2228, and instead relied upon a prior circuit court opinion that created an exception to this Court's speech precedents for purportedly viewpoint neutral laws. Pet.App.23a (citation omitted). However, *Reed* holds that government cannot sidestep satisfying strict scrutiny on content-based laws, even if it had "innocent" or "benign" motives and an "innocuous justification" for its actions (which California did not have), or the law is not "viewpoint" based (which the Act is not), or the law is not "speaker based" or "event based" (which the Act is not). 135 S. Ct. at 2228-30.

In ignoring this Court's precedents, the Ninth Circuit misapplied the unequivocal language in *Reed* that requires a court to apply strict scrutiny to any content-based speech law. *Reed* made clear that a viewpoint discriminatory law is a form of content-based regulation, and viewpoint neutrality does not bar application of strict scrutiny.[15] As such, the Act is subject to strict scrutiny under *Reed*.

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[15] Even assuming that an unwritten exception existed for viewpoint-neutral laws—which it does not—a law requiring pro-life organizations that would not exist but for their opposition to abortion to issue a disclaimer or advertise for "free or low cost" access to the same is far from viewpoint neutral. In addition to all of the health facilities excluded from the Act's coverage, the Act exempts from its coverage clinics providing pregnancy-related services who offer contraceptives, abortifacients and/or abortions under California's Family PACT program, and thus effectively only implicates the speech rights of pro-life organizations.

C. The Act discriminates based on viewpoint by compelling a select group of disfavored speakers to issue discrediting disclaimers or advertise for "free or low-cost" abortion services.

In operation, the Act "goes even beyond mere content discrimination, to actual viewpoint discrimination." *R.A.V.*, 505 U.S. at 391. While the Ninth Circuit characterizes the law's exceptions as "narrow," even a cursory examination of the law defeats the Ninth Circuit's justification for distinguishing *Sorrell*. The exemptions in the Act apply to any clinics operated by the United States and any "licensed primary care clinic that is enrolled as a Medi-Cal provider and a provider in the Family Planning, Access, Care, and Treatment Program." CAL. HEALTH & SAFETY CODE § 123471(c)(1)-(2). However, providers under the latter exception agree to provide services including all FDA approved contraceptive methods, drugs, devices, and supplies—an exemption which categorically excludes pro-life centers and organizations who are religiously and/or morally opposed to such contraceptives or abortifacients. CAL. WELF. & INST. CODE § 14132(aa)(8); *see also* Pet.Br.13 (discussing Family PACT program).

Consequently, the vast majority of organizations covered by the Act are those that would not exist but for the prevalence and acceptance of abortion. Indeed, their very existence is premised upon their opposition to abortion. By compelling primarily those pro-life speakers to issue discrediting disclaimers or promoting

abortion would not only undermine the efforts of these groups to curtail abortion, but would dismantle their First Amendment rights by burdening a "narrow class of disfavored speakers." *Sorrell*, 564 U.S. at 564.

III. The Act cannot survive strict scrutiny.

This Court's precedents "apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content." *Turner*, 512 U.S. at 642. As a general matter, "[l]aws that compel speakers to utter or distribute speech bearing a particular message are subject to ... rigorous scrutiny." *Id.*; *see also Riley*, 487 U.S. at 789 (compelled speech laws are subject to "exacting First Amendment scrutiny"). The Act's compelled disclosures are subject to—and cannot survive—this (or any constitutional) review.

A. Strict scrutiny is a demanding standard.

Reed mandates that the Act's compelled disclosures "can stand only if they survive strict scrutiny, 'which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest.'" 135 S. Ct. at 2231 (citations omitted). This Court has recognized that "it is all but dispositive to conclude that a law is content-based and, in practice viewpoint-discriminatory." *Sorrell*, 564 U.S. at 571 (citing *R.A.V.*, 505 U.S. at 382) ("Content-based regulations are presumptively invalid."). That is because "[t]he First Amendment requires heightened scrutiny whenever the

government creates 'a regulation of speech because of disagreement with the message it conveys.'" *Sorrell*, 564 U.S. at 566 (citing *Ward*, 491 U.S. at 791).

To satisfy strict scrutiny, the Act must further a government interest of the "highest order." *See Reed*, 135 S. Ct. at 2232. It also requires the government to show that the purported compelling interest is furthered by the burden placed on particular claimants. *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 799 (2011). "[A] law cannot be regarded as protecting an interest of the highest order ... when it leaves appreciable damage to that supposedly vital interest unprohibited." *Reed*, 135 S. Ct. at 2232 (citation omitted).

Under strict scrutiny, the Act fails unless the government can "specifically identify an 'actual problem' in need of solving, and the curtailment of free speech must be actually necessary to the solution. That is a demanding standard." *Brown*, 564 U.S. at 799; *see also Alvarez*, 567 U.S. at 725 ("There must be a direct causal link between the restriction imposed and the injury to be prevented."). "If a less restrictive alternative would serve the Government's purpose, the legislature must that alternative." *Playboy*, 529 U.S. at 813. Further, "when [laws] affect First Amendment rights they must be pursued by means that are neither seriously underinclusive nor seriously overinclusive," *Brown*, 564 U.S. at 805, because underinclusiveness and overinclusiveness demonstrate that a speech regulation is not narrowly tailored to further a compelling government interest. *Reed*, 135 S. Ct. at 2232.

Because California has not (and cannot) make the requisite showing under this demanding standard, the Act is unconstitutional.

B. California fails to identify an interest of the highest order demanding a particular speech burden on all pro-life organizations.

This Court must reject California's purported interest in passing this law for "it is no answer . . . to say . . . that the purpose of these regulations was merely to ensure high professional standards and not to curtail free expression." *NAACP v. Button*, 371 U.S. 415, 438-39 (1963). While states "ha[ve] a strong interest in protecting a woman's freedom to seek a lawful medical or counseling services in connection with her pregnancy," *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 767 (1994), that is not the interest that California seeks to promote here. Instead, California seeks to balance the risk of some women receiving purportedly-deceiving information by an unknown number of pregnancy centers by forcing *all* pro-life pregnancy facilities to advertise for California's abortion-related services.[16] Moreover, if deception, fraud, false advertising, and practicing medicine without a license were truly ills to be cured,

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[16] Indeed, the compelled disclosures are not tied to any specific medical procedure or treatment for a patient by a licensed practitioner. That takes the Act outside of "informed consent" laws and this Court's decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 881-83 (1992), which reviewed a state law requiring physicians to disclose certain information to women before an abortion.

California could simply pursue and enforce its already-existing laws to curb such speech and conduct. *See* CAL. BUS. & PROF. CODE § 17500 (state law prohibiting false advertising); CAL. BUS. & PROF. CODE § 2052 (state law prohibiting the unlicensed practice of medicine); CAL. CIVIL CODE § 1711 (state law prohibiting commercial fraud).

In light of the already-existing laws, permitting California to mandate the Act's compelled disclosures would endorse an expansive view of governmental authority and power that "has no clear limiting principle." *Alvarez*, 132 S. Ct. at 2547. It would also invoke a broad commandeering power "unprecedented in this Court's cases or in our constitutional tradition" and the "mere potential for the exercise of that power casts a chill, a chill the First Amendment cannot permit if free speech, thought, and discourse are to remain a foundation of our freedom." *Id.* at 2548. It would also run afoul of the "First Amendment's command that government regulation of speech must be measured in minimums, not maximums." *Riley*, 487 U.S. at 790; *see also F.E.C. v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 468-69 (2007) ("First Amendment freedoms need breathing space to survive.") (quoting *Button*, 371 U.S. at 433).

Upholding this Act could also have far-reaching effects on individuals, as well as other private organizations that disagree with a particular government message. States would be equipped to flip the existence of these organizations—and the messages that they convey—on its head to conform

with the state's own agenda.[17] As such, in order to avoid granting states *carte blanche* to undermine the messages of private organizations, this Court should find that requiring private organizations that would not exist but for their opposition to abortion to disclaim what they do not profess to do or advertise for abortion-related services cannot be considered a compelling government interest.

C. The Act is not narrowly tailored to achieve a compelling government interest.

The Act also fails to survive strict scrutiny because the compelled disclosures are not narrowly tailored to providing all California women with information on reproductive health services. Instead, the Act is focused on silencing pregnancy centers that allegedly "employ 'intentionally deceptive advertising and counseling practices that often confuse, misinform, and even intimidate women from making fully-informed, time-sensitive decisions about critical health care.'" JA39, JA84-85. Incredibly, California's chosen method of promoting its abortion-related services is to compel

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[17] Nor is the speech of private organizations covered by the Act best understood as professional speech. While government may regulate speech in certain traditional professions, *Lowe v. S.E.C.*, 472 U.S. 181, 228 (1985) (White, J., concurring in the judgment), the organizations covered by the Act do not practice a "profession" in the usual sense. Moreover, even if certain speech is designated professional speech (due to licensing requirements or the like), because the counseling and services are free-of-charge, strict scrutiny is the proper standard of constitutional review for *pro bono* speech. *In re Primus*, 436 U.S. 412, 437-38 (1978); *Button*, 371 U.S. at 438-39.

licensed pro-life facilities to post advertisements for the very services that these centers exist to oppose. This requirement is simultaneously overbroad by compelling such speech from every licensed pro-life facility, and underinclusive by applying only to those clinics that stand in opposition to abortion.

Thus, the Act fails to survive strict scrutiny because it is not narrowly tailored to prevent the alleged deception that it purports to combat, let alone an interest of the highest order. Strict scrutiny requires a law to "target[] and eliminate[] no more than the exact source of the 'evil' it seeks to remedy." *Frisby v. Schultz*, 487 U.S. 474, 485 (1988). The compelled disclosures, however, apply to all pregnancy centers without reference to whether any center has engaged in, or even been accused of, "deception." Rather, the Act compels all pro-life licensed facilities—which exist primarily to offer alternatives to abortion—to instead advertise affordable access to the same. Such an overly broad requirement places an unwarranted and unconstitutional burden on these centers' rights to free speech by undermining their life-affirming message. As this Court has explained, "[b]road prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *Riley*, 487 U.S. at 801 (internal quotations and citations omitted). Because the compelled disclosures lack such precision and instead seek to burden all licensed pro-life facilities, the Act is not narrowly tailored to achieve its stated purpose.

The Act's compelled disclosures must also be "disseminate[d] to clients on site and in any print and digital advertising materials including Internet Web sites." CAL. HEALTH & SAFETY CODE § 123472(b). Under strict scrutiny, requiring unlicensed facilities to include this disclosure in their advertisements "must be actually necessary" to solve an "actual problem" that the state is facing. *Brown*, 564 U.S. at 799. Here, however, this superfluous requirement has only the effect of making advertising for these unlicensed facilities cost prohibitive since the disclaimer must be "provided in English and in the primary threshold languages for Medi-Cal beneficiaries as determined by State Department of Health Care Services for the county in which the facility is located." In such counties, the included content of these additional languages will double, triple, or even quadruple the length of the entire advertisement. *See* Cal. Dep't of Health Care Services, "Medical Eligible with Threshold Languages by County," *available at* http://www.dhcs.ca.gov/dataandstats/statistics/Documents/Threshold_Language_Brief_Sept2016_ADA.pdf (last accessed Jan. 15, 2018). In Los Angeles County, this would require the compelled disclosure requirements of unlicensed facilities to be repeated in thirteen languages. *Id.* Thus, the alleged "one sentence long" disclaimer (Pet.App.38) is not so circumscribed and unobtrusive. California has other means by which to transmit this information than by requiring a conspicuous and eye-catching posting at the beginning of every pro-life clinic's encounter with a potential client and distribution of their life-affirming message.

Similarly, as discussed above, the two exemptions in the Act are so vast that the ultimate effect is to require only those clinics opposed to abortion to make and display compelled disclosures. On their face, the compelled disclosures are fatally underinclusive. Consequently, the speech requirement necessarily only applies to pro-life facilities that offer pro-life counseling, care, and services as alternatives to abortion. Such "[u]nderinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes rather than disfavoring a particular speaker or viewpoint." *Brown*, 564 U.S. at 802. California cannot claim that placing such burdens on all pro-life facilities is necessary to ensure that "all California women . . . have access to reproductive health services" while allowing licensed clinics that offer abortion-related services to forgo the same requirement. The overt underinclusiveness indicates an effort to silence or undermine a particular group of disfavored speakers by placing undue burdens upon their ability to advertise or communicate with potential clients. In light of such patently discriminatory effects, the Act fails to satisfy strict scrutiny. *Id.* ("The consequence is that its regulation is wildly underinclusive when judged against its asserted justification, which in our view is alone enough to defeat it.").

Even if the compelled disclosures were not unconstitutionally over- and underinclusive, the Act nevertheless fails to satisfy strict scrutiny because there are less restrictive means that the government could employ to spread its chosen

abortion message. While the Ninth Circuit found that dissemination of the compelled disclosures "directly" to persons entering a clinic "is an effective means of informing women about publicly-funded pregnancy services," that conclusion utterly fails to consider California's lack of pursuit of other, less restrictive, actions available to the state. *See Playboy*, 529 U.S. at 813 ("If a less restrictive alternative would serve the Government's purpose, the legislature must that alternative.").

Moreover, "the First Amendment does not permit the State to sacrifice speech for efficiency." *Riley*, 487 U.S. at 795. The Act's legislative record, which the Ninth Circuit favorably cited, shows a speech regulation chosen for the sake of efficiency. JA54, JA65, JA70 (claiming that compelled speech was the "most effective way to ensure that women quickly obtain the information and services they need to make and implement timely reproductive decisions"); *see also* Pet.App.7, 33. The First Amendment is not controlled by "an ad hoc balancing of relative social costs and benefits." *United States v. Stevens*, 559 U.S. 460, 470 (2010).

In this compelled speech case, California itself may "communicate the desired information to the public without burdening a speaker with unwanted speech." *Riley*, 487 U.S. at 800. California can pay for a public advertising campaign rather than commandeering the walls, advertisements, and budgets of private organizations who disagree with the government on that precise message. While the Ninth Circuit acknowledged that alternatives—such as an advertising campaign—exist, it avoided that inquiry by adopting the wrong level of

scrutiny and discarding the least-restrictive means test. Under the heightened strict scrutiny standard, however, that is not the case. *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 373 (2002) ("If the First Amendment means anything, it means that regulating speech must be a last-not first resort. Yet here it seems to have been the first strategy the Government thought to try."). Thus, the availability of state-funded medical services can be communicated through less restrictive means and, therefore, the Act is insufficiently tailored to satisfy strict scrutiny.[18]

CONCLUSION

This Court should reverse the Ninth Circuit's refusal to enjoin the Act.

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[18] Even under the lesser standard of intermediate scrutiny, the government "must show at least that the statute directly advances a substantial governmental interest and that the measure is drawn to achieve that interest." *Sorrell*, 564 U.S. at 572. "There must be a 'fit between the legislature's ends and the means chosen to accomplish those ends.'" *Id.* (citation omitted). Here, California may take it upon itself to advertise available medical services for women and funding for abortions, or provide lists of licensed health-related facilities, through countless forms of media, but chooses instead to burden only a select group of disfavored speakers who oppose abortion with mandatory disclosures. No part of the Act is fit to achieve any purpose other than one that is unconstitutional: to alter the manner and method of pro-life organizations' speech and correspondingly undermine their life-affirming message. Thus, the Act cannot even survive the lesser standard of intermediate scrutiny.

Respectfully submitted,

JONATHAN D. CHRISTMAN
Counsel of Record
DANIEL W. YAGER
Fox Rothschild LLP
10 Sentry Parkway, Suite 200
P.O. Box 3001
Blue Bell, PA 19422
(610) 397-6500
jchristman@foxrothschild.com

Counsel for Amicus Curiae

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In The Supreme Court of the United States

NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES, d/b/a NIFLA, et al.,

Petitioners,

v.

XAVIER BECERRA, ATTORNEY GENERAL, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICUS CURIAE* INSTITUTE FOR JUSTICE IN SUPPORT OF PETITIONERS

ROBERT J. MCNAMARA*
PAUL M. SHERMAN
INSTITUTE FOR JUSTICE
901 North Glebe Road
Suite 900
Arlington, VA 22203
(703) 682-9320
rmcnamara@ij.org

PAUL V. AVELAR
INSTITUTE FOR JUSTICE
398 South Mill Avenue
Suite 301
Tempe, AZ 85281
(480) 557-8300

**Counsel of Record*

Counsel for Amicus Curiae

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

Whether the disclosures required by the California Reproductive FACT Act violate the protections set forth in the Free Speech Clause of the First Amendment, applicable to the States through the Fourteenth Amendment.

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INTEREST OF *AMICUS CURIAE*[1]

The Institute for Justice is a nonprofit, public interest law firm that litigates in state and federal courts nationwide in defense of private property rights, educational choice, economic liberty, and free speech. Much of the Institute's free-speech practice centers on protecting individuals' right to speak over the objections of various state or local licensing authorities. *See, e.g.*, *Hines v. Alldredge*, 783 F.3d 197 (5th Cir. 2015) (challenge to state regulation prohibiting licensed veterinarian from emailing advice about animals he had not personally examined); *Edwards v. Dist. of Columbia*, 755 F.3d 996 (D.C. Cir. 2014) (challenge to municipal ordinance forbidding unlicensed tour guides from speaking to paying customers about certain topics).

While none of the Institute's clients speak about pregnancy- or abortion-related topics, all of their rights are at risk here because the Ninth Circuit resolved this case by applying its "professional speech" doctrine. This doctrine, which is wholly unmoored from this Court's free-speech jurisprudence, gives licensing authorities tremendous power to trammel the speech of ordinary citizens—power that, in the experience of the Institute's clients, is prone to just as much abuse as any other governmental power to censor. The Institute therefore files this brief to urge the Court to reject the

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[1] Pursuant to Rule 37.6, *Amicus* affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than *Amicus* itself provided any monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this *amicus* brief.

Ninth Circuit's jurisprudential invention and to reaffirm that the First Amendment provides Americans with the same free-speech protections against licensing authorities that they enjoy against any other government agent.

SUMMARY OF ARGUMENT

This Court's modern free-speech jurisprudence favors bright lines between protected and unprotected speech: Speech is fully protected unless it falls into certain narrow, historically grounded categories (like obscenity or true threats), and the degree of skepticism the Court applies to speech restrictions similarly depends on easily administrable tests like whether a law's penalties are triggered by speech with a particular content. Not only has this Court refused invitations to recognize new exceptions to the First Amendment, it has expressly cautioned that courts do not have "a freewheeling authority to declare new categories of speech outside the scope of the First Amendment." *United States v. Stevens*, 559 U.S. 460, 472 (2010); *accord United States v. Alvarez*, 567 U.S. 709, 722 (2012) (noting that strict scrutiny applies to content-based speech restrictions in the absence of "persuasive evidence that a novel restriction on content is part of a long . . . tradition of proscription" (internal quotation marks omitted)).

This caution, however, is hard to discern in the proceedings below, where both parties have consistently

urged the courts to abandon long-standing doctrine in favor of a rule of law that would be more congenial to their position. The Court should reject these arguments entirely and resolve this case by applying its long-standing doctrines about compelled speech.

First, this Court should reject the idea (which was dispositive below) that the appropriate level of First Amendment scrutiny is somehow reduced when a speaker can be characterized as a "professional." This notion has no footing in this Court's precedents. Quite the opposite: Every single time this Court has had occasion to address the speech of "professionals," it has treated such speech just like any other speech. The doctrine advanced below replaces this simple rule with a complicated inquiry into whether a speaker counts as a "professional" in a particular context. Moreover, this doctrinal innovation is unnecessary. The "professional speech" doctrine that played so large a role in the proceedings below inserts these new complexities into First Amendment doctrine without adding anything of value.

Second, this professional-speech doctrine is affirmatively dangerous. *Amicus* recognizes, of course, that this case arises in the context of pregnancy- and abortion-related speech where tempers run high and consequences are serious. But the "professional speech" rules applied below (and sure to be urged by Respondents here) would apply far beyond the specific parties before the Court. According lesser protection to the "professional" speakers here would mean reduced protection for newspaper columnists, tour guides, bloggers

and many others who have been menaced with regulation and censorship of their assertedly "professional" speech. The Court should take great care not to inadvertently endorse the consequences of the Ninth Circuit's doctrine, which has resulted in (among other things) a $1,000 fine against a citizen for providing testimony and reports at a public hearing of a government body without holding the proper license to opine.

Third and finally, the Court should reject any suggestion that the Petitioners here must be treated differently because they do not directly charge for their services. While Petitioners have suggested that the First Amendment analysis must be informed by their nonprofit status, the Ninth Circuit was right to reject these arguments: Once again, this Court has well-reasoned and long-standing doctrine on point, and the Court should simply follow established law rather than indulging in unnecessary innovation. A speaker's First Amendment protection does not ratchet up or down depending on whether he is paid to speak; any rule to the contrary would be both wrong and utterly impossible to administer.

ARGUMENT

I. The "professional speech" doctrine advanced below is a doctrinal innovation squarely at odds with this Court's precedents.

This Court has repeatedly held that courts are not free to create new exceptions to the free-speech

protections of the First Amendment. *United States v. Alvarez*, 567 U.S. 709, 722 (2012) ("Before exempting a category of speech from the normal prohibition on content-based restrictions, however, the Court must be presented with persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription" (internal quotation marks omitted)); *accord United States v. Stevens*, 559 U.S. 460, 472 (2010). These holdings have been disregarded in the proceedings below; instead of resolving the case at bar based on this Court's long-standing free-speech jurisprudence, the Ninth Circuit resolved it based on a speech-restricting doctrine of its own devising. Because this doctrinal innovation has no basis in this Court's decisions, it should be rejected, and this case should instead be resolved by applying ordinary compelled-speech analysis.

The court below did *not* engage in ordinary compelled speech analysis; instead, it expressly grounded its holding on the "professional speech" doctrine first articulated by the Ninth Circuit in *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014).[2] Pet. App. 28a–32a. Under that doctrine, "speech that occurs between a professional and a client is distinct from other types of speech" and entitled to less First Amendment protection because

[2] *Pickup*'s invention of the "professional speech" doctrine sparked a dissent from Judge O'Scannlain, who noted that "[t]he Supreme Court has chastened us lower courts for creating, out of whole cloth, new categories of speech to which the First Amendment does not apply[, b]ut that is exactly what the panel's opinion accomplishes in this case[.]" *Pickup*, 740 F.3d at 1221 (O'Scannlain, J., dissenting from denial of rehearing en banc).

"professionals, 'through their education and training, have access to a corpus of specialized knowledge that their clients usually do not' and [their] clients put 'their health or their livelihood in the hands of those who utilize knowledge and methods with which [they] ordinarily have little or no familiarity.'" Pet. App. 29a. As such, the Ninth Circuit holds, the speech of a professional must be placed on a "continuum" with a professional's "public dialogue" at one end and a professional's "professional conduct" at the other, with other kinds of professional-client speech falling somewhere in the middle and receiving only intermediate scrutiny. Pet. App. 28a.

This doctrine is wrong, and it should play no role in the Court's resolution of this case. It is squarely at odds with this Court's controlling precedents; it introduces unnecessary (and potentially insoluble) questions into the constitutional analysis; and it is, in any event, an unnecessary innovation that achieves no worthwhile end.

As an initial matter, the doctrine is simply irreconcilable with binding precedent: There is no "continuum" between speech and conduct for First Amendment purposes. A law (as applied) regulates speech or it regulates conduct, and this Court has given simple instructions in how to differentiate the two.[3]

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[3] To be sure, some *conduct* is expressive conduct and entitled to greater First Amendment protection. *See United States v. O'Brien*, 391 U.S. 367, 376–77 (1968); *accord Texas v. Johnson*, 491 U.S. 397, 406–07 (1989). But that is a far cry from saying, as the

The most instructive case here is *Holder v. Humanitarian Law Project*, in which the Court confronted a federal law that forbade speech in the form of individualized legal and technical advice to designated foreign terrorist groups. 561 U.S. 1, 7–11 (2010). The plaintiffs in that case wanted, among other things, to provide "train[ing] [to] members of [the Kurdistan Workers' Party (PKK)] on how to use humanitarian and international law to peacefully resolve disputes" and to "teach[] PKK members how to petition various representative bodies such as the United Nations for relief." *Id.* at 14–15. They wanted, in other words, to use their expertise to provide individualized advice to particular people or groups.

The Court rejected the plaintiffs' contention that the law had "banned their 'pure political speech,'" noting that the plaintiffs remained free to engage in whatever political advocacy they wished as long as they did not engage in speech directly to or under the direction of a terrorist organization. *Id.* at 25–26. But it also rejected the government's position; the government had argued that the case should be resolved under intermediate scrutiny because the underlying law was aimed at conduct—specifically the conduct of providing "material support" to terrorist groups—and therefore only incidentally burdened the plaintiffs' expression. *Id.* at 26 (citing *O'Brien*, *supra*).

Ninth Circuit has, that some *speech* can be downgraded into sort-of-conduct and thereby stripped of First Amendment protection.

Instead, the Court reiterated and clarified its long-standing test for whether a law is a regulation of speech or a regulation of conduct: If, as applied to a plaintiff, "the conduct triggering coverage under the statute consists of communicating a message," then it is a restriction on *speech* and must be analyzed as such. *Id.* at 28. The Court's analysis of the issue was straightforward and practical:

> [The law] regulates speech on the basis of its content. Plaintiffs want to speak to the PKK and the LTTE, and whether they may do so under § 2339B depends on what they say. If plaintiffs' speech to those groups imparts a "specific skill" or communicates advice derived from "specialized knowledge"—for example, training on the use of international law or advice on petitioning the United Nations—then it is barred. On the other hand, plaintiffs' speech is not barred if it imparts only general or unspecialized knowledge.

Id. at 27 (citations omitted).

This practical analysis is simply irreconcilable with the way the court below approached this case. Instead of asking whether a law is directed at or triggered by speech, the Ninth Circuit asks what *kind* of speech is at issue: whether it requires "access to a corpus of specialized knowledge" or whether a speaker uses methods or knowledge with which their listeners would "ordinarily have little or no familiarity." Pet. App. 29a. This is error. *Cf. Pickup v. Brown*, 740 F.3d 1208, 1216–18 (9th Cir. 2014) (O'Scannlain, J., dissenting

from denial of rehearing en banc) (arguing that the Ninth Circuit's "professional speech" doctrine is contrary to the holding of *Humanitarian Law Project*).

Beyond being inconsistent with binding precedent, these new criteria do not lend themselves to straightforward or predictable analysis, as evidenced by the strange permutations the "professional speech" doctrine has created in the Circuits that have attempted to apply it. *See, e.g.*, *Moore-King v. County of Chesterfield*, 708 F.3d 560, 569 (4th Cir. 2013) (holding that the "professional speech doctrine" applies to fortune tellers); *Conant v. Walters*, 309 F.3d 629, 637 (9th Cir. 2002) (applying strict scrutiny to a policy that sought "to punish physicians on the basis of the content of doctor-patient communications").

Worse, the entire premise of the inquiry is simply backwards: Courts generally do not investigate whether a speaker has *too much* knowledge such that her speech will be *too persuasive* and overwhelm an unsophisticated listener. Certainly this Court has never endorsed such a proposition. *See Sorrell v. IMS Health Inc.*, 564 U.S. 552, 578 (2011) ("That the State finds expression too persuasive does not permit it to quiet the speech or to burden its messengers."). To the contrary, unprotected speech is generally unprotected precisely because it is *unpersuasive* and unlikely to aid in any search for truth. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942) (justifying exclusion of obscenity, libel, fighting words, and other "well-defined and narrowly limited classes of speech" from First Amendment protection because "such utterances . . . are of

such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality").

These problems with the "professional speech" doctrine are, perhaps, why this Court has never felt the need to invoke it, despite a long history of reviewing First Amendment challenges to speech by professionals. The closest the doctrine comes to having any footing in this Court's cases is Justice White's concurrence in *Lowe v. SEC*, 472 U.S. 181, 211–36 (1985) (White, J., concurring). In that opinion, Justice White posits that there is a difference between the "regulation of a profession" and "prohibitions on speech," and that the line between the two is whether someone "takes the affairs of a client personally in hand and purports to exercise judgment on behalf of the client in the light of the client's individual needs and circumstances[.]" *Id.* at 232 (White, J., concurring). But Justice White's proposed rule has never been adopted by this Court; indeed, in the three decades since *Lowe*, it has not been approvingly cited by even a single Justice. To the contrary, the Court has expressly rejected the proposition that occupational licensure that affects speech is "devoid of all First Amendment implication" or "subject only to rationality review." *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 801 n.13 (1988).

Instead, this Court consistently treats speech by professionals the same way it treats any other speech. Sometimes, for example, the Court confronts restrictions on professionals' commercial solicitations, and it treats these restrictions much like other restrictions

on commercial solicitations: Where they are supported by sufficient evidence, they are upheld. *E.g.*, *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456–57 (1978) (upholding restriction on in-person solicitation by lawyers based on record of long-standing prohibitions on the practice and dangers it posed to consumers). Where they are not so supported, they are struck down. *E.g.*, *Edenfield v. Fane*, 507 U.S. 761, 770–73 (1993) (declining to extend *Ohralik*'s holding to accountants in the absence of comparable record evidence).

This Court generally treats speech from professionals the same as it treats other speech because, quite simply, there is no need to do otherwise—and therefore no need for the doctrinal innovation of "professional speech" in the first place. The concerns that animate Justice White's original concurrence in *Lowe* obviously center around foreclosing First Amendment challenges to the licensure of financial professionals, attorneys, and the like. And, indeed, academic defenders of the "professional speech" doctrine generally proceed from the assumption that the doctrine's absence would require the wholescale deregulation of lawyers or doctors. *See generally* Robert Post & Amanda Shanor, *Adam Smith's First Amendment*, 128 Harv. L. Rev. F. 165 (2015) (invoking the specter of lawyer deregulation in response to a D.C. Circuit opinion invalidating a law licensing tour guides). But these concerns are obviously misplaced: Most applications of most state licensing laws will have no First Amendment implications at all. These licensing laws will apply, largely, to conduct. Financial advisers take money from

their clients to invest on their behalf; doctors perform surgeries; lawyers prepare and file binding legal documents. Even when professionals' work involves speech, the First Amendment is not necessarily implicated. Lawyers' briefs are *speech*, to be sure, but federal courts are not public forums in which individuals have any right to engage in such speech. Similarly, a doctor writing a prescription certainly writes words on a piece of paper, but the government's regulation of that act has nothing to do with the communicative aspect of the writing and everything to do with its *legal effect* (which gives someone the legal right to access controlled substances).

The only thing the "professional speech" doctrine adds is the state's ability to prevent individuals from engaging in pure speech (without any regulable conduct).[4] But it is far from obvious that government officials *need* (or can be trusted with) the power to prohibit people from saying things like "you should eat less sugar" or "you should take away your rebellious teen's smartphone"—both statements of the sort that, as discussed in Section II below, government officials have

---

[4] Significantly, the professional-speech doctrine would only be necessary to allow the advance prohibition of such speech, not to allow punishment of certain speech that results in harm. *See, e.g.*, *United States v. Alvarez*, 567 U.S. 709, 718–19 (2012) (noting that false statements that create a "legally cognizable harm" can be punished consistent with the First Amendment); *cf.* Paul M. Sherman, *Occupational Speech and the First Amendment*, 128 Harv. L. Rev. F. 183, 195–96 (2015) (noting that actions for medical and legal malpractice predate both licensing requirements and the First Amendment itself and therefore presumably are not barred by the First Amendment).

already tried to prohibit under the guise of "professional speech."

The "professional speech" doctrine relied upon below is wrong as a matter of law. It articulates a standard that will, in practice, prove nearly impossible to administer. And it does so while providing no useful additions to this Court's existing jurisprudence. The Court should reject it entirely and decide this case as an ordinary compelled-speech question.

II. According less First Amendment protection to Petitioners because they are "professionals" would threaten the rights of speakers nationwide.

This case arises in a controversial context: pregnancy centers (many of which are state-licensed) providing controversial services that have the effect (indeed, the purpose) of deterring people from exercising their legal right to obtain an abortion. But any decision from this Court will have doctrinal implications far beyond this context. To the extent the Court does not reject the idea of a "professional speech" doctrine outright, it should proceed with caution to avoid inadvertently stripping free-speech protection from millions of Americans.

As an initial matter, any doctrine announced in this case will necessarily apply to speech by licensed and unlicensed speakers alike. To be sure, some lower courts have held that the doctrine applies only to limit the speech rights of individuals who hold a government

license. *See Greater Baltimore Center for Pregnancy Concerns, Inc. v. Mayor and City Council of Baltimore*, No. 16-2325, 2018 U.S. App. LEXIS 297, at *14 & n.2, 2018 WL 298142, at *4 & n.2 (4th Cir. Jan. 5, 2018) (distinguishing the instant case on the grounds that this case involves "clinics licensed by the state," to which the professional-speech doctrine applies, and holding that it cannot apply to unlicensed clinics). But this cannot be right: Individuals cannot be compelled to sacrifice their rights to engage in otherwise protected speech in exchange for a government license, and this Court has already held exactly that. *44 Liquormart v. Rhode Island*, 517 U.S. 484, 513 (1996) ("That the State has chosen to license its liquor retailers does not change the [First Amendment] analysis."). Thus, if Petitioners can be compelled to speak because they are "professionals," anyone could be compelled to speak—or prohibited from speaking—in similar circumstances, whether they hold a state license or not.

Neither could a ruling in this case be easily confined to the pregnancy (or even the medical) context. As noted *supra*, the boundaries of "professional speech" are exceedingly difficult to draw with any certainty, and any reduction in First Amendment protection for "professionals" will inevitably bleed over into more fields than the Court anticipates.

And, indeed, this is exactly how the "professional speech" doctrine has played out in lower courts. Government officials have (with varying degrees of success) invoked the doctrine to justify silencing unlicensed

tour guides,[5] fortunetellers,[6] and even advice columnists.[7]

Unsurprisingly, government officials armed with the power to silence speech have used that power against speech expressing minority or unpopular opinions. When North Carolinian Steve Cooksey challenged conventional dietary wisdom by publicly advocating for a low-sugar, low-carbohydrate "Paleolithic" diet, speaking out in public and operating an internet site on the subject, he triggered an investigation by the state's Board of Dietetics/Nutrition. *Cooksey v. Futrell*, 721 F.3d 226, 230–32 (4th Cir. 2013). The Board eventually sent him a "red-pen review" of his website highlighting the statements it claimed he was not allowed to make without being a licensed dietician. *Id.* at 232. And this instinct for censorship is not confined to administrative officials: When the Florida legislature heard stories of doctors discussing gun ownership with their patients "to satisfy a political agenda," it passed a law forbidding physician inquiries about gun ownership outright. *Wollschlaeger v. Governor of Florida*, 848 F.3d 1293, 1302 (11th Cir. 2017) (en banc).

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[5] *Edwards v. Dist. of Columbia*, 755 F.3d 996, 1000 n.3 (D.C. Cir. 2014).

[6] *Moore-King v. Cty. of Chesterfield*, 708 F.3d 560, 569 (4th Cir. 2013).

[7] *Rosemond v. Markham*, 135 F. Supp. 3d 574, 583–84 (E.D. Ky. 2015) (rejecting government's argument that the professional-speech doctrine applied to a newspaper columnist who had urged a letter writer to discipline her wayward son by taking away his smartphone).

To be clear, these examples are only those that have found their way into the federal courts (and generally only because the speakers in question have found pro bono counsel to help them fight back against the government's assertions of power). The true mischief worked by the "professional speech" doctrine is far less visible from a simple survey of federal-court decisions. In 2015, for example, the Oregon State Board of Examiners for Engineering and Land Surveyors assessed a $1,000 fine against a private citizen for submitting technical testimony at a public meeting without a license, ruling that his "reports, commentary and testimony" were the acts of a "professional" and thus "clearly not protected speech." Final Order by Default at 16–17, *In the Matter of Dale La Forest*, Case No. 2697 (Aug. 14, 2015) (citing *Lowe*, 472 U.S. at 228), *available at* http://ij.org/wp-content/uploads/2017/04/OR-Math-La-Forest-Default-Order-IJ083240xA6322-1.pdf (last visited January 11, 2018).

These examples illustrate that this Court has been correct to avoid creating new categories of less-protected speech. Removing First Amendment protection from entire categories of speech does far more than uphold a particular speech restriction that seems necessary in given circumstances; it empowers whatever faction holds power at a given point in time to demand ideologically congenial speech or silence disfavored speech. In the case at bar, one's sympathies for the Petitioners may vary greatly depending on one's underlying views about abortion rights, but the specifics of this case are merely happenstance. There is, after

all, no doubt that giving California authorities the power to regulate the speech of crisis-pregnancy centers under the guise of "professional speech" must perforce give Arizona authorities the power to do the same to abortion providers in that state. *See Planned Parenthood Ariz., Inc. v. Brnovich*, 172 F. Supp. 3d 1075 (D. Ariz. 2016) (challenge by licensed abortion clinics and providers to statute compelling them to convey to their patients a state-mandated message with which plaintiffs disagree).[8] The better course is to do what this Court has historically done and analyze the particular speech restriction at issue by using long-standing, neutral First Amendment doctrines—not by cutting whole swaths of speech loose from the protection those doctrines provide.

Simply put, the "professional speech" doctrine allows the politically powerful to dictate the speech of

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[8] To be sure, saying that the First Amendment *applies* to speech does not mean that a given restriction on that speech fails First Amendment scrutiny. *See* Rodney A. Smolla, *Professional Speech and the First Amendment*, 119 W. Va. L. Rev. 67, 81 (2016) (arguing that requirements that doctors obtain informed consent by explaining medical procedures to patients before performing medical procedures would "fall within a range of 'easy cases' that . . . would survive even strict scrutiny review"). This Court can (and does) uphold speech restrictions it deems justified without feeling the need to announce new categories of less-protected speech. *See Humanitarian Law Project*, 561 U.S. at 28–30 (rejecting First Amendment challenge to material-support restriction under strict scrutiny); *accord Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1665–66 (2015) (upholding restriction on judicial solicitation of campaign contributions under strict scrutiny without categorically reducing protection for speech by judges). There is no need to treat the speech of "professionals" any differently.

the politically weak. It does so in the context of pregnancy—but also in the context of diet, psychology, history, and more. It does so in the context of state licensees—but also in the context of unlicensed citizens who simply want to offer their point of view. The doctrinal question in this case affects speech by countless ordinary Americans everywhere from public meetings to personal sites on the internet to one-on-one conversations and advice. To the extent the Court does not reject wholesale the idea of a "professional speech" doctrine, it should make abundantly clear that it is not endorsing the actual doctrine articulated below or any of the rampant abuses thereof.

III. This case does not hinge on whether Petitioners are paid for their services.

Petitioners have argued below and to this Court that any analysis of the regulations at issue here must account for the fact that Petitioners provide their services "pro bono." *E.g.*, Pet. 21–23. It should not. According *greater* free-speech protection to unpaid speakers is synonymous with according *lesser* free-speech protection to paid speakers—and the Court has repeatedly and expressly refused to do this. *See, e.g.*, *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 756 n.5 (1988) ("the degree of First Amendment protection is not diminished merely because the . . . speech is sold rather than being given away" (citing *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385 (1973))). Indeed, any number of this Court's First Amendment precedents center around

paid speech—speech that this Court has uniformly treated as fully protected. *See, e.g.*, *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105 (1991) (book publishing); *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975) (movie theaters); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964) (paid newspaper advertisement); *accord Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653, 2665 (2011) ("While the burdened speech results from an economic motive, so too does a great deal of vital expression.").

Of course, this is not to say that an entity's commercial or noncommercial nature is *never* relevant to the analysis—but, under current doctrine, it is only relevant when the government regulates the entity's *solicitations*. *See, e.g.*, *44 Liquormart*, 517 U.S. at 501 (positing that less-strict review is appropriate where "a State regulates commercial messages to protect consumers from misleading, deceptive, or aggressive sales practices" but not "when a State entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process").

This principle explains this Court's decisions in cases like *In re Primus*, 436 U.S. 412 (1978). In *Primus*, this Court rejected a state bar's attempt to sanction an ACLU lawyer for sending solicitations to potential clients because the lawyer was offering uncompensated services. *Id.* at 414–15. But *Primus*, at most, is drawing a distinction between commercial and noncommercial speech, not paid and unpaid speech: A lawyer soliciting a paid client is (at least potentially) engaged in

commercial speech, while a lawyer soliciting a pro bono client is recruiting an ally in political speech rather than proposing a commercial transaction. That case is fundamentally irrelevant here because California is not simply regulating the centers' solicitations. *See, e.g.*, Pet. App. 31a ("the Licensed Notice regulates the clinics' speech in the context of medical treatment, counseling, or advertising"). The State does not, for example, require the centers to make disclosures in the course of advertising their services to prospective customers. Instead, it purports to regulate what the centers say in the course of performing services for people who have already become customers. If the Court signs off on that compulsion, it is signing off on that compulsion in all contexts, regardless of whether the services are paid or unpaid.

Any contrary rule would prove impossible to administer. It is difficult enough to determine whether a given *communication* merely proposes a commercial transaction and thus constitutes commercial speech.[9] A rule that required the Court to divide not just messages but *speakers* into "commercial" and "noncommercial" boxes would multiply these difficulties. After all, many if not most speakers who do not charge their listeners nonetheless draw financial support for their

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[9] *Cf. Nike v. Kasky*, 539 U.S. 654 (2003) (dismissing as improvidently granted a petition for certiorari presenting the question of whether a business participating in public debate could "be subjected to liability for factual inaccuracies on the theory that its statements are 'commercial speech' because they might affect consumers' opinions about the business as a good corporate citizen and thereby affect their purchasing decisions").

speech from *somewhere*. Charities receive donations; politicians receive contributions; religious figures receive tithes. Even pro bono attorneys can be paid for successful litigation. *See* 42 U.S.C. § 1988(b).[10]

Which of these speakers should be considered paid and which unpaid? This question finds no answer in this Court's precedents because this Court's precedents resolutely refuse to consider whether an individual is speaking from pecuniary motives, from non-pecuniary motives, or (as is probably most often the case) from some mix of the two. So it should be here. Petitioners' arguments to the contrary should be rejected.

CONCLUSION

Despite the controversial underlying subject-matter of this case, the doctrinal innovation at the heart of the Ninth Circuit's opinion below represents a threat to the rights of countless Americans speaking about countless other topics. That innovation should be squarely rejected, and this case should be decided

[10] Indeed, this was the case in *Primus* itself, where the ACLU attorneys stood to recover fees if they were successful—a fact this Court noted and declined to accord any weight. 436 U.S. at 428–31.

in line with this Court's long-standing precedents governing compelled speech.

Respectfully submitted,

ROBERT J. MCNAMARA*
PAUL M. SHERMAN
INSTITUTE FOR JUSTICE
901 North Glebe Road
Suite 900
Arlington, VA 22203
(703) 682-9320
rmcnamara@ij.org

PAUL V. AVELAR
INSTITUTE FOR JUSTICE
398 South Mill Avenue
Suite 301
Tempe, AZ 85281
(480) 557-8300

*Counsel of Record

Counsel for Amicus Curiae

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No. 16-1140

In the Supreme Court of the United States

NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES, D/B/A NIFLA, ET AL.,

Petitioners,

v.

XAVIER BECERRA, ATTORNEY GENERAL, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICUS CURIAE JEWS FOR RELIGIOUS LIBERTY IN SUPPORT OF PETITIONERS

ANDREW PEPPER
10 Marcy Place
West Orange, N.J. 07052
(973) 699-6869
andrewpepper1@gmail.com

HOWARD N. SLUGH
Counsel of Record
2400 Virginia Ave., N.W.
Apt. C619
Washington, D.C. 20037
(954) 328-9461
hslugh1@gmail.com

Counsel for Amicus Curiae

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INTEREST OF AMICUS CURIAE[1]

Jews for Religious Liberty ("JFRL") is an unincorporated, cross-denominational group of lawyers, rabbis, and communal professionals who practice Judaism and are committed to defending religious liberty. JFRL's members have written extensively on the role of religion in public life. Representing members of the legal profession and adherents of a minority religion, JFRL has a strong interest in ensuring that the rights of adherents of minority religions are protected and that First Amendment jurisprudence enables the flourishing of diverse religious viewpoints and practices in the United States.

Amicus maintains that while the Ninth Circuit's holding would curtail every American's freedom of speech, it will uniquely threaten practitioners of minority religions such as Orthodox Judaism. Amicus is dedicated to protecting the religious liberty of its co-religionists as well as adherents of other religions nationwide.

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[1] Pursuant to SUP. CT. R. 37.3(a), amicus certifies that all parties have given consent to the filing of this amicus brief. Pursuant to SUP. CT. R. 37.6, amicus certifies that no counsel for any party has authored this brief in whole or in part, no party or party's counsel has made a monetary contribution to fund its preparation or submission, and no person other than amicus or their counsel has made such a monetary contribution.

SUMMARY OF ARGUMENT

The Orthodox Jewish community in America maintains various organizations intended to facilitate adherents' incorporation of Jewish law and tradition into every facet of their personal and communal lives. From hospices to arbitration panels, from marriage counseling to drug rehabilitation, the Jewish community offers a comprehensive slate of services that cater to Orthodox Jews' needs as individuals, as Americans, and as practicing Jews. To fulfill their goals, these institutions must freely communicate with adherents. The message that these organizations communicate—that it is possible to flourish as an Orthodox Jew within the larger American society—is an essential part of their mission.

The adoption of a rule that allows the government to regularly force such groups to convey messages contrary to their beliefs would undermine these organizations by preventing them from clearly communicating their own messages. As adherents of a minority religion, Orthodox Jews have a particularly strong need to convey their unadulterated messages. Otherwise, they risk the dissolution and assimilation of their coherent and vibrant community into the larger secular society.

This risk is even greater if, as here, a governmental entity targets unpopular or minority religious ideas. Orthodox Jews are a minority within a minority in America, and, as such, many of their practices are unknown or unappreciated. Laws targeting speech promoting practices such as circumcision or ritual

slaughter would make it significantly more difficult for Orthodox Jews to flourish in America.

California's Reproductive FACT Act (the "Act") targets organizations that express pro-life sentiments, including those that do so for religious reasons. If the Ninth Circuit's judgment in *Nat'l Inst. of Family & Life Advocates v. Harris*, 839 F.3d 823 (9th Cir. 2016), becomes the law of the land, governmental entities will have license to compel religious organizations to contradict their intended messages without demonstrating that doing so is the least restrictive means of furthering a compelling government interest. If that occurs, all religious groups will lose an important Constitutional protection that they have heretofore enjoyed, but unpopular and minority religions will be particularly vulnerable to purposeful targeting by the state.[2] Reversing the decision below will ensure that these groups are afforded the full protection of the First Amendment, and will require the state to demonstrate a compelling need before co-opting religious individuals and organizations to spread a governmental message contrary to their deeply held religious beliefs.

Orthodox Jews and other minority religions depend on the freedom of speech guaranteed by the First Amendment. This Court should reaffirm that those protections cannot be lightly removed by governmental actors pursuing their own ideas of progress.

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[2] Such laws could also be enacted regarding non-religious, minority and unpopular views as well. *See* California Reproductive FACT Act, Assembly Committee on Health, Analysis of Assembly Bill No. 775 (Apr. 14, 2015) at 5 (opposing bill because "if enacted, it could set a precedent for many other businesses that are not liked or appreciated by one group in society").

ARGUMENT

I. A Legal Regime Authorizing Governmental Entities to Compel Orthodox Jewish Organizations to Communicate Messages Contrary to Their Objectives and Beliefs Will Diminish Orthodox Jews' Ability to Maintain a Vibrant and Coherent Community Within the Larger American Society.

Orthodox Jewish communal organizations have played a vital role in allowing Jews to maintain successful diaspora communities for centuries. Strong Jewish communal organizations help Jews to both thrive as members of their larger societies and maintain their Jewish identities and commitments. The Ninth Circuit's decision below threatens the efficacy of these organizations by allowing governmental entities, without first demonstrating a compelling need, to co-opt them for governmental purposes at odds with their communal goals.

A. The Act at Issue in This Case is Particularly Offensive to the First Amendment and Dangerous for the Orthodox Jewish Community Because It Singles Out a Minority View for Disparate Treatment.

As this court has noted, "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). Recently, this Court has reaffirmed the First Amendment's protection of views expressed by

unpopular religious minorities. In *Snyder v. Phelps*, this Court held the First Amendment protects a church's message even though it is highly unpopular and "many Americans might feel [the message is flawed]." 562 U.S. 443, 460 (2011). Indeed, such protection was afforded to the speech at issue, even though the Court considered it "tortious." *Id.* at 451 n.2. This Court reiterated that protection in *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015) (holding that despite the recognition of a constitutional right to same-sex marriage, "religions, and those who adhere to religious doctrines may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned").

The Ninth Circuit's decision stands in stark contrast to this Court's decisions reaffirming that the freedom of speech extends to all Americans—especially to those speakers expressing controversial ideas or advocating for unpopular causes.

California's Legislature transparently targeted "facilities that offer pregnancy-related services and are commonly affiliated with or operated by organizations whose stated goal is to prevent women from accessing abortions." *See* California Reproductive FACT Act, Assembly Committee on Judiciary, Analysis of Assembly Bill No. 775 (Apr. 28, 2015) at 5. The Act's selective targeting, it explained, represented a "forward-thinking program," one that is "in the best interest of the state, patients and providers." *Id.* at 4–5. If such explicit targeting of a particular religious view does not constitute viewpoint discrimination and is not subject to strict scrutiny, the Americans most in need of the First Amendment's assurances will be

stripped of those protections. Popular opinions of politically powerful groups are unlikely to need the First Amendment's protections to avoid censorship. *See* Laura W. Brill, *The First Amendment and the Power of Suggestion: Protecting "Negligent" Speakers in Cases of Imitative Harm*, 94 Colum. L. Rev. 984, 1030 (1994) ("The fear of majoritarian bias in adjudication and legislation has shaped much First Amendment doctrine. The fear derives from a perceived tendency of democratic forces ... to permit only popular opinion and to suppress points of view that are unconventional or threaten dominant values.").

While the Ninth Circuit's approach to the question is of concern to all faiths, it is of special concern to Orthodox Jews, who are a minority within a minority, and whose neighbors do not always know, understand, or approve of their beliefs. Orthodox Jewish Americans are more likely than most to be negatively impacted by "forward-thinking" laws aimed at suppressing unpopular religious ideas. Speech promoting practices like circumcision and ritual slaughter that are not well-known or understood is particularly likely to be targeted by "forward-thinking" governments. To prevent such discriminatory targeting of Orthodox Jewish speech, the Supreme Court should reverse the Ninth Circuit and reaffirm the notion that government entities may never target speech or speakers simply because they disagree with the message being conveyed.

B. Laws Compelling Orthodox Jewish Organizations to Convery Messages Contrary to Their Purposes Would Pose a Threat to the American Orthodox Jewish Community's Continuity and Vibrancy, Even Absent the Impermissible Animus-Based Targeting.

It is a fundamental tenet of Orthodox Judaism that all members of the Jewish people are guarantors for one another,[3] and each Jew is therefore considered partially responsible for the spiritual well-being of his fellow Jews. As a result, Orthodox Judaism places a premium on the concept of community and the obligation to assist one's neighbors. In the United States, this religious objective is fulfilled, in part, by the community's creation of and involvement in various organizations, which assist members of the community in leading their lives in accordance with Jewish law and tradition. These organizations play an essential role in allowing Orthodox Jews to thrive as both Jews and Americans.

Laws like the Act would obscure these organizations' messages and undermine their ability to sustain the Jewish community. A few examples are sufficient to illustrate the well-founded nature of this concern.

- *Social Services and Counseling*: The Orthodox Jewish community supports a number of social service organizations that provide counseling to troubled youth who struggle with alcohol or substance

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[3] Babylonian Talmud, Shevuot 39a

abuse. These organizations include Madraigos, Chabad Residential Treatment Center, Jewish Recovery Center, and Behavioral Crossroads's Kosher Recovery Program. *See, e.g.*, *Chabad Residential Treatment Center*, CHABADREHAB.COM (last visited Jan. 11, 2018). These organizations specialize in offering professional services in a religious-friendly environment that is geared towards the community's specific needs. *Id.* (noting that the program "is based on the traditional values of the Jewish Torah").

Similarly, many Orthodox Jewish mental health professionals and marriage counselors provide services sensitive to the community's religious needs and ideals.

The *raison d'etre* of these organizations and professionals is to send the message that people's needs—including serious needs such as substance abuse counseling—can be handled in an environment friendly to Orthodox Judaism. As such, many of these institutions utilize Jewish values to improve the effectiveness of their counseling. They also offer clients and patients the opportunity to benefit from top-quality care without compromising strict adherence to Orthodox Jewish standards. If such organizations and practitioners were required to inform their patients or customers of alternative secular options at the very outset of their treatment, it would obscure this message and send a contrary one: that processes infused with Jewish ideals are somehow incapable of solving these types of problems.

- *Arbitration of Civil Disputes*: The Orthodox Jewish community strives to resolve civil disputes without resorting to litigation. When disputes escalate beyond individuals' ability to reach a resolution,

many Orthodox Jews deem it obligatory to utilize a *beth din* (a Jewish religious court) to attempt, in the first instance, to arbitrate certain civil cases according to the Jewish law and tradition. *See* Menachem Posner, *What is a Beit Din*, https://goo.gl/N9cTZ7, CHABAD.ORG, (last visited Jan. 11, 2018).

One of the purposes of requiring Jewish litigants to begin a case in Jewish arbitration is to reinforce the notion that the Jewish people are part of a religious community. Additionally, the requirement sends a message to the community that Jewish law is alive and relevant to Jews' daily lives. A statute requiring the *beth din* to begin the process by alerting litigants that they can simply bypass the religious courts and proceed to litigation would undercut the very purpose of having a *beth din* and suggest that the Jewish law is unimportant and inadequate for modern American problems.

- *Hospice Care*: Jewish tradition extols the virtue of caring for the ill and dying. Orthodox Jews adhere to detailed laws informed by the belief in the sanctity of human life and the obligation to provide all people with life's basic needs. As such, hospice care in the Orthodox Jewish community operates pursuant to strict religious standards that place a premium on saving even a single life for even a short amount of time.[4] There are therefore Jewish hospice and nursing home programs that provide care with sensitivity to the needs of Orthodox Jewish patients. *The YU/Riets*

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[4] *See* Moses Maimonides, *Code of Jewish Law and Ethics, Laws of Murder and Protecting Life*, Chapter 2, Law 7; Rabbi Immanuel Jakobovits, *Jewish Medical Ethics* 123-25 (New York: Bloch, 1959).

End-of-Life Care Halachic Advisory Program, YU.EDU, https://goo.gl/bYmvXy (last visited Jan. 11, 2018).

Jewish hospice programs demonstrate that the Jewish community is capable of caring for its adherents even in the most difficult and trying of times, and that Jewish law is relevant from the moment a Jewish person is born until the moment he dies. If such hospice care providers were required to inform patients of alternative hospice options, their message would be lost.

In each of the foregoing examples, the Jewish community would be weakened if communal organizations were compelled to communicate messages inconsistent with Jewish law and tradition. The Constitution requires any law that produces such a result to satisfy strict scrutiny.

The First Amendment is intended to protect a vibrant and diverse marketplace of ideas. *McCullen v. Coakley*, 134 S. Ct. 2518, 2529, (2014). The Ninth Circuit's decision, which allows governments, without satisfying strict scrutiny, to compel organizations to convey governmental messages that might fatally undercut their own messages, places that marketplace in mortal danger. This Court should therefore reverse that decision.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Ninth Circuit should be reversed.

Respectfully submitted,

ANDREW PEPPER
10 Marcy Place
West Orange, N.J. 07052
(973) 699-6869
andrewpepper1@gmail.com

HOWARD N. SLUGH
Counsel of Record
2400 Virginia Ave., N.W.
Apt. C619
Washington, D.C. 20037
(954) 328-9461
hslugh1@gmail.com

Counsel for Amicus Curiae

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Petitioners,

v.

XAVIER BECERRA,
Attorney General of California, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF JUSTICE AND FREEDOM FUND AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Deborah J. Dewart
620 E. Sabiston Drive
Swansboro, NC 28584-9674
(910) 326-4554
debcpalaw@earthlink.net

James L. Hirsen
Counsel of Record
505 S. Villa Real Drive
Suite 208
Anaheim Hills, CA 92807
(714) 283-8880
james@jameshirsen.com

Counsel for Amicus Curiae

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

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INTEREST OF AMICUS CURIAE[1]

Justice and Freedom Fund ("JFF"), as *amicus curiae*, respectfully urges this Court to reverse the decision of the Ninth Circuit.

Justice and Freedom Fund is a California non-profit, tax-exempt corporation formed on September 24, 1998 to preserve and defend the constitutional liberties guaranteed to American citizens, through education, legal advocacy, and other means. JFF's founder is James L. Hirsen, professor of law at Trinity Law School and Biola University in Southern California and author of New York Times bestseller, *Tales from the Left Coast*, and *Hollywood Nation*. Mr. Hirsen is a frequent media commentator who has taught law school courses on constitutional law. Co-counsel Deborah J. Dewart is the author of *Death of a Christian Nation* (2010) and holds a degree in theology (M.A.R., Westminster Seminary, Escondido, CA). JFF has made numerous appearances in this Court as *amicus curiae*.

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[1] The parties have consented to the filing of this brief. *Amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to its preparation or submission.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The *mission* of Petitioners is advocacy, not financial profits or the practice of a profession. Their *message* is religious expression on a matter of intense public concern. Their *method* is to provide free information and other resources. The State's alleged *mission* is to prevent deception and ensure that women are informed about their full range of reproductive choices. But that mission is betrayed by its *method*. Rather than using its own voice to disseminate its own message, which advocates only *one* choice—abortion—California hijacks the Centers as its couriers.

Compelled speech is anathema to the First Amendment. The Ninth Circuit parted company with this Court and other circuits when it upheld California's Reproductive FACT Act (Cal. Health & Safety Code §§ 123471, 123472, 123473) (the "Act"). Its ruling, if allowed to stand, empowers government to bludgeon free speech. Moreover, the Ninth Circuit employs a flawed professional speech analysis to draw an analogy between the Act's disclosures and informed consent requirements. The resemblance is wholly superficial. Both are disclosures and both are content-based restrictions on speech, but the similarity ends there. Informed consent requires a doctor to provide information about a procedure he performs—such as abortion. The Act requires Petitioners to disclose information about a procedure they do not perform and adamantly oppose—information about what the *state* provides, not about the limited, non-surgical medical services Petitioners offer free of charge.

ARGUMENT

I. THE NINTH CIRCUIT OBSTRUCTS THE CENTERS' ABILITY TO CARRY OUT THEIR *MISSION*.

Petitioners represent religious, nonprofit pregnancy resource centers (the "Centers") whose mission is to offer life-affirming alternatives to abortion. As the Ninth Circuit acknowledged:

> Appellants are strongly opposed to abortion. None provide abortions or referrals for abortions. NIFLA's mission is to "empower the choice for life," and Pregnancy Care Clinic "provides its services to women in unplanned pregnancies pursuant to its pro-life viewpoint, desiring to empower the women it serves to choose life for their child, rather than abortion." Fallbrook believes "that human life is a gift of God that should not be destroyed by abortion."

Nat'l Institute of Family and Life Advocates, et al., v. Harris, 839 F.3d 823, 831 (9th Cir. 2016) ("*NIFLA*").

The State has a competing mission—allegedly to ensure that women are fully informed:

> California has a substantial interest in the health of its citizens, including ensuring that its citizens have access to and adequate information about constitutionally-protected medical services like abortion.

NIFLA, 839 F.3d at 841.[2] But in reality the State aggressively promotes abortion and suppresses information about alternatives. The State treats the religious nonprofit Centers as professional and/or commercial enterprises, ignoring their mission and tax-exempt purposes. The State's mission, if successful, would ensure that many Centers fail to accomplish their mission. Indeed, the State openly concedes its intent to target the Centers because of their pro-life viewpoint. Through a scheme of broad exemptions, the State cherry-picks pro-life centers and deliberately thwarts their mission. The end result is that the only entities legally required to promote abortion are those who oppose it.

Incredibly, the Ninth Circuit insists the Act does not "encourage, suggest, or imply that women should use those state-funded services." *NIFLA*, 839 F.3d at 842. This is an astounding denial of reality. If California does not intend to "encourage, suggest, or imply" that women should use state-subsidized abortion services, then it makes no sense to commandeer the Centers to advertise them. The Centers exist to *discourage* abortion and they rely on charitable contributions to finance their efforts. The State subsidizes abortion, then uses its superior resources and power to impede *the Centers'* mission rather than to accomplish *its own* mission.

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[2] The Ninth Circuit vastly overstates the State's interests. The State has no obligation to ensure access to abortion, which is perhaps the only "constitutionally-protected" medical service ever recognized by this Court. But that is another discussion beyond the scope of this brief.

The State essentially compels the Centers to abandon their mission. Either they must comply with the law and direct women to state-subsidized abortions, or they must enroll in a regime (the Family PACT program) that would mandate their participation in abortion-related drugs and services. Both options are constitutionally flawed.

II. THE NINTH CIRCUIT DECISION OBSTRUCTS THE CENTERS' ABILITY TO COMMUNICATE THEIR *MESSAGE*.

California impermissibly "prescribes what shall be orthodox" on a morally hot-button issue and "force[s] [the Centers] to confess by word or act their faith therein." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). The State advances a distinctly pro-abortion message and demands that the Centers publicize its state orthodoxy. The Centers' proclaim a distinctly religious, pro-life message that abortion is not the only solution to an unplanned pregnancy. Their speech is at the heart of the First Amendment:

> Our precedent establishes that private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression. Indeed, in Anglo-American history, at least, government suppression of speech has so commonly been directed *precisely* at religious speech that a free-speech clause without religion would be Hamlet without the prince.

Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 760 (U.S. 1995) (internal citations omitted).

It is difficult enough for small nonprofits to accomplish their mission in reliance on voluntary contributions. Those difficulties may be insurmountable if the Centers cannot communicate effectively with their intended audience.

A. The State Compels The Centers To Disseminate A Pro-Abortion Message In Direct Contradiction To Their Own Pro-Life Message.

This Court has long recognized that "regulatory measures . . . no matter how sophisticated, cannot be employed in purpose or in effect to stifle, penalize, or curb the exercise of First Amendment rights." *Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293, 297 (1961). Here, in both purpose and effect, California stifles, penalizes, and curbs the Centers' free speech rights. The State's compelled disclosures drown out the message the Centers exist to proclaim.

1. The Centers Are Engaged In Expressive Advocacy On A Matter Of Public Concern.

The Centers promote an ideology on one of the most explosive public issues in America. "[S]peech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Snyder v. Phelps*, 562 U.S. 443, 444 (2011), quoting *Connick v. Myers*, 461 U.S. 138, 145 (1983). A matter of public concern is "a subject of general interest and of value and concern to the public at the time of publication." *City of San Diego v. Roe*, 543 U.S. 77, 83-84 (2004); *see also Connick*, 461 U.S. at 146 ("any matter of political, social, or other concern to the

community"). Abortion has been a quintessential "matter of public concern" for over four decades. The State's efforts to stifle the Centers' message and compel "the utterance of a particular message favored by the Government . . . contravenes this principle." *Turner Broadcast Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994). California "may not burden the speech of [the Centers] in order to tilt public debate in a preferred direction." *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 578-579 (2011); *Wollschlaeger v. Governor*, 848 F.3d 1293, 1314 (11th Cir. 2017).

2. The Disclosures Force The Centers To Become Couriers Of The State's Speech.

The Act reeks of viewpoint discrimination in spite of the Ninth Circuit's inexplicable denial. The Act "is not applied across the board . . . , but instead reflects a legislative purpose to penalize the [Centers]" because they oppose abortion. *NAACP v. Button*, 371 U. S. 415, 445 (1963) (Douglas and White, J.J., concurring). The Ninth Circuit admits the Act is content-based but declines to acknowledge the thinly veiled viewpoint discrimination in California's gerrymandered targeting of pro-life organizations. *NIFLA*, 839 F.3d at 834 ("Although the Act is a content-based regulation, it does not discriminate based on viewpoint."). The Act mandates an exact message that highlights state-subsidized abortion and contraception. Rather than using the massive resources at its disposal, California usurps the Centers' limited resources. The mandatory disclosures gobble up space and garble the Centers' message. Instead of hearing a clear pro-life message, the public is confronted with a hodgepodge of

statements for and against abortion. This commingling of conflicting messages is likely to confuse and mislead the women who come to the Centers for help.

The Act stifles the Centers' right to tailor, time, and edit their messages. Regardless of motives, the State "may not substitute its judgment as to how best to speak" for that of the Centers. *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 791 (1988). The Centers are entitled to exercise discretion about the "choice of material . . . the size and content . . . and treatment of public issues." *Hurley v. Irish-American Gay, Lesbian & Bisexual 21 Group,* 515 U.S. 557, 575 (1995). The State wrongfully intrudes on this "editorial control and judgment." *Id.* Even statutory disclosures that do pass constitutional muster should grant "flexibility to tailor the disclosures to . . . individual circumstances, as long as the resulting statements are substantially similar to the statutory examples." *Milavetz, Gallop & Milavetz, P.A. v. United States,* 130 S. Ct. 1324, 1341 (2010). The Act's *inflexible* provisions compel precise words and allow no breathing space for the Centers to craft their own presentations, even if the disclosures themselves were justified. The Ninth Circuit minimizes the burden on the Unlicensed Centers: The "[n]otice is . . . only one sentence long." *NIFLA*, 839 F.3d at 843. But even a cursory look at the law reveals that font size, multiple languages, and other details render that "one sentence" disclosure so onerous that advertising is virtually impossible. Pet. 11; App. 81a-821.

The factual nature of the disclosures cannot salvage the Act. Editorial rights extend "not only to expressions of value, opinion, or endorsement, but *equally to*

statements of fact the speaker would rather avoid." *Hurley*, 515 U.S. at 573 (emphasis added). Compelled statements of either opinion *or* fact burden protected speech. *Riley,* 487 U.S. at 797-798; *see also Milavetz,* 130 S. Ct. at 1343 (Thomas, J., concurring). "While it is true that the words the state puts into the [Centers'] mouth are factual, that does not divorce the speech from its moral or ideological implications." *Stuart v. Camnitz*, 774 F.3d 238, 246 (4th Cir. 2014). Unlike this case, *Stuart* addressed an informed consent requirement imposed on doctors who perform abortions. Even in that context, where disclosures are generally constitutional, the state could not craft an *ideological* mandate.

B. The Disclosures Are Not Comparable To Informed Consent Requirements For Medical Procedures.

Four decades ago, this Court decreed abortion a constitutional right. It remains a matter of intense public debate that intersects morality, conscience, religion, and law. But it is also a medical procedure. This unique combination creates a tension that has plagued legislatures and emerged in scores of cases before this Court. The government's regulatory role varies considerably depending on the subject matter. The state must exercise restraint so as not to infringe or unduly burden constitutional rights, but it has greater latitude to regulate the practice of medicine.

As a medical procedure, abortion is subject to reasonable state regulation, including informed consent. Even *Roe* conceded that "[the] State has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under

circumstances that insure maximum safety for the patient." *Roe v. Wade*, 410 U.S. 113, 149-150 (1973). Those interests in health and safety are "legitimate objectives, amply sufficient to permit a State to regulate abortions *as it does other surgical procedures*." *Id.* at 170-171 (Stewart, J., concurring) (emphasis added). The government may impose informed consent requirements for the disclosure of truthful, non-misleading information about the nature of the abortion procedure and associated health risks. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 882 (1992). Informed consent requirements for abortion are "no different from a requirement that a doctor give certain specific information about any medical procedure." *Casey*, 505 U.S. at 884; *see also Gonzales v. Carhart*, 550 U.S. 124, 163-164 (2007) (same). This is a standard practice that cuts across many procedures and varies depending on factors such as surgical risk. *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 67 (1976) ("we see no constitutional defect in requiring it only for some types of surgery as, for example, an intracardiac procedure, or where the surgical risk is elevated above a specified mortality level").

However, the Ninth Circuit fails to distinguish expressive advocacy from informed consent to a medical procedure. Unlike typical informed consent provisions, the Act's disclosures are unrelated to any services the Centers *do provide* but consist wholly of a state-crafted ideological message about what the *state provides*. Indeed, the disclosures constitute free advertising for state-subsidized abortion services. Moreover, although "the state may prohibit the pursuit of medicine as an occupation without its license, . . . it

could [not] make it a crime publicly or privately to speak urging persons to follow or reject any school of medical thought." *Thomas v. Collins*, 323 U.S. 516, 544-545 (1945) (Jackson, J., concurring). Here, the State compels speech "urging persons to follow" its pro-abortion "school of medical thought," contrary to the Centers' message "urging persons" to reject that school of thought.

Prior to *Casey*'s explicit approval of informed consent requirements for abortion, this Court struck down certain state laws that interfered with doctor-patient communications. *See Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986) and *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983), both overruled in part by *Casey*, 505 U.S. 833. These cases involved mandatory physician disclosures about the State's position on abortion and potential alternatives. In *Thornburgh*, this Court found the disclosures were "designed not to inform . . . but rather to persuade" and constituted "a rigid requirement that a specific body of information be given in all cases, irrespective of the particular needs of the patient." *Thornburgh*, 476 U.S. at 762. *Casey* narrowed the scope of *Thornburgh* and *Akron* to the extent that these rulings might preclude requiring disclosure of "truthful, non-misleading information about the nature of the procedure, the attendant health risks and those of childbirth, and the 'probable gestational age' of the fetus." *Casey*, 505 U.S. at 881. But *Casey* does grant carte blanche to the government to mandate the rigid, ideological disclosures California imposes on the Centers.

1. The Ninth Circuit's Professional Speech Analysis Is Flawed.

The Ninth Circuit opinion rests heavily on precedents governing professional speech, asserting that clients come to the Centers "precisely because of the professional services" and specialized knowledge they offer. *NIFLA*, 839 F.3d at 840. The relationship between the First Amendment and the regulation of professional speech has been described as "complex and difficult . . . obscure and controversial." Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 U. Ill. L. Rev. 939, 944 (2007). The government has regulated professions for many decades, yet this Court has never formally segregated "professional speech" or relegated it to second-class status for First Amendment purposes. On the contrary, full protection is the norm, guided by established First Amendment principles. *See, e.g., In re Primus*, 436 U.S. 412, 432 (1978) (nonprofit's offer of free legal representation); Pet. Op. Brief 42 (citing cases).

There is no reason for this Court to carve out "professional speech" as a new category, having disclaimed "a freewheeling authority to declare new categories of speech outside the scope of the First Amendment." *United States v. Stevens*, 559 U.S. 460, 472 (2010). "[T]here are perils to the recognition of new categories of speech that enjoy diminished First Amendment protection." Rodney A. Smolla, *Professional Speech and the First Amendment*, 119 W. Va. L. Rev. 67, 84 (2016). Those perils include the risk of "government censorship of professional speech that ought to receive robust First Amendment protection."

Id. at 68. Other applicable areas of law—criminal, tort, fraud, ethics, *inter alia*—protect clients from speech-related harms caused by professionals.

The Licensed Centers are not full-fledged medical clinics, nor are they engaged in a licensed, "talk treatment" profession such as psychotherapy. They offer limited, non-surgical medical services, free of charge, that are integrally related to the Centers' pro-life advocacy. Any required disclosures should be relevant to services the Centers *do offer*, not a compelled referral for services they oppose and *do not offer*. If there were risks associated with the ultrasounds, pregnancy tests, or other clinical services the Centers offer, disclosure requirements would be reasonable. Instead, the Ninth Circuit blithely brushes over the distinction between the informed consent requirements imposed on physicians about a procedure *they do perform* and the disclosures the Act imposes on Centers about a procedure *they do not perform*.

Even if the Licensed Centers were engaged in "professional speech"—a questionable premise at best—speech uttered by professionals has many dimensions and is likely entitled to "the strongest protection our Constitution has to offer" when the topic is a public issue like abortion. *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 634 (1995). This Court should consider "the nature of the speech taken as a whole and the effect of the compelled statement[s] thereon." *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988). California may not, "under the guise of prohibiting professional misconduct, ignore constitutional rights." *NAACP v. Button*, 371 U.S. at 439. In *Button*, this Court "rightly rejected the State's

claim that its interest in the 'regulation of professional conduct' rendered the statute consistent with the First Amendment." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2229 (2015), citing *Button*, 371 U.S. at 438-439. The Ninth Circuit also departs from recent Eleventh Circuit precedent and even its own prior case law:

> The Ninth Circuit recognized that doctor-patient speech (even if labeled professional speech) is entitled to First Amendment protection, and invalidated the policy because it was content- and viewpoint-based and did not have the requisite "narrow specificity." *See Conant v. Walters*, 309 F.3d 629, 637-639 (9th Cir. 2002).

Wollschlaeger, 848 F.3d at 1310; *see also Pickup v. Brown*, 740 F.3d 1208, 1227 (9th Cir. 2013) ("doctor-patient communications *about* medical treatment receive substantial First Amendment protection").

Pro Bono Public Interest Advocacy. The Ninth Circuit ignores the distinction this Court carved out for pro bono public interest advocacy. This case is remarkably analogous to *Primus,* where an ACLU attorney offered free services "to express personal and political beliefs and to advance the civil-liberties objects of the ACLU, rather than to derive financial gain." *In re Primus*, 436 U.S. at 422. This Court relied on the speaker's motive to distinguish protected expression from commercial or professional activities. *Id.* at 437-438 n. 2. The same is true here. The Centers are engaged in advocacy, as in *Primus*. Their free services and information are the method they use to accomplish their mission and communicate their message.

Unlike the Ninth Circuit, the Fourth Circuit found "the relevant inquiry" to be "whether the speaker is providing personalized advice in a private setting to a *paying client* or instead engages in public discussion and commentary." *Moore-King v. Cty. of Chesterfield*, 708 F.3d 560, 569 (4th Cir. 2013) (emphasis added). The Centers have no "paying client[s]" and unquestionably engage in "public discussion and commentary." The Ninth Circuit briefly brushed over *Moore-King* in a footnote. *NIFLA*, 839 F.3d at 841 n. 8. The Fourth Circuit, striking down a pregnancy center disclosure requirement, highlighted this factor: "With no record of comprehensive state regulation or paying clients before us, we cannot say that the ordinance regulates professional speech." *Greater Baltimore Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council Baltimore*, 2018 U.S. App. LEXIS 297, *15 (4th Cir. 2018).

Moreover, "a speaker's rights are not lost merely because compensation is received." *Riley*, 487 U.S. at 801. As in *Riley*, the Act's disclosures are "intertwined with informative and perhaps persuasive speech" (*id.* at 796)—persuasion against abortion and information about alternatives. Under the Act, women who enter Licensed Centers are confronted with a state pro-abortion message that contradicts the Center's core message and undermines its mission. Woman who enter an Unlicensed Center are greeted by the State's message about what the Center is *not*. In both cases, the State compels conspicuous disclosures about what the Center does *not* do before the Center can explain what it *does* do. The State—not the Centers—creates each woman's first impression, obscuring the Centers' message and mission. The disclosures are not made

within the context of a professional-client relationship, but before that relationship ever commences—and the "Compelled Abortion Referral" (Pet. Op. Br. 8) may ensure that no relationship is ever formed.

Professional Licensing. The state has "a strong interest in supervising the ethics and competence" of licensed professionals. *Greater Baltimore Ctr. for Pregnancy Concerns,* 2018 U.S. App. LEXIS 297, *14. Courts uphold reasonable regulations on licensed professions, including law, accounting, medicine.[3] But there is a difference between (1) ensuring that the Centers' clients are under the care of an appropriately trained physician and (2) providing information on how women can terminate the new life they now carry—using *state* funded services. The former is a legitimate exercise of state power to elevate public health and safety and is typically accomplished through licensing. Laws that regulate entry into a profession are constitutional if they "have a rational connection with the applicant's fitness or capacity to practice" the profession. *Lowe v. Sec. & Exch. Comm'n,* 472 U.S. 181, 228 (1985) (White, J., concurring), quoting *Schware v. Bd. of Bar Examiners,* 353 U.S. 232, 239 (1957).

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[3] *Fla. Bar v. Went For It, Inc.,* 515 U.S. at 625-26 (restriction on direct-mail solicitation of accident victims); *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio,* 471 U.S. 626 (1985) (upholding disclosures about litigation costs in attorney ads for contingency fee cases); *Ohralik v. Ohio State Bar Ass'n,* 436 U.S. 447 (1978) (in-person attorney-client solicitation); *Accountant's Soc'y of Va. v. Bowman,* 860 F.2d 602 (4th Cir. 1988) (accounting terms and standards for licensed CPA's).

Here, "[California] is attempting to use the leverage of licensure to manipulate discussion among private citizens . . . on an issue of major public importance." *Professional Speech and the First Amendment,* 119 W. Va. L. Rev. at 103. The Licensed Centers have already complied with the licensing requirements applicable to the limited services they provide, and unlike other regulatory schemes, the Act dictates the precise content. *See, e.g., Nat'l Ass'n for Advancement of Psychoanalysis v. Cal. Bd. of Psychology,* 228 F.3d 1043, 1056 (9th Cir. 2000) ("California does not dictate the content of what is said in therapy; the state merely determines who is qualified as a mental health professional.") This is classic compelled speech. The State commandeers the Centers to disseminate a government message antithetical to their core mission. The Unlicensed Centers are not subject to any licensing requirement. None of the Centers "purport to exercise judgment on behalf of [a] client in the light of a client's individual needs and circumstances." *Lowe v. SEC,* 472 U.S. at 232 (White, J., concurring). Their free information and services empower *the women themselves* to make informed decisions about their pregnancies. The licensed and unlicensed Centers both engage in expressive advocacy on an issue with significant moral, religious, and political ramifications, not a profession the State may regulate. "It cannot be the duty, because it is not the right, of the state to protect the public against false doctrine." *Thomas v. Collins,* 323 U.S. at 545 (Jackson, J., concurring).

The speech of professional individuals may trigger "a collision between the power of government to license and regulate . . . and the rights of freedom of speech." *Lowe v. SEC,* 472 U.S. at 232 n. 10 (White, J.,

concurring) (non-personalized newsletters with investment advice are not professional speech). Occupational regulations are valid only if "[a]ny abridgement of the right to free speech is merely the incidental effect of observing an otherwise legitimate regulation." *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. at 467-468. The Act's constitutionally flawed burdens can hardly be deemed *incidental*.

2. A Commercial Speech Analysis Would Be Inappropriate.

The Ninth Circuit conceded that the Act does not regulate "commercial speech." But the line between "commercial" and "professional" is a thin one. Professional services are typically offered to paying clients in a commercial setting. *See, e.g., Miller v. Stuart*, 117 F.3d 1376, 1382 (11th Cir. 1997) (advertising oneself as a "certified public accountant" is commercial speech). Here, the Centers have no economic interests at stake and do not engage in commercial transactions with the women they serve.

In rejecting the analogy between this case and *Primus*, the Ninth Circuit reasoned that the Centers "have positioned themselves in the marketplace as pregnancy clinics" that "offer medical services in a professional context." *NIFLA*, 839 F.3d at 841. Even the Ninth Circuit's own description of the Centers' mission (Section I above) lays bare the flaws in this reasoning. Like the parties in *Primus*, the Centers are engaged in "political expression and association" (*In re Primus*, 436 U.S. at 437-438) concerning one of the most volatile issues of our time. Abortion intersects speech, religion, politics, culture, law, and medical practice. The Centers are not "in the marketplace" to

compete with medical clinics, hospitals, doctors, or others engaged in the practice of medicine. All services are offered free of charge, including the limited medical services provided by the Licensed Centers.

Even in the world of commercial and business activity, "[t]he idea is not sound . . . that the First Amendment's safeguards are wholly inapplicable." *Thomas v. Collins,* 323 U.S. at 531. The marketplace "provides a forum where ideas and information flourish." *Sorrell,* 564 U.S. at 579, quoting *Edenfield v. Fane*, 507 U.S. 761, 767 (1993). In some circumstances the government may "compel disclosure without suppressing speech." *Conn. Bar Ass'n v. United States,* 620 F.3d 81, 93 (2d Cir. 2010). The state has some responsibility to "protect the public from those who seek . . . to obtain its money." *Thomas v. Collins,* 323 U.S. at 545 (Jackson, J., concurring). But even there, "unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech." *Zauderer,* 471 U.S. at 651.

The Centers exist to assist women facing unplanned pregnancies and inform them about *choices* other than abortion. At no time do they "propose a commercial transaction." *Bolger v. Youngs Drug Prods. Corp.,* 463 U.S. 60, 64-68 (1983); *Greater Baltimore Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Baltimore*, 721 F.3d 264, 284 (4th Cir. 2013). Their message is not "expression related solely to the economic interests of the speaker and its audience." *Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.,* 447 U.S. 557, 561 (1980). It is only through a warped redefinition—e.g., equating "the

opportunity to advocate against abortion" with economic benefit—that the government could possibly manufacture a "commercial" transaction. *Evergreen Ass'n, Inc. v. City of New York*, 801 F. Supp. 2d 197, 204 (S.D.N.Y. 2011), *aff'd in part and rev'd in part*, 740 F.3d 233 (2014). That fanciful transformation is "particularly offensive to free speech principles." *Id.* at 206. It twists the mission of the Centers and upends the First Amendment, with absurd results:

> [A]ny house of worship offering their congregants sacramental wine, communion wafers, prayer beads, or other objects with commercial value, would find their accompanying speech subject to diminished constitutional protection.

O'Brien v. Mayor & City Council of Baltimore, 768 F. Supp. 2d 804, 813-814 (D. Md. 2011). Restaurants may be required to disclose caloric and nutritional information. *N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health*, 556 F.3d 114, 131-32 (2d Cir. 2009). But it would be flagrantly unconstitutional to impose comparable disclosures on a church operating a soup kitchen to feed the homeless. Restaurants and soup kitchens both provide food—but a church ministry to the poor is not a commercial venture subject to the same level of government regulation. That position would "represent a breathtaking expansion of the commercial speech doctrine." *Evergreen*, 801 F. Supp. 2d at 205. Here, the Centers are motivated by religious beliefs and social concerns, not economic interest.

For many years, "the Constitution impose[d] [no] restraint on government as respects purely commercial advertising." *Valentine v. Chrestensen*, 316 U.S. 52, 54

(1942). When this Court expanded First Amendment protection to cover admittedly commercial speech, the context was abortion. This Court held that an out-of-state advertisement for abortion services "did more than simply propose a commercial transaction . . . it contained factual material of clear 'public interest.'" *Bigelow v. Virginia*, 421 U.S. 809, 822 (1975). "The fact that the particular advertisement in appellant's newspaper [for legal abortions in New York] had commercial aspects or reflected the advertiser's commercial interests did not negate all First Amendment guarantees." *Id.* at 818. This Court distinguished the facts from *Valentine*, where a "message of asserted public interest was appended solely for the purpose of evading the ordinance." *Id.* at 819. At this point, three decades after *Valentine*, "the notion of unprotected commercial speech all but passed from the scene." *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 759-760 (1976).

Commercial speech that is "inextricably intertwined" with expressive speech is fully protected. This Court declines to "parcel out the speech," phrase by phrase, applying different tests—particularly when the expressive aspect is targeted for regulation. *Riley*, 487 U.S. at 796. *Riley* built on the principle that "[s]olicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues." *Village of Schaumberg v. Citizens for a Better Environment*, 444 U.S. 620 (1980). Just recently, this Court applied the First Amendment to strike down the disparagement provision of trademark law. *Matal v. Tam*, 137 S. Ct.

1744 (2017). Federal law regulates trademarks to provide customers with information about the source of goods and services in interstate commerce, but a mark may include expressive components—as in *Matal*. Although this Court found it unnecessary to decide whether or not trademarks are commercial speech (*id.* at 1764), "the line between commercial and non-commercial speech is not always clear, as this case illustrates" (*id.* at 1765). Here, even if the Centers' speech could plausibly be considered either professional or commercial, it is "inextricably intertwined" with persuasive speech advocating a particular view on a contentious social issue.

Even if a commercial speech analysis were appropriate here, the framework developed by this Court is "substantially similar to the test for time, place, and manner restrictions." *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 554 (2001) (internal citations and quotation marks omitted). And "the abiding characteristic of valid time, place, and manner regulations is their content neutrality. See *Ward v. Rock Against Racism,* 491 U.S. 781, 791-796 (1989)." *Id.* at 573 (Thomas, J., concurring). The FACT Act is not content neutral, as the Ninth Circuit acknowledged.

3. The Disclosures Shut Off The Free Flow Of Information—The Very Purpose Of Informed Consent And Other Disclosures In Professional and Commercial Contexts.

The First Amendment promotes the free flow of ideas and information. This helps ensure that even commercial decisions are well informed. "To this end,

the free flow of commercial information is indispensable." *Va. State Bd. of Pharmacy*, 425 U.S. at 765. *See also Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 113-114 (2d. Cir. 2001) ("Protection of the robust and free flow of accurate information is the principal First Amendment justification for protecting commercial speech, and requiring disclosure of truthful information promotes that goal.").

In *Bolger*, this Court considered a federal statute that prohibited mailing information about contraception. The mailings were classified as commercial speech but the statute was unconstitutional because it unreasonably suppressed the flow of information about an important social issue—family planning. *Bolger*, 463 U.S. at 72. This Court "found the First Amendment interest served by such speech paramount." *Id.* at 69. As in *Bolger*, the Centers "desire to convey truthful information relevant to [an] important social issue." *Id.* They provide valuable information to pregnant women about alternatives to abortion. Their pro-life message is at the heart of their existence, not an afterthought designed to sidestep government regulation. The State cannot employ its regulatory authority to shut down speech on either side of the abortion debate. The most it could do is "assess liability for specific instances of deliberate deception"—not "impose a prophylactic rule requiring disclosure even where misleading statements are not made." *Riley*, 487 U.S. at 803 (Scalia, J., concurring).

Even if the Centers' speech was accurately characterized as professional or commercial, the State mandate thwarts the flow of information that

disclosures should facilitate. The Act purports to ensure that women are fully informed of their reproductive options but in reality it stifles access to their full range of choices. Its primary focus is the availability of abortion, emergency contraception, and birth control. The State crafts its message so as to promote abortion. *But that does not fully inform women.* The Centers fill the gap by providing "truthful information relevant to [an] important social issue[]." *Bolger,* 463 U.S. at 69. The Centers widen the range of options for women who might otherwise believe abortion is their *only* choice. Their services facilitate the free flow of information. The Act garbles the Centers' message and thus hinders that flow by interfering with the right to *receive* information. "Indeed, the right to hear and the right to speak are flip sides of the same coin." *Conant,* 309 F.3d at 643 (Kozinski, J., concurring) (medical marijuana); see also *Bd. of Educ. v. Pico,* 457 U.S. 853, 866-867 (1982), *Va. State Bd. of Pharmacy,* 425 U.S. at 756-757. Contrary to the State's alleged interest in *fully* informing women, the Act imposes restrictions *only* on entities that oppose abortion and mandates *only* disclosures that endorse abortion. The Act smothers expression and impedes access to information.

Informed consent laws facilitate the free flow of information by equipping patients with critical information they need in order to consent to a medical procedure. Like any other surgical procedure, abortion requires informed consent. Without it, the physician could be liable for malpractice. Doctors remain free to advocate abortion or discuss other options with pregnant patients. The State erroneously equates informed consent requirements with the mandate

imposed on the Centers. Both schemes are related to the broad subject of abortion but they are otherwise quite dissimilar. The Act's disclosures are unrelated to any risk associated with services the Centers offer. If ultrasounds or pregnancy tests posed health risks, the State could require disclosures of those risks. Instead, the State mandates dissemination of information about a procedure the Centers *oppose* and would never perform or recommend—abortion. That is just as illogical as it is unconstitutional. California's inflexible mandate drowns out the Centers' pro-life message and even jeopardizes their ability to remain open.

The Ninth Circuit echoes the State's charade, citing this Court's decision in *Casey,* 505 U.S. 833. *NIFLA*, 839 F.3d at 837 ("[T]he Supreme Court has recognized a state's right to regulate physicians' speech concerning abortion."). The Ninth Circuit references Fourth, Fifth, and Eighth Circuit cases that are anything but analogous to the facts here. The Fourth Circuit struck down an informed consent law it deemed "ideological" because it "conveys a particular opinion." *Stuart v. Camnitz*, 774 F.3d at 246. The Fifth Circuit upheld a requirement that doctors show pregnant women sonograms and make the fetus's heartbeat audible. *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 575-576 (5th Cir. 2012). The Eighth Circuit upheld the compulsory disclosure of "truthful, non-misleading information relevant to a patient's decision to have an abortion." *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 734-735 (8th Cir. 2008). Unlike *Stuart v. Camnitz*, *Lakey*, *Rounds*, or *Casey*, the Act contains no informed consent provision. The Ninth Circuit masks the difference by using the vague term "abortion-related disclosures."

See, e.g., NIFLA, 839 F.3d at 837 ("courts are in agreement that strict scrutiny is inappropriate in abortion-related disclosure cases").

Communication between professionals and their clients enhances the free flow of information. The Ninth Circuit's departure from its own precedent is startling. In a case *not* related to abortion, the court stated that: "An integral component of the practice of medicine is the communication between a doctor and a patient. Physicians must be able to speak frankly and openly to patients." *Conant*, 309 F.3d at 636. In *Conant*, the Ninth Circuit enjoined a federal law that allowed revocation of a physician's license for recommending medical marijuana. The law impermissibly "condemn[ed] expression of a particular viewpoint." *Id.* at 636. *Conant* acknowledged First Amendment rights in the context of requiring informed consent. *Id.* at 637 ("Being a member of a regulated profession does not, as the government suggests, result in a surrender of First Amendment rights.") The State's authority to regulate commercial or professional speech does not, under any standard, grant the government carte blanche to skew disclosures in favor of one side of a heated public debate and destroy the mission of those who disagree with its viewpoint.

Occasionally courts enhance the free flow of information by expanding First Amendment protection to new categories of speech. Indeed, protection for commercial speech was forged in the context of disseminating information about abortion services (*Bigelow v. Virginia*, 421 U.S. 809) and contraception (*Bolger*, 463 U.S. 60). But the exclusion of new speech categories is another matter. Courts cannot exercise

"freewheeling authority to declare new categories of speech outside the scope of the First Amendment." *United States v. Stevens*, 559 U.S. at 472. That is exactly what the Ninth Circuit has done. The court expunges speech about life-affirming alternatives to abortion.

III. THE NINTH CIRCUIT OBSTRUCTS THE CENTERS' ABILITY TO IMPLEMENT THEIR *METHOD*.

The Centers and the State each have a method to accomplish their respective missions. The Centers' method is to offer free information and resources, including limited, non-surgical medical services such as pregnancy tests and ultrasounds. The State has a constitutionally flawed method—rather than using its own funds and voice, California confiscates the Centers' limited resources and compels them to spread a government message that contradicts their mission and message. And while the State claims its purpose is to prevent deception and ensure that women are fully informed about their reproductive choices, its method betrays that claim. The State informs women about *only one* choice—abortion—and deceives women by using pro-life speakers as its mouthpiece. The State abuses its power by enacting laws that distort the Centers' message, crippling their ability to speak and accomplish their mission.

Applying intermediate scrutiny, the Ninth Circuit explained that the Act "need not be the least restrictive means possible" to accomplish the State's purpose. *NIFLA*, 839 F.3d at 842. But the Act turns free speech jurisprudence on its head. Its burdensome, broadly tailored disclosures use the most restrictive means to

accomplish the State's viewpoint-based objective. California defies this Court's warning that:

> If the First Amendment means anything, it means that regulating speech must be a *last—not first—resort. Yet here it seems to have been the first strategy the Government thought to try.*

Thompson v. Western States Medical Ctr., 535 U.S. 357, 373 (2002) (emphasis added); *see also Conant*, 309 F.3d at 637. Rather than use its own voice, the "first strategy the [State] thought to try" was to play ventriloquist and require the Centers to become its dummies, bearing the costs of transmitting its message. Even in the commercial context, "if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive." *Cent. Hudson*, 447 U.S. at 564. The State has a wealth of more narrowly tailored means available—starting with its own voice and resources. *See, e.g., Riley*, 487 U.S. at 800 ("the State may itself publish the detailed financial disclosure forms it requires professional fundraisers to file").

The State is free to adopt, promote, publicize and even fund a viewpoint. "The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way." *Rust v. Sullivan*, 500 U.S. 173, 193 (1991). In *Rust*, the government funded family-planning services but chose to exclude abortion. *Id.* at 178. California has chosen to subsidize abortion

and contraception. But the State crosses the constitutional line by compelling the Centers to expend their limited resources to advertise the State's program, compromising "the core principle of speaker's autonomy" (*Hurley*, 515 U.S. at 575) and "assum[ing] a guardianship of the public mind" (*Riley*, 487 U.S. at 791, quoting *Thomas v. Collins*, 323 U.S. at 545 (Jackson, J., concurring)).

The Constitution severely restricts the State's ability to compel speech. Under narrow circumstances, the government may use mandatory disclosures to protect the public. But even in a commercial context, "unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech." *Zauderer*, 471 U.S. at 651. That would be true here *even if* the Centers' speech were "commercial"—which the Ninth Circuit admits it is not. *NIFLA*, 839 F.3d at 834 n. 5 ("We find unpersuasive Appellees' argument that the Act regulates commercial speech subject to rational basis review.").

Unlike the Ninth Circuit, the Second Circuit expressed concerns about laws "requir[ing] pregnancy services centers to advertise on behalf of the City." *Evergreen Ass'n*, 740 F.3d 233, 250 (2d Cir. 2014). This "offends the Constitution even if it is clear that the government is the speaker." *Id.*, citing *Wooley v. Maynard*, 430 U.S. 705, 715 (1977) (invalidating statute that turned "private property [into] a mobile billboard for the State's ideological message"). Even if a message appears benign or is acceptable to some, the State's interest does not "outweigh the [Centers'] First Amendment right to avoid becoming the courier for

such message." *Id.* at 717. Even seemingly innocuous content-based laws can too easily cross the threshold into viewpoint discrimination. Such laws "pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion." *Turner*, 512 U.S. at 641. That is exactly what California does—in conflict with this Court:

> While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government.

Hurley, 515 U.S. at 579. The FACT Act contravenes the basic presumption "that speakers, not the government, know best both what they want to say and how to say it." *Riley*, 487 U.S. at 791. Moreover, the State fails to publicize its own message, instead *inflicting the entire burden on the Centers.*

CONCLUSION

This Court should reverse the decision of the Ninth Circuit.

Respectfully submitted,

James L. Hirsen
Counsel of Record
505 S. Villa Real Drive, Suite 208
Anaheim Hills, CA 92807
(714) 283-8880
james@jameshirsen.com

Deborah J. Dewart
620 E. Sabiston Drive
Swansboro, NC 28584-9674
(910) 326-4554
debcpalaw@earthlink.net

Counsel for Amicus Curiae

No. 16-1140

IN THE

Supreme Court of the United States

NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES, D/B/A NIFLA, ET AL.,
Petitioners,

v.

XAVIER BECERRA, ATTORNEY GENERAL, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF LEGAL ETHICISTS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

ALBERT GIANG
Counsel of Record
BOIES SCHILLER FLEXNER LLP
725 S. Figueroa Street
Los Angeles, CA 90017
agiang@BSFLLP.com
(213) 629-9040

NORA FREEMAN ENGSTROM
Professor of Law
STANFORD LAW SCHOOL
559 Nathan Abbott Way
Stanford, CA 94305-8610

Counsel for Amici Curiae

QUESTION PRESENTED

Whether the disclosures required by the California Reproductive FACT Act violate the protections set forth in the Free Speech Clause of the First Amendment, applicable to the States through the Fourteenth Amendment.

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INTEREST OF AMICI CURIAE[1]

Amici curiae are professors and legal ethicists at law schools throughout the United States. They teach, write, or practice in the field of legal ethics and professional responsibility for attorneys. While they have no personal interest in the outcome of this case, they have a professional interest in the clear, consistent, and fair application of rules of ethics and professional responsibility.

Amici submit this brief to address a discrete issue raised by Petitioners and their supporting *amici*: whether Petitioners should be exempt from the Reproductive FACT Act's minimum disclosure requirements, on the theory that the First Amendment shields professionals (such as attorneys) from speech regulation as long as they offer services without expectation of "monetary recovery" or "financial gain." *See, e.g.*, Pet. Br. at 41. Petitioners' analogy, however, is based on a flawed premise. In the analogous context of attorney regulation, the rules are developed and clear: *all* attorneys are subject to professional regulations, including affirmative disclosure requirements—and these requirements do not turn on the expectation of payment. Rather they apply, in the same way and with the same force, even if attorneys offer services on a pro bono basis. *Amici* seek to provide this Court with background on

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[1] Pursuant to Supreme Court Rule 37.3, *amici* certify that all parties have consented to the filing of this brief. Pursuant to Rule 37.6, *amici* certify that no counsel for a party authored this brief in whole or in part, and no persons other than *amici* or their counsel made a monetary contribution to its preparation or submission.

those regulations and their underlying rationales in order to illuminate why the challenged California provisions may be permissible as a legal matter and may be justifiable as a policy matter.

For these reasons, the following *amici* have joined together to file this accompanying brief:

Professor Nora Freeman Engstrom is a Professor of Law and the Associate Dean for Curriculum at Stanford Law School.[2] She is also a co-author of a leading professional responsibility casebook, Legal Ethics (with Deborah L. Rhode, David Luban, and Scott Cummings).

Deborah L. Rhode is the Ernest W. McFarland Professor of Law, the director of the Center on the Legal Profession, and the director of the Program in Law and Social Entrepreneurship at Stanford University. She is the most frequently cited scholar on legal ethics, and a co-author of the casebook, Legal Ethics.

David Luban is a Professor of Law at Georgetown University Law Center, a nationally recognized expert on legal ethics and professional responsibility, and a co-author of the casebook, Legal Ethics.

Scott Cummings is a Professor of Law at the UCLA School of Law, an expert on legal ethics, and a co-author of the casebook, Legal Ethics.

Carole Silver is the Professor of Global Law & Practice at Northwestern Pritzker School of Law,

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[2] All institutional affiliations are noted only for identification purposes.

and is an expert on regulations governing lawyers, the legal profession, and legal education.

Robert W. Gordon is a Professor of Law at Stanford Law School, and teaches and writes on the subjects of legal ethics and professional responsibility.

Gillian K. Hadfield, Kirtland Professor of Law and Professor of Economics at USC Gould School of Law, is an expert in the design and regulation of legal markets and institutions.

Leslie C. Levin is the Joel Barlow Professor of Law at the University of Connecticut School of Law, and an expert in the area of professional ethics and media law.

Lynn A. Baker holds the Frederick M. Baron Chair in Law at the University of Texas School of Law, and regularly teaches and publishes in the area of professional responsibility.

Stephen Gillers, Elihu Root Professor of Law at New York University School of Law, is the author of the casebook, Regulation of Lawyers: Problems of Law and Ethics (11th edition 2018).

Bruce A. Green is the Louis Stein Chair of Law and Director of the Stein Center for Law and Ethics at Fordham University School of Law, and is the co-author of a casebook on legal ethics.

Richard L. Abel, Connell Distinguished Professor of Law Emeritus and Distinguished Research Professor at UCLA School of Law, taught professional responsibility for thirty-five years and has written extensively on the subject.

Benjamin H Barton, Helen and Charles Lockett Distinguished Professor of Law at the University of Tennessee College of Law, has written on the interaction of the First Amendment and professional duties, including the ethical duties of doctors and lawyers.

SUMMARY OF ARGUMENT

Petitioners' challenge to the Reproductive FACT Act's ("the Act") mandatory disclosure requirements is based in part on a misunderstanding of professional speech regulations. Analogizing to cases that involved attempts to ban public interest attorneys from solicitation in the context of collective activity, Petitioners suggest that professionals are exempt from speech regulation as long as they do not charge for their services. Petitioner's position not only misinterprets the attorney solicitation cases, but is contradicted by numerous rules of professional responsibility and cases upholding minimum disclosure requirements for attorneys.

The reality is that lawyers of all stripes and in all states are subject to a variety of speech regulations, including minimum disclosure requirements. Attorney speech is regulated even before the formation of an attorney-client relationship and even if lawyers offer their services pro bono. Such regulations are designed to protect clients and prospective clients by providing important disclosures, preventing consumer deception, and facilitating informed decisionmaking. Simply put, no attorney enjoys a broad exemption from reasonable professional regulations, and Petitioners' attempt to seek such immunity for themselves should be rejected.

ARGUMENT

This case presents a challenge to two disclosure requirements in the California Reproductive FACT Act ("the Act"), which apply to facilities that

primarily serve pregnant women: (1) unlicensed medical clinics must provide clients a one-sentence disclosure of their unlicensed status; and (2) licensed medical clinics must provide clients a two-sentence notice about the existence of state-funded programs offering free and low-cost reproductive healthcare services. Resp. Br. at 1-2. Petitioners object to these disclosures, but do not otherwise claim that the Act prohibits speech in which they might want to engage. Pet. Br. at i.

To support their claim that these mandatory disclosures impermissibly infringe on their First Amendment rights, Petitioners argue that they are nonprofits that do not "sell any services" or engage in commercial speech. *Id.* at 40. Petitioners also argue that they should not be subject to professional speech regulations, because they are simply providing pregnant women with free information "before any professional relationship has begun." *Id.* at 44. Both arguments are rooted in part in an implied analogy to pro bono services in other professions, particularly the legal profession, and Petitioners repeatedly cite to cases that have struck down broad prohibitions on attorney solicitation. *See id.* at 41, 44 (citing *Button* and *In re Primus*).

Amici, who are trained scholars in the field of legal ethics and professional responsibility, take issue with any suggestion that attorneys are exempt from professional regulation as long as they offer their services for free or their speech occurs prior to the formation of a professional relationship. The reality is that the Model Rules of Professional Conduct, and related State Bar rules, absolutely and permissibly regulate attorney speech, including

requiring affirmative disclosures in many circumstances. And these disclosure requirements for attorneys, not unlike the disclosure requirements in the Act, are intended to protect clients (even prospective or pro bono clients) and prevent undue influence by the regulated professionals.

Therefore, *amici* respectfully urge this Court to reject Petitioners' misplaced argument that professionals can claim a broad exemption from minimum disclosure requirements. No such exception exists for attorneys, not even pro bono attorneys. Permitting such an exception would flout the reasonable policy rationales for providing narrow and accurate disclosures to the clients that professionals hope to serve.

I. All Attorneys Are Subject to Reasonable Regulations of Their Professional Speech, Including the Obligation to Make Affirmative and Accurate Disclosures in Certain Circumstances.

There can be no reasonable dispute that attorney speech is comprehensively regulated. Lawyers of all types, representing all kinds of clients, and practicing in different specialties throughout the United States, are constrained in what they can say, what they cannot say, and even what they must say.

Indeed, many regulations govern attorney speech even *before* the formation of a lawyer-client relationship, as all states regulate how lawyers may recruit and obtain clients. By way of example only, lawyers must comply with certain rules when describing themselves and their firms, *see* Model

Rules of Prof'l Conduct R. 7.5, as well as their experience and practice area, *see id.* at R. 7.4 (a lawyer may not describe herself as a specialist in a particular field of law unless she has been certified by an approved organization). All states regulate the manner in which lawyers may solicit clients. *See id.* at R. 7.3. And lawyers in a majority of states must make affirmative disclosures in their advertisements. *See id.* at R. 7.2(c) ("Any communication made pursuant to this Rule shall include the name and office address of at least one lawyer or law firm responsible for its content."); Am. Bar Ass'n, *Differences Between State Advertising and Solicitation Rules and the ABA Model Rules of Professional Conduct*, at 1–8 (2016) [hereinafter ABA, *Advertising and Solicitation Rules*] (compiling state authority).

Most relevantly, and as explained in more detail below, some of these regulations take the form of required minimum disclosures to ensure that clients, and also prospective clients, are adequately informed, both when it comes to selecting counsel and when making decisions within the context of the attorney-client relationship. Neither *Button* nor *In re Primus*, which are cited by Petitioners, bars such reasonable regulations of professional speech.

A. Examples of permissible regulation of attorney speech abound, including affirmative disclosure requirements.

While lawyers speaking in the professional context enjoy a tremendous amount of discretion, their speech is never completely unfettered. Attorney speech can even be compelled, as in the

long-recognized requirement that lawyers communicate with clients in certain ways and about certain things, and inform prospective, current, and former clients of any conflicts of interest. *See* Model Rules of Prof'l Conduct R. 1.4, 1.18, 1.7, 1.9.

Indeed, states compel lawyers to disclose certain information not just to clients, but also to prospective clients and the public at large. These compelled disclosures are seen most frequently in the context of attorney advertising, where disclosures are commonplace and have been legal in the United States for over four decades.

Compelled disclosures in attorney advertisements can be traced back to this Court's jurisprudence. Striking down a blanket ban on attorney advertising in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), this Court declared that "the preferred remedy" for misleading advertising was "more disclosure, rather than less," *id.* at 375, and explicitly tasked the organized bar with ensuring that lawyer advertisements would be appropriately regulated, for information to "flow[] both freely and cleanly," *id.* at 384. In so doing, the Court explicitly recognized the important role that affirmative disclaimers and warnings may play. *See id.* at 384 ("We do not foreclose the possibility that some limited supplementation, by way of warning or disclaimer or the like, might be required of even an advertisement of the kind ruled upon today so as to assure that the consumer is not misled.").

Heeding this Court's call, *many* states compel lawyers to make certain disclosures when

advertising their service. ABA, *Advertising and Solicitation Rules, supra*, at 1–8 (compiling relevant authority). Some states impose simple labeling requirements. *See, e.g.*, Conn. Rules of Prof'l Conduct R. 7.3(c) (mandating inclusion of the words "Advertising Material" in certain written, audio, and visual communications). Numerous states go further by compelling attorneys to accompany their ads with substantive, state-written disclosures in particular languages, types, and fonts. *See, e.g.*, Fla. Rules of Prof'l Conduct R. 4-7.12 (requiring that all "advertisements for legal employment" include certain specified information and mandating that this information "appear in the same language in which the advertisement appears" and "be reasonably prominent and clearly legible if written"); Ala. Rules of Prof'l Conduct R. 7.2(e) (compelling attorneys who advertise to state: "No representation is made that the quality of the legal services to be performed is greater than the quality of legal services performed by other lawyers." and mandating that the disclosure be "clearly legible or audible, as the case may be"); Mo. Rules of Prof'l Conduct R. 4-7.2(f) (compelling the following "conspicuous disclosure: The choice of a lawyer is an important decision and should not be based solely upon advertisements.," while specifying that "'Conspicuous' means that the required disclosure must be of such size, color, contrast, location, duration, cadence, or audibility that an ordinary person can readily notice, read, hear, or understand it.").

Nor is advertising the only site of compelled attorney speech. Two categories of compelled disclosures seem particularly relevant. *First*,

certain states require lawyers to inform prospective clients of the availability of state-subsidized alternatives to their services. *See* Ala. Ethics Op. RO-98-01 (1998) (requiring attorneys seeking to charge a fee for helping to collect back child support to advise prospective clients that the state offers similar assistance for free); Tex. Ethics Op. 485 (1994) (same).

Second, several states have adopted rules that compel those lawyers who do not carry a minimum amount of professional liability insurance to disclose this fact, prior to (and, additionally, sometimes after) attorney retention. *See* Leslie C. Levin, *Lawyers Going Bare and Clients Going Blind*, 68 Fla. L. Rev. 1281, 1284–86 (2016).[3] South Dakota, for example, requires lawyers who carry less than $100,000 in liability insurance to note as much in their letterhead, advertisements, and written communications with clients. S.D. Rules of Prof'l Conduct R. 1.4(c)-(d), 7.2(l). Likewise, if a lawyer "does not have professional liability insurance," California mandates disclosure "at the time of the client's engagement" so long as "it is reasonably foreseeable that the total amount of the member's legal representation of the client in the matter will exceed four hours." Cal. Rules of Prof'l Conduct R. 3-410(A).[4] *See also, e.g.*, N.H. Rules of

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[3] Seventeen additional states require disclosure on attorney registration forms, with some states posting this information on bar or judicial websites. Levin, *supra*, at 1286.

[4] Tellingly, in enacting this provision, the California Bar considered—but rejected—a proposed exception for when lawyers represent clients pro bono. *See* Devin S. Mills & Galina Petrova, *Modeling Optimal Mandates: A Case Study*

Prof'l Conduct R. 1.19(a); N.M. Rules of Prof'l Conduct R. 16-104(C)(1); Ohio Rules of Prof'l Conduct R. 1.4(c). Much like the Act, these laws seek to ensure that prospective clients are adequately informed—and not inadvertently misled—when it comes to the risks and benefits associated with selecting a particular professional service provider.

It bears emphasizing that the various disclosures discussed in this section do not hinge on the presence of an already-established attorney-client relationship. In fact, because the above regulations govern lawyers' attempts to gain *new* clients, such regulations compel certain attorney speech *before* such a relationship has formed.

B. Attorney speech regulations do not generally exempt attorneys who offer services on a nonprofit or pro bono basis.

As the Ninth Circuit explained below, "We do not think a necessary element of professional speech is for the client to be a paying client. A lawyer who offers her services to a client pro bono, for example, nonetheless engages in professional speech." Pet. App. at 32a n.8, 9th Cir. Op. at 31 n.8. This sentiment is consistent with the vast majority of rules regulating attorney speech, which apply to all attorneys regardless of whether the lawyer is charging a fee for her service or is providing the legal service pro bono.

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on the Controversy over Mandatory Professional Liability Coverage and Its Disclosure, 22 Geo. J. Legal Ethics 1029, 1041 (2009) (offering the relevant history).

Only one Model Rule, Rule 7.3, distinguishes between attorneys working for a fee and those working pro bono.[5] Rule 7.3 applies different standards to the limited context of live solicitations, depending on whether the lawyer is significantly motivated by the prospect of "pecuniary gain." Model Rules of Prof'l Conduct R. 7.3(a) (providing, with certain exceptions, "[a] lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain"). But Rule 7.3 does not grant a "free pass" for pro bono attorneys to disobey other Model Rules, which do not distinguish between paid and pro bono attorneys.

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[5] Another Rule, Rule 6.5, is also instructive. Aimed at lawyers providing "short-term limited legal services" through a nonprofit or court-sponsored program, such as a "legal advice hotline[]," Rule 6.5 relaxes conflict-of-interest restrictions as long as "there is no expectation that the lawyer's representation of the client will continue beyond the limited consultation." Model Rules of Prof'l Conduct R. 6.5 & cmt. 1. This temporary relaxation is premised on the theory that the rapid pace and limited duration of this kind of work means that "it is not feasible for a lawyer to systematically screen for conflicts." *Id.* at R. 6.5, cmt. 1. Even then, however, once a lawyer opts to represent a Rule 6.5 client "on an ongoing basis," the regular conflict-of-interest rules kick in. *Id.* at R. 6.5, cmt. 5. Furthermore—and tellingly—"Rule 6.5 and its comment do not . . . make any reference to the client's economic status, nor do they draw any distinctions based upon the participating lawyer's fee, if any." Ellen J. Bennett et al., Am. Bar Ass'n, Annotated Model Rules of Prof'l Conduct R. 6.5, note at 530 (7th ed. 2011). It is the limited nature and short duration of the representation, rather than its pecuniary nature, that matters.

Aside from this narrow exception, the Rules explicitly apply to *all* lawyers—regardless of whether the lawyer works for a fee or provides legal services pro bono. *Id.* at Preamble 12 ("Every lawyer is responsible for observance of the Rules of Professional Conduct."). Indeed, "[t]here is no separate, more relaxed version of applicable ethical precepts for attorneys providing pro bono advice." N.J. Ethics Op. 671 (1993). Accordingly, authorities agree that, even when a lawyer represents a client pro bono, "all ethical rules applicable to [a typical] attorney-client relationship are in force." Lynn A. Epstein, *With A Little Help from My Friends: The Attorney's Role in Assisting Pro Se Litigants in Negotiations*, 13 T.M. Cooley J. Prac. & Clinical L. 11, 38 (2010); *see also Segal v. State Bar*, 751 P.2d 463, 466 (Cal. 1988) ("An attorney's standard of professional conduct to a pro bono client should be no different from his or her responsibility to any other client."); Albert W. Alschuler, *The Search for Truth Continued, the Privilege Retained: A Response to Judge Frankel*, 54 U. Colo. L. Rev. 67, 72 (1982) ("A lawyer's ethical obligations are the same when he provides his services pro bono as when he has been retained . . . ."); Danielle R. Cover, *Pro Bono Grievances*, 12 Cardozo Pub. L. Pol'y & Ethics J. 375, 404 (2014) ("As they are currently written, the Rules and their Commentary make no distinction between pro bono cases and paying cases . . . ."); Amber Hollister, *The Ethical Pro Bono Lawyer: Increasing Access to Justice*, Or. St. B. Bull., Oct. 2013 (recognizing that "the same ethics rules apply to paid and pro bono representation").

Therefore, there is no basis for Petitioners to imply that professionals can self-select out of professional regulations by simply offering services for free. If anything, the narrow exception in Rule 7.3 proves that the *default* presumption is that all attorneys, even those acting pro bono, are equally subject to the same rules and regulations. *See* U.S. Br. at 20 ("This Court has never held that the applicable level of First Amendment scrutiny for speech related to commercial or professional services depends on the price charged. Courts have not doubted, for instance, that the government may regulate malpractice or misconduct by attorneys, tax preparers, and medical professionals without regard to whether a professional charges for a particular service or provides it pro bono.").

C. Neither *Button* nor *In re Primus* granted a broad exemption for attorneys to avoid disclosure requirements and to engage in unfettered speech.

Petitioners' claim of immunity from mandatory disclosure requirements stems in part from a misreading of *Button* and *In re Primus*. *See* Pet. Br. at 41, 44. Although both cases struck down specific state prohibitions on attorney solicitation, neither case established the type of exemption from professional regulation that Petitioners now seek. *See* Resp. Br. at 35-37 (distinguishing both cases).

First, both cases involved *prohibitions* on attorney speech, rather than compelled *disclosures* like the type at issue in this case. In attempting to analogize to *Button* and *In re Primus*, Petitioners "overlook[] material differences between disclosure requirements and outright prohibitions on speech."

Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626, 650 (1985).

"[D]isclosure requirements trench much more narrowly on an advertiser's interests than do flat prohibitions on speech." *Id.* at 651, 638 (striking down "prohibitions on soliciting legal business through advertisements containing advice and information regarding specific legal problems," but permitting "disclosure requirements relating to the terms of contingent fees"). Where the regulation at issue does not ban attorney speech, "the bar retains the power to correct omissions that have the effect of presenting an inaccurate picture, [and] the preferred remedy is more disclosure, rather than less." *Bates*, 433 U.S. at 375.[6]

Second, both *Button* and *In re Primus* involved *broad* prohibitions on entire categories of attorney speech and, therefore, turned on whether such regulations were precisely tailored to meet the asserted state interests. In *Primus*, the State

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[6] In fact, this Court has recognized that factually accurate disclosures, which otherwise do not impair a professional's ability to provide service or engage in other speech, are not serious impingements. *See, e.g.*, *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 250 (2010) (noting that challenged Bankruptcy Code provisions require "only an accurate statement identifying the advertiser's legal status and the character of the assistance provided, and they do not prevent debt relief agencies like Milavetz from conveying any additional information"); *Bates*, 433 U.S. at 383. In such cases, the professional has no inviolable right to omit the specific disclosure. *See Zauderer*, 471 U.S. at 651 ("appellant's constitutionally protected interest in not providing any particular factual information in his advertising is minimal").

"failed to advance any substantial regulatory interest in the form of substantive evils flowing from [the NAACP's activities to] justify the *broad prohibitions* which it has imposed." *In re Primus*, 436 U.S. 412, 425 (1978) (emphasis added). And in *Button*, the State failed to justify "*[b]road prophylactic rules* in the area of free expression [which] are suspect." *In re Primus*, 436 U.S. at 432 (analyzing *Button*) (emphasis added).

In sharp contrast, Petitioners are not challenging any prohibitions but narrow and targeted disclosures, which this Court has historically recognized to be the preferred "remedy in the first instance." *In re R. M. J.*, 455 U.S. 191, 203 (1982). Therefore, Petitioners' reliance on *Button* and *In re Primus* is misplaced. Neither case immunizes Petitioners from the type of targeted disclosures required in the Act.

II. Professional Regulations of Attorney Speech, Including Required Minimum Disclosures, Are Justified by Important Policy Considerations.

This Court has long affirmed—even in *Button* and *In re Primus*—the general principle that professional regulations of attorney speech may be justified by important policy interests. "The State's special interest in regulating members whose profession it licenses, and who serve as officers of its courts, amply justifies the application of narrowly drawn rules to proscribe solicitation that in fact is misleading, overbearing, or involves other features of deception or improper influence." *In re Primus*, 436 U.S. at 438-39.

As the Ninth Circuit recognized below, where services are offered and rendered *in a professional context*, unique considerations justify additional regulation and mandatory disclosures. Pet. App. at 33a, 9th Cir. Op. at 31 ("non-profit status does not change the fact that they offer medical services in a professional context"). The special treatment of professional speech stems from the recognition that professionals, "through their education and training, have access to a corpus of specialized knowledge that their clients usually do not" and that clients put "their health or their livelihood in the hands of those who utilize knowledge and methods with which [they] ordinarily have little or no familiarity." Pet. App. at 29a, 9th Cir. Op. at 28 (citing *King v. Governor of N.J.*, 767 F.3d 216, 232 (3d Cir. 2014)). Accordingly, when evaluating Petitioners' challenges to, and Respondents' justifications for, the specific disclosure requirements in the Act, this Court should consider the various policy reasons behind other professional speech regulations.

When prospective clients approach an attorney seeking legal representation, they are often disadvantaged by an imbalance of power and information.[7] "The public's comparative lack of

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[7] Because the Model Rules of Professional Conduct presuppose the practice of law by *licensed* attorneys, *amici* focus on how the Rules regulate licensed lawyers. *See Restatement (Third) of the Law Governing Lawyers* § 4 (2000) (explaining restrictions on the unauthorized practice of law). It is worth noting, however, that on those occasions when states permit the provision of quasi-legal services by certified non-attorneys, states carefully constrain what those individuals may do or say. Furthermore, states require these

knowledge, the limited ability of the professions to police themselves, and the absence of any standardization in the 'product' renders advertising for professional services especially susceptible to abuses that the States have a legitimate interest in controlling." *In re R. M. J.*, 455 U.S. at 202. For example, this Court has affirmed that advertising by lawyers may still be regulated, even if commercial speech is protected by the First Amendment, "because the public lacks sophistication concerning legal services [and] misstatements that might be overlooked or deemed unimportant in other advertising may be found quite inappropriate in legal advertising." *Id.* at 200 (quoting *Bates*, 433 U.S. at 383). Similarly, the affirmative disclosures at issue in this case are intended to target the "particularly vulnerable population" of women who go to medical clinics

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non-lawyers to make certain targeted disclosures to ensure that prospective clients are not inadvertently misled by the non-lawyer's lack of professional qualification. *See, e.g.*, Wash. Admission to Prac. Rules R. 5(j)(5) (requiring all Limited License Legal Technicians to swear an oath, in which they promise to "faithfully disclose the limitations of my services and that I am not a lawyer"); Ariz. St. Code of Jud. Admin. § 7-208(A) (defining a "Legal document preparer" as "an individual or business entity certified pursuant to this section to prepare or provide legal documents, without the supervision of an attorney, for an entity or a member of the public who is engaging in self representation in any legal matter"); *id.*, § 7-208(J)(5)(c) ("A legal document preparer shall inform the consumer in writing that a legal document preparer is not a lawyer, is not employed by a lawyer, and cannot give legal advice, and that communications with a legal document preparer are not privileged.").

while facing "time sensitive" decisions about pregnancy. Resp. Br. at 52, 3.

Even absent a particularly vulnerable population, the regulation of professional speech, including mandatory disclosures, is sometimes necessary to prevent consumer deception. For example, this Court has upheld a Bankruptcy Code provision that requires a law firm offering bankruptcy assistance to affirmatively "identify itself as a debt relief agency and include certain information about its bankruptcy-assistance and related services." *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 252–53 (2010). Mandatory disclosures may also be required to accurately inform clients about the limitations of one professional's services and the availability of alternative services by another. *See* Model Rules of Prof'l Conduct R. 1.2(c), 1.0(e) (requiring lawyer providing limited-scope representation to disclose "adequate information and explanation about the material risks of and reasonably available alternatives to" the representation). These disclosures are designed to "ensure that the client or other person possesses information reasonably adequate to make an informed decision." *Id.* at R. 1.0, cmt. 6.[8]

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[8] In this vein, numerous states have enacted rules governing the provision of legal services following the determination of a major disaster. Following a now-familiar script, these rules require the visiting lawyer to notify clients that they are not generally authorized to practice law in the particular state and are doing so only pursuant to a narrow exception. *See, e.g.*, N.J. Ct. R. 1:21-10(g) ("Lawyers who provide legal services pursuant to this Rule shall inform clients in New

Moreover, the potential for consumer deception is heightened in the case of in-person solicitations, which are particularly difficult to police. In *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 462 (1978), this Court held that the possibility of "fraud, undue influence, intimidation, overreaching, and other forms of 'vexatious conduct'" was so likely in the context of in-person solicitation, that such solicitation could be prohibited. The Court explained: "[I]n-person solicitation may exert pressure and often demands an immediate response, without providing an opportunity for comparison or reflection. . . . In-person solicitation is as likely as not to discourage persons needing counsel from engaging in a critical comparison of the 'availability, nature, and prices' of legal services . . . ." *Id.* at 457–58.[9] Not unlike the

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Jersey of the jurisdiction in which they are authorized to practice law, any limits of that authorization, and that they are not authorized to practice law in New Jersey except as permitted by this Rule. They shall not state or imply to any person that they are otherwise authorized to practice law in New Jersey."); Ill. Sup. Ct. R. 718(g) (declaring that "[l]awyers authorized to practice law in another United States jurisdiction who provide legal services pursuant to this rule shall inform clients in this jurisdiction of the jurisdiction in which they are authorized to practice law, any limits of that authorization, and that they are not authorized to practice law in this jurisdiction except as permitted by this rule").

[9] Although Petitioners repeatedly cite *In re Primus*, they tellingly make no mention of *Ohralik*, which was decided on the same day as *In re Primus* and which involved a much more analogous situation to this one. In *Ohralik*, this Court upheld a narrow prohibition on in-person solicitation for pecuniary gain, which targeted the unique harms posed by, and the difficulties of regulating, in-person solicitations by attorneys. "The solicitation of business by a lawyer through

decision whether to retain a particular attorney, the decision whether to use particular medical clinics would benefit from minimum disclosures designed to reduce "practices [that] confuse, misinform, and even intimidate women from making fully-informed, time-sensitive decisions about critical health care." J.A. at 39.

To the extent that Petitioners' nonprofit services target women with less income and education, that population is in fact especially vulnerable and in particular need of basic information, so as to make an informed choice. *Cf. Ohralik*, 436 U.S. at 465 (recognizing "the very plight of [a victim of misfortune] . . . makes him more vulnerable to influence"). Thus, nonprofit organizations should have no entitlement to entice prospective clients and offer services, without making required minimum disclosures designed to provide accurate information and promote informed decisionmaking.

Lawyers in every state and in every specialty are regulated; they have no entitlement to unfettered speech. That's true, and has long been true, regardless of whether the lawyer is paid or is working pro bono—and regardless of whether the lawyer is working for a Manhattan law firm or small town nonprofit clinic. This Court should reject Petitioners' attempt to suggest otherwise and to carve out a dangerous new exception to professional speech regulation.

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direct, in-person communication with the prospective client has long been viewed as inconsistent with the profession's ideal of the attorney-client relationship and as posing a significant potential for harm to the prospective client." *Ohralik*, 436 U.S. at 454.

CONCLUSION

For the foregoing reason, *amici* submit this brief in support of Respondents and respectfully request that this Court deny Petitioners' request for a broad exemption from the Act's disclosure requirements.

Respectfully submitted,

ALBERT GIANG
Counsel of Record
BOIES SCHILLER FLEXNER LLP
725 S Figueroa Street
Los Angeles, C.A. 90017
(213) 629-9040

NORA FREEMAN ENGSTROM
Professor of Law
STANFORD LAW SCHOOL
559 Nathan Abbott Way
Stanford, CA 94305-8610

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No. 16-1140

In the Supreme Court of the United States

NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES, dba NIFLA, *et al.*,
Petitioners,

v.

XAVIER BECERRA,
Attorney General of California, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR *AMICI CURIAE* LEGAL SCHOLARS IN SUPPORT OF PETITIONERS

KELLY J. SHACKELFORD
KENNETH A. KLUKOWSKI
Counsel of Record
JOSEPH A. BINGHAM
LEA E. PATTERSON
FIRST LIBERTY INSTITUTE
2001 West Plano Parkway
Suite 1600
Plano, TX 75075
(972) 941-4444
kklukowski@firstliberty.org

Counsel for Amici Curiae

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

Whether the disclosures required by the California Reproductive FACT Act violate the protections set forth in the Free Speech Clause of the First Amendment, applicable to the States through the Fourteenth Amendment.

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INTEREST OF *AMICI CURIAE*[1]

Amici are 23 professors whose research and teaching focus on constitutional law, nonprofit organizations, health law, and technology. *See* Appendix A (listing the individual law professors joining this brief). This brief addresses issues that are within amici's particular areas of scholarly expertise.

SUMMARY OF ARGUMENT

This Court applies strict scrutiny to content-based regulation of speech. Such scrutiny serves as a prophylactic against viewpoint-based discrimination, a particularly insidious form of content-based discrimination that can be difficult to discern directly. Where it is found, viewpoint discrimination is *per se* unconstitutional when the speech is private speech that is not spoken by, or otherwise affiliated with, the government.

Here, California has engaged in open and admitted viewpoint discrimination. Because of its disapproval of the viewpoint and expression of pro-life pregnancy clinics, it crafted regulations specifically designed to (1) compel licensed pro-life pregnancy clinics to advertise subsidized abortions and (2) compel unlicensed pro-life pregnancy clinics to dilute their advertisements with statements regarding their

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[1] All parties have consented to the filing of this amicus brief. No counsel for a party authored the brief in whole or in part. No party, counsel for a party, or any person other than amici and their counsel made a monetary contribution intended to fund the preparation or submission of the brief. Amici are individuals who do not purport to speak on behalf of their respective institutions.

unlicensed status. Such viewpoint-discriminatory compulsion of speech is patently unconstitutional.

The regulations are discriminatory on their face, because they offer an exemption available to all *but* pro-life pregnancy clinics. The regulations exempt participants in state programs that require offering a full range of contraceptives, including emergency contraceptives to which pro-life clinics have moral objections. California claims that this exemption is justified by the fact that exempted clinics already offer a full range of reproductive health services, but this only underscores the viewpoint discrimination at issue: California expects those clinics to provide information about state-subsidized abortion voluntarily precisely because those clinics demonstrably do not share pro-life clinics' moral viewpoint regarding nascent human life.

California also explicitly justified its regulations by reference to the disfavored views of pro-life pregnancy clinics, but the Ninth Circuit erroneously held that such viewpoint-discriminatory purpose is acceptable if a law is facially neutral. But this Court holds, to the contrary, that "[t]he government must abstain from regulating when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995).

A viewpoint-neutral regulation would apply to all clinics providing any pregnancy-related services. California has crossed the line into prohibited viewpoint discrimination.

ARGUMENT

I. VIEWPOINT-BASED COMPELLED SPEECH STRIKES AT THE HEART OF THE FIRST AMENDMENT.

A. Prevention of viewpoint discrimination is *the* core principle of the Court's free-speech jurisprudence.

The First Amendment protects "the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence." *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 641 (1994). Accordingly, this Court closely scrutinizes laws that restrict or mandate expression based on its content. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015) ("Content-based laws . . . are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests."). When a state "requires the utterance of a particular message favored by the Government," it "contravenes this essential right." *Turner*, 512 U.S. at 641.

The scrutiny applied to content-based speech serves a vital function: ferreting out viewpoint-based discrimination by the government.[2] Content-based

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[2] *See* Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. Chi. L. Rev. 413, 451 (1996) ("The critical question is thus whether the distinction between content-based and content-neutral action – more specifically, the distinction among viewpoint-based, other content-based, and content-neutral action – facilitates the effort to flush out improper purposes. The distinction in fact serves just this

laws "pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information and manipulate the public debate through coercion rather than persuasion." *Id.* Strict scrutiny ensures that the government cannot disguise an effort to favor a particular viewpoint. *See, e.g.*, *R.A.V. v. St. Paul*, 505 U.S. 377, 386 (1992) ("The government may not regulate use based on hostility — or favoritism — towards the underlying message expressed.").

The risk of content-based state action is *always* present when the government compels speech, because such compulsion necessarily "dictate[s] the content of speech[.]" *Riley v. Nat'l Fed. of the Blind of N.C., Inc.*, 487 U.S. 781, 800 (1988). In this case, however, the law presents not just a mere risk of targeting disfavored viewpoints for unfavorable treatment; it presents a rare instance of *open, admitted* viewpoint discrimination. *Cf. Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J. dissenting) ("Frequently an issue of this sort will come before the Court clad, so to speak, in sheep's clothing . . . But this wolf comes as a wolf."). The law at issue here does not merely hypothetically discriminate against dissenting viewpoints; it openly flaunts the very viewpoint discrimination that strict scrutiny of content-based regulation is designed to prevent.

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function: it separates out, roughly but readily, actions with varying probabilities of arising from illicit motives.").

B. Outside the context of government speech or government-sponsored speech, viewpoint discrimination is *per se* unconstitutional.

Preventing viewpoint discrimination is the core concern of this Court's First Amendment jurisprudence. "Content-based [speech] regulations," therefore, "are presumptively invalid." *R.A.V.*, 505 U.S. at 382. When found, viewpoint discrimination is *per se* unconstitutional, subject to one limited exception inapplicable here.[3] *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 571 (2011) ("In the ordinary case it is all but dispositive to conclude that a law is content-based and, in practice, viewpoint-discriminatory."). This exception highlights the gravity of the viewpoint discrimination at issue here: instead of merely giving voice to its own view that abortion is a legitimate option for mothers to consider, or recruiting others to do so, the State has chosen to impress disfavored clinics into service as its mouthpieces. *See id.* at 578–79 ("But a State's failure to persuade does not allow it to hamstring the opposition. The State may not burden the speech of others in order to tilt public debate in a preferred direction.").

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[3] That exception permits viewpoint discrimination "where the government itself is speaking or recruiting others to communicate a message on its behalf." *Matal v. Tam*, 137 S. Ct. 1731, 1789 (2017). It applies to speech requirements where the government seeks "to enlist the assistance of those with whom it already agrees[.]" *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321, 2330 (2013). "The government may enlist the assistance of those who believe in its ideas to carry them to fruition," *id.* at 2332 (Scalia, J., dissenting), but it "may not . . . compel the endorsement of ideas that it approves." *Knox v. SEIU*, 567 U.S. 298, 309 (2012).

C. Viewpoint discrimination is no more permissible in the context of compelled speech than the context of banned speech.

For First Amendment purposes, the "difference between compelled speech and compelled silence . . . is without constitutional significance." *Riley*, 487 U.S. 781, 796 (1988). The "right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'" *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (citing *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943)).

Compelled speech is *always* content-based, because by definition it "dictate[s] the content of speech," *Riley*, 487 U.S. at 800, and so is always subject to the same "most exacting scrutiny" as laws that "suppress, disadvantage, or impose differential burdens upon speech because of its content." *Turner*, 512 U.S. at 642; *see also Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Grp. of Bos.*, 515 U.S. 557, 579 (1995) ("The very idea that a noncommercial speech restriction be used to produce thoughts and statements acceptable to some groups or, indeed, all people, grates on the First Amendment, for it amounts to nothing less than a proposal to limit speech in the service of orthodox expression. The Speech Clause has no more certain antithesis. . . . [T]he law . . . is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government.") (citing *Barnette*, 319 U.S. at 642; *Pac.*

Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal., 475 U.S. 1, 20 (1986)).

II. THE NINTH CIRCUIT ERRED WHEN IT FOUND THAT THE ACT DOES NOT TARGET CLINICS FOR COMPELLED SPEECH BASED ON THEIR VIEWPOINT.

The court below concluded that the Reproductive FACT Act ("the Act") is content-based but not viewpoint-based. App. 41a. It asserted that: (1) it is irrelevant that the legislature targeted speakers based on their viewpoint if the law they employed is neutral on its face; (2) the Act "applies to almost all licensed and unlicensed speakers"; and (3) the exemptions in the Act are "unrelated to viewpoint." *Id.* at 41a–42a. The first assertion flouts this Court's clear instruction. The second is simply false. The third begs the question.

In fact, (1) the Court's cases hold that viewpoint-discriminatory purpose or justification is impermissible; (2) the Act does not apply to most clinics; and (3) the Act's exemptions are undeniably viewpoint-related. Indeed, not only do Respondents admit that the Act discriminates on the basis of viewpoint, but the Act's viewpoint discrimination is independently demonstrated *both* on the face of the Act and by its legislative history.

A. The Act on its face targets speakers by viewpoint.

The Act targets speakers' viewpoint by offering an exemption available only to pro-abortion clinics, because only pro-abortion clinics serve as Medi-Cal providers and Family Planning, Access, Care, and Treatment Program enrollees, which requires

participating clinics to provide family planning services, including all FDA approved contraceptive methods and supplies. Pet. Br. 13, 33. "[A]ll . . . contraceptive methods and supplies" includes abortifacient emergency contraceptives, to which crisis pregnancy centers ("CPCs") have moral objections. *See Clinical Practice Alert, Emergency Contraception*, California Department of Health Care Services: Office of Family Planning, June 2015, http://www.familypact.org/Providers/clinical-practice-alerts/CPA_EC_2015%20June_ADA.pdf. Even any non-CPC clinics covered by the Act and not already exempted are given the option of *becoming* exempted by participating in Medi-Cal and FPACT, an option not available to CPCs, because they object to provision of some or all of the required contraceptives. Thus, "[t]he law on its face burdens disfavored speech by disfavored speakers." *Sorrell*, 564 U.S. at 564.

The facially obvious basis for the exemption underscores the viewpoint-based nature of the discrimination. The State's interest in informing pregnant women about its subsidizing of abortions is equally strong for all such women, regardless of whether those women are seeking services from covered or exempted clinics. The Act exempts clinics participating in Medi-Cal and FPACTP not because those clinics' customers deserve less information, but because those clinics can be expected to provide information about state subsidization of contraceptives and abortion voluntarily. Those clinics provide information about abortion voluntarily because of their viewpoint: they view abortion as a legitimate option and are willing to provide it. CPCs will not voluntarily provide the same information because of their

viewpoint: those clinics exist because they view abortion as a grave injustice.

The law further discriminates by limiting its application in general. Only entities "whose *primary purpose* is providing pregnancy-related services" are covered by the Act. App. 78a. Other facilities offering the same services are not covered. Again, the State's interest in informing customers of those noncovered facilities is precisely the same as its interest in informing the customers of covered, non-exempted facilities. Moreover, the argument that any regulation will more greatly burden, as a moral matter, those who disagree with it does not reflect the concrete difference between crisis pregnancy centers, which must comply, and pro-abortion clinics, which may acquire an exemption.

Even if the exception for FPACTP participants were not available exclusively to pro-abortion clinics, the act would be viewpoint-discriminatory because of the nature of the required speech. Consider, for example, if California were concerned that beef-loving consumers were being tricked into visiting Chick-Fil-A by arguably misleading ads, which feature cows. The state might respond by requiring that *every* fast-food restaurant post a sign saying, "delicious and affordable hamburgers are available at McDonald's, Wendy's, Burger King, and In-N-Out." Such a law forcing the business to give advertising space to competitors, but *only* requiring such space be given to competitors selling beef, would be viewpoint-discriminatory even though it failed to name chicken-only restaurants as its target. This is functionally what the FACT Act requires of crisis pregnancy centers: that they provide free

advertisement for services that they exist to provide an alternative to.

The same would be true of a law analogous to the regulation of unlicensed clinics here: for example, requiring that every fast food restaurant not offering burgers for sale post a notice that it does not sell them, when any chicken-only restaurant surely believes its own offerings are a superior option.[4]

B. The Act's legislative history emphatically establishes (and the State does not deny) that the Act was introduced and passed specifically to target clinics opposed to abortion because of their disfavored viewpoint.

The Ninth Circuit held here that explicitly viewpoint-discriminatory purpose or justification is irrelevant if the resulting law is facially viewpoint-neutral. App. 41a. That holding directly contradicts this Court's admonition that "[t]he government must abstain from regulating when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction," *Rosenberger*, 515 U.S. at 829, which the Court recently reaffirmed in *Sorrell*: "Just as the 'inevitable effect of a statute on its face may render it unconstitutional,' a statute's stated purposes may also be considered." *Sorrell*, 564 U.S. at

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[4] The "factual" nature of the requirements is irrelevant to the viewpoint-discrimination at work here. *See Tam*, 137 S. Ct. at 1763 ("Our cases use the term 'viewpoint' discrimination in a broad sense, see *ibid*, and in that sense, the [clause prohibiting disparagement] bases of 'viewpoint.'").

565 (quoting *United States v. O'Brien*, 391 U.S. 367, 384 (1968)).

The Act here is indisputably (and undisputedly) motivated by a desire to target CPCs based on their viewpoint. The bill's author cited his disapproval of CPCs' s speech as the reason for introducing it. *See* 9th Cir. EOR 11, 76, 86 (alleging "that, unfortunately, there are nearly 200 licensed and unlicensed clinics known as crisis pregnancy centers (CPCs) in California," and they "aim to discourage and prevent women from seeking abortions," and that, according to pro-abortion activists, "often confuse [and] misinform" women). The "Background" section of Exhibit A from the April 14, 2015 Assembly Committee on Health hearing to discuss the bill *exclusively* concerns CPCs and their disfavored pro-life views. JA39–42.

The thorny problems arising from attempts to discern legislative intent are thus not present here, where everyone – including the author, the Committee on Health, the background information provided to legislators, and the district court – agrees that but for the State's disapproval of the views of CPCs, the Act would not exist. *See Kagan, supra* note 2, at 439 (noting that if "[t]he issue of motive . . . is one of but-for causation: would the restriction on speech have passed – that is, would the outcome of the legislative process have differed – in the absence of ideological considerations?" then "it is unnecessary to consider the essential intent of any individual, much less of the decision-making body; it is irrelevant whether any such intent exists or can exist as a conceptual matter. The 'thing' that a court is attempting to find is only the intrusion of a particular factor in a way that affects the

decision-making process. Whatever questions attach to the notion of collective intent do not place in doubt these but-for causes of governmental action.").

Again, this Court instructs that "[t]he government must abstain from regulating when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger*, 515 U.S. at 829. The Ninth Circuit's dissent must give way.

III. THE ACT FORCES LICENSED CLINICS TO CONVEY A MESSAGE CONTRARY TO THEIR VIEWPOINT.

This Court's "cases use the term 'viewpoint' discrimination in a broad sense[.]'" *Tam*, 137 S. Ct. at 1763. It is of no moment that the compelled speech at issue is "factual." *Riley*, 487 U.S. at 797–98. That a statement is one of fact "does not divorce the speech from its moral or ideological implications," *Stuart v. Camnitz*, 774 F.3d 238, 246 (4th Cir. 2014), so "[the] general rule that the speaker has the right to tailor the speech, applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact." *Hurley*, 515 U.S. at 573.

The Fourth Circuit recently got this right in a similar case. With regard to a similar disclosure, it noted that "'[t]hough the information conveyed may be strictly factual, the context surrounding the delivery of it promotes the viewpoint the state wishes to encourage." *Stuart*, 774 F.3d at 253. Just as requiring Planned Parenthood to advertise the existence of no-kill clinics would imply a viewpoint about the practices of Planned Parenthood, requiring CPCs to advertise

abortion subsidies implies a viewpoint about the legitimacy of abortion.

The consequence of the Act is that no covered licensed clinic in California may decline to suggest abortion to often-desperate pregnant women (except, of course, those clinics that the State expects will do so anyway and accordingly exempts), and every advertisement by a covered unlicensed clinic must suggest the State's view that the clinic is deficient or inferior.

A content-based restriction would concern all discussion of abortion. The fact that California excuses those who support abortion but compels those who oppose abortion crosses the line into viewpoint discrimination. The First Amendment will not tolerate such compulsion, and the Court's precedent does not support the State's argument to the contrary.

CONCLUSION

The Act targets disfavored speakers for compelled speech contrary to CPCs' viewpoint. The Ninth Circuit's decision cannot be allowed to stand, and the Court should accordingly reverse.

Respectfully submitted,

KELLY J. SHACKELFORD
KENNETH A. KLUKOWSKI
Counsel of Record
JOSEPH A. BINGHAM
LEA E. PATTERSON
FIRST LIBERTY INSTITUTE
2001 West Plano Parkway
Suite 1600
Plano, TX 75075
(972) 941-4444
kklukowski@firstliberty.org

Counsel for Amici Curiae

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Larry Alexander, Warren Distinguished Professor, University of San Diego School of Law.

Helen Alvaré, Professor of Law, Antonin Scalia Law School, George Mason University.

Gerard V. Bradley, Professor of Law, University of Notre Dame.

Teresa S. Collett, Professor and Director of the Prolife Center, University of St. Thomas.

George W. Dent, Jr., Schott-van den Eynden Professor of Law Emeritus, Case Western Reserve University School of Law.

Richard F. Duncan, Sherman S. Welpton, Jr. Professor of Law and Warren R. Wise Professor of Law, University of Nebraska College of Law.

Richard A. Epstein, Laurence A. Tisch Professor of Law at the New York University School of Law, James Parker Hall Distinguished Service Professor of Law Emeritus at the University of Chicago, and the Peter and Kirstin Bedford Senior Fellow at the Hoover Institution.

Thomas Farr, Director of the Religious Freedom Research Project & School of Foreign Service and Associate Professor of the Practice of Religion and Global Affairs, Georgetown University.

Bruce P. Frohnen, Ella and Ernest Fisher Professor of Law, Ohio Northern University College of Law.

Timothy R. Lickness is Professor of Law at Trinity Law School, Trinity International University

Allen Mendenhall, Associate Dean at the Thomas Goode Jones School of Law, and Executive Director of the Blackstone & Burke Center for Law & Liberty, Faulkner University.

Michael P. Moreland, University Professor of Law and Religion, Director, Eleanor H. McCullen Center for Law, Religion and Public Policy, Villanova University.

Edward A. Morse, McGrath North Mullin and Kratz Endowed Chair in Business Law, Creighton University.

Stephen B. Presser, Raoul Berger Professor of Legal History Emeritus, Northwestern University Pritzker School of Law.

Robert Pushaw, James Wilson Endowed Professor, Pepperdine University School of Law.

Ronald D. Rotunda, The Doy & Dee Henley Chair and Distinguished Professor of Jurisprudence, Chapman University, Dale E. Fowler School of Law.

Lisa A. Runquist, Adjunct Professor of Law at Trinity Law School, Trinity International University,

Michael Scaperlanda, Gene and Elaine Edwards Family Chair in Law Emeritus and Professor of Law Emeritus, University of Oklahoma College of Law.

O. Carter Snead, William P. and Hazel B. White Director, Center for Ethics and Culture, Professor of Law and Concurrent Professor of Political Science, University of Notre Dame.

Andrew C. Spiropoulos, Robert S. Kerr, Sr. Professor of Constitutional Law and Director, Center for the Study of State Constitutional Law and Government, Oklahoma City University School of Law.

Myron Steeves, Dean and Professor of Law at Trinity Law School, Trinity International University, and Director of the Church Law Center of California.

David Taylor, Co-Director of the Tsai Center for Law, Science and Innovation and Associate Professor of Law, Southern Methodist University.

Christopher Wolfe, Professor of Politics, University of Dallas.

No. 16-1140

IN THE

Supreme Court of the United States

NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES, D/B/A/ NIFLA, ET AL.,

Petitioners,

v.

XAVIER BECERRA, ATTORNEY GENERAL, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR MASSACHUSETTS CITIZENS FOR LIFE, ELEANOR MCCULLEN, EXPECTANT MOTHER CARE, AND THE PRO-LIFE LEGAL DEFENSE FUND AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

DWIGHT G. DUNCAN
Counsel of Record for Amici Curiae
333 Faunce Corner Road
North Dartmouth, MA 02747-1252
508-985-1124
dduncan@umassd.edu

MARY ANN GLENDON
Of Counsel
1585 Massachusetts Avenue
Hauser 504
Cambridge, MA 02138
617-496-2609
glendon@law.harvard.edu

Dated: January 12, 2018

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

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INTEREST OF *AMICI CURIAE* [1]

Massachusetts Citizens for Life, Inc. (MCFL), is a not-for-profit corporation organized under the laws of the Commonwealth of Massachusetts that is dedicated to furthering the protection of human life from conception until natural death. As such, MCFL is opposed to government regulations such as the one at issue here, which would mandate the provision of information on how to obtain an abortion.

Eleanor McCullen has a pro-life counselling ministry in Massachusetts and was the lead plaintiff in *McCullen v. Coakley*, 134 S. Ct. 2518 (2014). As such, she is against any regulation that mandates the promotion of abortion services or inhibits the ability of private pregnancy centers to spread a pro-life message.

Expectant Mother Care (EMC) is a non-profit organization that is registered in the State of New York and that operates a network of pro-life centers that offer alternatives to abortion. As such, EMC is against any government regulation that mandates the promotion of abortion services.

The Pro-Life Legal Defense Fund, Inc. (PLLDF), is a Massachusetts not-for-profit

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Petitioners' letter evidencing blanket consent has been filed with the Clerk of the Court, and all other parties have granted consent. Furthermore, pursuant to Rule 37.6, no counsel for a party authored this brief in whole or in part, nor did such counsel or party make a monetary contribution to the preparation or submission of this brief. Only *Amici Curiae* made such a monetary contribution.

corporation, which provides pro bono legal services for the protection of human life. As such, PLLDF opposes coercive government practices such as the State of California's mandate that pro-life pregnancy centers provide information on how to obtain an abortion.

SUMMARY OF ARGUMENT

The Court should apply strict scrutiny to the California Reproductive FACT Act ("the FACT Act") because the regulation is content-based and does not regulate commercial speech. Even if the FACT Act is found to regulate professional speech, the Act should still be subject to strict scrutiny because the speech at issue is not motivated by a pecuniary interest.

ARGUMENT

Content-based regulations of speech are subject to strict scrutiny, *see Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2227 (2015); *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000); *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989), unless the regulated speech is commercial, *see Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 571–72 (2011); *44 Liquormart v. Rhode Island*, 517 U.S. 484, 501 (1996); *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 651 (1985); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980); *Edenfield v. Fane*, 507 U.S. 761, 767 (1993), in which case intermediate scrutiny may apply. Even if the regulated speech is professional speech, strict scrutiny applies if the speech is not motivated by pecuniary interest. *See In re Primus*, 436 U.S. 412, 430 (1978) (applying strict scrutiny to regulation of

an ACLU lawyer's solicitation of clients when not motivated by pecuniary interest). Because the FACT Act is a content-based regulation of speech that is not commercial speech, the FACT Act should be subject to strict scrutiny. Even if the regulated speech were professional speech (which *Amici* do not concede), strict scrutiny should still apply because the speech in question is not motivated by a pecuniary interest.

I. The California Reproductive FACT Act's regulations are content-based.

The Ninth Circuit properly found that the FACT Act is a content-based regulation. *See Nat'l Inst. of Family & Life Advocates ("NIFLA") v. Harris*, 839 F.3d 823, 834 (9th Cir. 2016) ("[T]he [FACT] Act is a content-based regulation . . . ."). A regulation of speech is a "content-based regulation of speech" when the regulation "mandat[es] speech that a speaker would not otherwise make" because such a regulation "necessarily alters the content of the speech." *Riley v. Nat'l Fed'n of the Blind of N. Carolina, Inc.*, 487 U.S. 781, 795 (U.S. 1988) (citing *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256). This is true regardless of whether the mandated speech is opinion or fact. *See Riley*, 487 U.S. at 797–98; *Hurley v. Irish-American Gay, Lesbian, and Bisexual Grp. of Bos.*, 515 U.S. 557, 573 (1995) ("[The] general rule, that the speaker has the right to tailor the speech, applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid."). Here, the FACT Act mandates speech which the pregnancy centers would not otherwise make. In particular, the FACT Act mandates that licensed pregnancy centers provide

information on whom to contact in order to obtain an abortion and requires that unlicensed non-medical pregnancy centers disseminate a notice stating that "[the] facility is not licensed as a medical facility by the State of California and has no licensed medical provider who provides or directly supervises the provision of services." Cal. Health & Safety Code § 123472(b)(1) (West 2017). Therefore, the FACT Act necessarily alters the content of the pregnancy centers' speech and is thus a content-based regulation of speech. It is immaterial that the mandated speech is fact-based and not opinion-based. *See Riley*, 487 U.S. at 797–98.

Additionally, the FACT Act's regulation of licensed pregnancy centers is content-based because it favors some speakers over others in a way that reflects a content preference of the legislature. In particular, the FACT Act favors pregnancy centers enrolled in the Family PACT Program and reflects the legislature's preference for content that promotes awareness of access to abortion. Membership in the Family PACT Program requires providing abortifacient drugs. *See* Petition for Writ of Certiorari at 8–9, *Nat'l Inst. of Family & Life Advocates v. Becerra*, No. 16-1140 (U.S. *petition for cert. filed* Mar. 20, 2017). Therefore, exempting members of the Family PACT Program from making the disclosures mandated by the FACT Act disfavors pregnancy centers that are fundamentally opposed to all forms of abortion, including abortifacients.

II. The California Reproductive FACT Act regulates non-commercial speech.

The Court has defined "commercial speech" as "speech that does no more than propose a

commercial transaction." *Harris v. Quinn*, 134 S. Ct. 2618, 2639 (2014) (citing *United States v. United Foods, Inc.*, 533 U.S. 405, 409 (2001)); *see also Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978); *Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 761–762 (1976). Commercial speech can be subjected to greater governmental regulation than non-commercial speech because the State has an interest in protecting consumers from "commercial harms." *Sorrell*, 564 U.S. at 579 (citing *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 426 (1993)); *see also Liquormart*, 517 U.S. at 502–03. Additionally, commercial speech is not afforded the full protection of the First Amendment because it is "the offspring of economic self-interest" and therefore "a hardy breed of expression that is not 'particularly susceptible to being crushed by overbroad regulation.'" *Cent. Hudson*, 447 U.S. at 564 n.6 (quoting *Bates v. State Bar of Ariz.*, 433 U.S. 350, 381 (1977)).

The Ninth Circuit properly held that the speech regulated by the FACT Act is not commercial speech. *See NIFLA*, 839 F.3d at 834 n.5. The pregnancy centers do not propose a commercial transaction; the centers are non-profit enterprises and offer their services free of charge. Their motivation is not economic, but moral or religious opposition to abortion. For this reason, the FACT Act does not regulate commercial speech. To hold that the pregnancy centers are engaging in commercial speech would transform a broad array of expressive action unconnected to economic self-interest into regulable commercial speech.

III. Even if the California Reproductive FACT Act regulates professional speech, it should be subject to strict scrutiny because the speech is not motivated by pecuniary interest.

Amici do not concede that the speech at issue is professional speech,[2] or that professional speech is a category of speech which is entitled to less protection under the First Amendment. However, even if the Court finds that the speech at issue is professional speech, the Court should still apply strict scrutiny because the speech at issue is not motivated by a pecuniary interest. This Court has held that the regulation of professional speech is subject to strict scrutiny when the professional speech is not motivated by a pecuniary interest. *See Primus*, 436 U.S. at 438; *see also NAACP v. Button*, 371 U.S. 415, 429 (1963). In *Button*, this Court applied strict scrutiny to a Virginia law that regulated the NAACP's activities because those activities were conducted not for pecuniary gain, but for the public interest. *See* 371 U.S. at 429. This Court further observed that regulations that are aimed at ensuring "high professional standards" rather than inhibiting free speech may still be subject to strict scrutiny and that states "may not, under the guise of prohibiting professional misconduct, ignore constitutional rights." *Id.* at 439.

Similarly, in *Primus*, the Court applied strict scrutiny to state regulation of the ACLU's provision

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[2] As argued by other *Amici*, "it is clear that the compelled speech at issue here . . . does not have any of the qualities that uniquely characterize professional speech." Brief for The Cato Institute as *Amici Curiae* Supporting Petitioners at 4, *Nat'l Inst. of Family & Life Advocates v. Becerra*, No. 16-1140 (U.S. *petition for cert. filed* Mar. 20, 2017).

of free legal services when the ACLU was not "motivated by considerations of pecuniary gain." 436 U.S. at 430. Strict scrutiny was applied even though the ACLU, unlike the NAACP, did not have a near-sole focus on political activism. Unlike the NAACP, the ACLU had "as one of [their] primary purposes the rendition of legal services." *Id.* at 427. This Court noted that, although states may promulgate prophylactic speech regulations when attorney speech is made for monetary compensation, "significantly greater precision" is required for the regulation of attorney speech that is not for monetary compensation. *Id.* at 438.

Here, as in *Primus* and *Button*, Petitioners are providing services for free and, therefore, are not motivated by a pecuniary interest. Petitioner's provision of services is instead motivated by a moral opposition to abortion. Therefore, because Petitioners are not motivated by a pecuniary interest, the FACT Act's regulation of Petitioner's speech should be subjected to strict scrutiny.

IV. The First Amendment interest in protecting the right of speakers not to convey messages with which they fundamentally disagree weighs in favor of applying strict scrutiny to the California Reproductive FACT Act.

Freedom of speech requires the liberty to determine not only what to say, but also what not to say. *See Hurley*, 515 U.S. at 573; *see also Riley*, 487 U.S. at 797–98; *Wooley v. Maynard*, 430 U.S. 705 (1977) (holding that the State of New Hampshire could not require its citizens to display the state's motto of "Live Free or Die" on their vehicle license plates because the First Amendment protected the

right of individuals to hold a point of view different from the majority and to refuse to foster an idea they found morally objectionable).

The Court has recognized some spheres in which the State can compel speech. For instance, the State may "prescribe what shall be orthodox in commercial advertising." *Zauderer*, 471 U.S. at 651. However, the Court has upheld the permissibility of regulations on commercial entities on the basis of the argument that "appellant's constitutionally protected interest in not providing any particular factual information in his advertising is minimal." *Id.* Even in *Zauderer*, the Court recognized that regulations on commercial advertising may violate the First Amendment. *See id.* ("We recognize that unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech"). In this case, the pregnancy centers do have an interest in not providing the information at hand, because directing clients to the location of abortion providers violates the moral purposes these pregnancy centers are established to uphold.

In the case of licensed pregnancy centers in California, the regulations in question represent a clear violation of the principles that this Court has used to decide previous cases of compelled speech. Particularly problematic is the requirement that licensed pregnancy centers must provide information directing potential clients to public clinics that provide abortions, as well as the contact information of such clinics. The entire *raison d'etre* of pro-life pregnancy centers is to provide services to pregnant women that help them move away from choosing an abortion. Requiring the pregnancy centers to

advertise for abortion providers—or to do anything that promotes abortion—forces them to promote a practice with which they fundamentally disagree.

Although the information the pregnancy centers are required to provide may be factual, sharing it requires the pregnancy centers to engage in the promotion of a procedure which they oppose. Moreover, this requirement is even more intrusive than those struck down in *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995), or *Riley*. In those cases, the Court held that the State could not require political campaigners or fundraisers to disclose information pertinent to their own professional activities. In *McIntyre*, the Court struck down an Ohio law requiring campaigners to share their own name and address in campaign literature, while in *Riley* the Court struck down a North Carolina requirement that charity fundraisers disclose percentages of funds retained. California's regulations go even farther, mandating that pregnancy centers provide information about the services provided by their competitors, namely public clinics. In so doing, these regulations use the power of the State to compel pro-life pregnancy centers to actively promote abortion by directing their clients to clinics that offer this procedure.

The combination of (i) the exemptions in the FACT Act that ensure that only pro-life centers are affected by it and (ii) the compelled speech requiring licensed pregnancy centers to spend their own funds, resources, space, and time to deliver a message that promotes abortions—thereby violating the central pro-life tenets of the pregnancy centers—favors applying strict scrutiny to the FACT Act.

CONCLUSION

For the foregoing reasons, and those presented by Petitioners, this Court should reverse the decision below.

Respectfully submitted,

Dwight G. Duncan
Counsel of Record for Amici Curiae
333 Faunce Corner Road
North Dartmouth, MA 02747-1252
508-985-1124
dduncan@umassd.edu

Mary Ann Glendon
Of Counsel
1585 Massachusetts Avenue
Hauser 504
Cambridge, MA 02138
617-496-2609
glendon@law.harvard.edu

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No. 16-1140

IN THE

Supreme Court of the United States

NATIONAL INSTITUTE OF FAMILY LIFE ADVOCATES, D/B/A NIFLA, ET AL.,

Petitioners,

v.

XAVIER BECERRA, ATTORNEY GENERAL OF CALIFORNIA, ET AL.,

Respondents.

On Writ of Certiorari to the U.S. Court of Appeals for the Ninth Circuit

BRIEF OF MEMBERS OF CONGRESS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

ELIZABETH B. WYDRA
BRIANNE J. GOROD*
DAVID H. GANS
ASHWIN P. PHATAK**
CONSTITUTIONAL ACCOUNTABILITY CENTER
1200 18th Street NW
Suite 501
Washington, D.C. 20036
(202) 296-6889
brianne@theusconstitution.org

Counsel for Amici Curiae

February 27, 2018

* Counsel of Record

** Not admitted in D.C.; supervised by principals of the firm

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INTEREST OF *AMICI CURIAE*[1]

Amici are members of Congress who are familiar with federal laws enacted by Congress that, like the law challenged here, protect consumers' access to truthful information about goods and services by requiring disclosure of accurate information concerning consumers' rights and benefits, as well as how to exercise those rights and access those benefits. *Amici* are committed to ensuring that consumers and recipients of services have complete and accurate information when making important decisions that affect them, including about the rights and benefits they possess, and they understand the important role disclosure laws play in making such knowledge possible. *Amici* are also committed to the robust enforcement of the First Amendment's guarantee of freedom of speech. They recognize that disclosure rules, like the law at issue here, further First Amendment values by ensuring consumers' access to accurate information. Accordingly, they have a strong interest in the outcome of this case.

A full listing of *amici* appears in the Appendix.

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[1] The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

In 2015, the California Legislature enacted the Reproductive FACT Act, Cal. Health & Safety Code §§ 123470-73 ("the Act"), to "ensure that California residents make their personal reproductive health care decisions knowing their rights and the health care services available to them." Assem. Bill 775, 2015-2016 Reg. Sess., ch. 770, § 2 (Cal. 2015) ("Assembly Bill 775"). The legislature found that "[m]illions of California women are in need of publicly funded family planning services, contraception services and education, abortion services, and prenatal care and delivery." *Id.* § 1(b). Yet "thousands of women remain unaware of the public programs available to provide them with contraception, health education and counseling, family planning, prenatal care, abortion, or delivery." *Id.* Compounding this problem, the legislature found that some clinics employ "intentionally deceptive advertising and counseling practices [that] confuse, misinform, and even intimidate women from making fully-informed, time-sensitive decisions about critical health care." J.A. 39.

In light of these findings, the California legislature imposed a disclosure requirement on licensed health care clinics "whose primary purpose is providing family planning or pregnancy-related services," Cal. Health & Safety Code § 123471(a), and who are unable to enroll patients immediately into the state's publicly funded programs.[2] The California

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[2] The Act also imposes a disclosure requirement applicable to unlicensed providers, which requires them to inform women that "[t]his facility is not licensed as a medical facility by the State of California and has no licensed medical provider who

legislature found that disclosure was the "most effective way to ensure that women quickly obtain the information and services they need to make and implement timely reproductive decisions." Assembly Bill 775, § 1(d).

The Act requires licensed clinics to disclose that "California has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women. To determine whether you qualify, contact the county social services office at [insert the telephone number]." Cal. Health & Safety Code § 123472(a)(1). This notice can be combined with other mandated disclosures and can be posted in a waiting room or distributed to patients in printed or digital form. *Id.* § 123472(a)(2).

Petitioners claim that the Act's disclosure requirement violates the First Amendment because it is, in their view, "[c]ompelled speech." According to petitioners, "[c]ompelled speech is antithetical to the First Amendment," and a law that requires a speaker to deliver a "government-mandated message"—even a neutrally worded statement informing persons of their rights and benefits and how to exercise them—"is precisely the kind of compelled speech that the Constitution forbids." Pet'rs Br. at 22. Petitioners' objection to the Act's disclosure requirement cannot be squared with this Court's precedents and should be rejected.

Disclosure requirements, such as those contained

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provides or directly supervises the provision of services." Cal. Health & Safety Code § 123472(b)(1).

in the Act, are pervasive in the law. They serve substantial governmental interests in "protecting consumers" and in "maintaining standards among members of the licensed professions." *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 460 (1978). They reflect that "people will perceive their own best interests if only they are well enough informed." *Va. St. Bd. of Pharm. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976). Such rules therefore ensure that statutory rights are actually enjoyed by the people they are designed to protect. They prevent important rights from being reduced to mere parchment barriers, ensuring they are not lost simply because of ignorance of the law. Moreover, disclosure laws that, like the Act, provide notice of rights and services to which people are legally entitled are "designed in a reasonable way to accomplish that end," *Edenfield v. Fane*, 507 U.S. 761, 769 (1993), using a "less restrictive alternative to more comprehensive regulations of speech," *Citizens United v. FEC*, 558 U.S. 310, 369 (2010).

Every day, because of such disclosure requirements, individuals learn of federal rights they possess, including rights to medical privacy, *see* 42 U.S.C. § 1320d-2; 45 C.F.R. § 164.520(a)(1), to continuing insurance coverage after loss of employment, *see* 29 U.S.C. § 1166; 29 C.F.R. §§ 2590.606-1-606-4, to insurance coverage for hospital stays of at least two days following childbirth, 29 U.S.C. § 1185(d); 45 C.F.R. § 146.130(d)(1), to rights to obtain a consumer credit report, to dispute erroneous information in an individual's file, and to redress fraud and identity theft, 15 U.S.C. § 1681g(c); *id.* § 1681g(d), to workplace equality under a long list of federal civil rights laws, *see* 42 U.S.C. § 2000e-10; *id.* § 12115, to rights to take family and medical leave from work, 29

U.S.C. § 2619(a), to return to civilian employment following military service, 38 U.S.C. § 4334(a), and to safe working conditions, *see* 29 U.S.C. § 657(c)(1). Even more such regulation occurs on the state level. *See* Amicus Br. of States in Supp. of Resp'ts.

The First Amendment does not stand in the way of such content-neutral regulation designed to ensure that rights-holders know about, and therefore can enjoy, their statutorily-protected rights. As *amici* well know, such disclosure requirements are consistent with the First Amendment and further its values, while ensuring that consumers have access to accurate information about their rights.

As this Court has recognized, "[w]hen a State . . . requires the disclosure of beneficial consumer information, the purpose of its regulation is consistent with the reasons for according constitutional protection to commercial speech and therefore justifies less than strict review." *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 501 (1996). Consistent with these principles, in a number of different First Amendment contexts, this Court has upheld properly tailored disclosure requirements, recognizing that disclosure represents a less restrictive alternative to suppression of speech. *See, e.g., Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 249 (2010); *Doe #1 v. Reed*, 561 U.S. 186, 195-96 (2010); *Citizens United*, 558 U.S. at 369; *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884 (1992); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 650-51 (1985).

These principles do not change simply because a speaker disagrees—even vehemently—with the statutorily-protected rights that he is required to disclose. A physician who thinks that HIPAA disclosures are wasteful, unproductive, and damaging to

the environment still must provide those disclosures to his patients. An employer who is opposed on moral or religious grounds to giving leave under the Family and Medical Leave Act to married same-sex couples must nevertheless post the required notice informing employees about how to exercise their FMLA rights. An employer that believes that members of the military should not be hired for civilian jobs still has to notify his workforce of federal protections for service members.

Many federal protections spark bitter controversy. But opposition to a federal right—whether on religious, moral, or other grounds—does not give a speaker a First Amendment right to be exempt from generally-applicable content-neutral disclosure requirements that ensure individuals are informed about statutorily protected rights and how to exercise them. That is true whether the subject is medical privacy, equality, or, as in this case, women's health care.

NIFLA is opposed to abortion and contraception, and it counsels women in accordance with its beliefs. These views, of course, are entitled to respect and protection under the First Amendment. *See, e.g.*, *McCullen v. Coakley*, 134 S. Ct. 2518, 2536-37 (2014). But California here has not undertaken to regulate how NIFLA counsels the persons it serves. The Act leaves that to the unfettered judgment of NIFLA and other petitioners. California simply insists that NIFLA post or distribute neutral, objective, factual information about legal rights and state-funded services California provides. NIFLA is entitled to counsel women to choose alternatives to abortion and to forego contraception, but it is not entitled to keep them in the dark about their rights under state law and publicly funded services the state offers. The judgment of the court of appeals should be affirmed.

ARGUMENT

I. DISCLOSURE REQUIREMENTS THAT REQUIRE A SERVICE PROVIDER TO INFORM PERSONS OF AVAILABLE RIGHTS AND BENEFITS AND HOW TO EXERCISE THEM ARE PERVASIVE IN THE LAW AND DO NOT VIOLATE THE FIRST AMENDMENT.

The First Amendment's guarantee of freedom of speech "includes both the right to speak freely and the right to refrain from speaking at all," *Wooley v. Maynard*, 430 U.S. 705, 714 (1977), but the First Amendment has never been a shield against all regulation of speech by service providers, such as NIFLA and other petitioners in this case. When regulating the provision of services, "government is not only permitted to prohibit misleading speech that would be protected in other contexts, but it often requires affirmative disclosures that the speaker might not make voluntarily." *Rubins v. Coors Brewing Co.*, 514 U.S. 476, 492 (1995) (Stevens, J., concurring) (citation omitted).

This Court's precedents give a wide berth to disclosure requirements—both in regulating commercial and professional activity and in other contexts—because "disclosure is a less restrictive alternative to more comprehensive regulations of speech." *Citizens United*, 558 U.S. at 369; *Zauderer*, 471 U.S. at 651 n.14 ("[A]ll our discussions of restraints on commercial speech have recommended disclosure requirements as one of the acceptable less restrictive alternatives to actual suppression of speech."). Disclosure requirements comport with "our law and our tradition that more speech, not less, is the governing rule." *Citizens United*, 558 U.S. at 361; *Meese v. Keene*, 481 U.S. 465, 481 (1987) ("[T]he best

remedy for misleading or inaccurate speech . . . is fair, truthful, and accurate speech."); *see Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) ("If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."). And this is particularly true when the government enacts disclosure requirements that require a service provider to provide consumers complete, truthful, and accurate information about medical and health rights and services.

As this Court has recognized, "disclosure of truthful, relevant information is more likely to make a positive contribution to decisionmaking than is concealment of such information." *Ibanez v. Fla. Dep't of Bus. & Prof. Regulation*, 512 U.S. 136, 142 (1994) (quoting *Peel v. Att'y Registration & Disciplinary Comm'n of Ill.*, 496 U.S. 91, 108 (1990)). In fact, "[a] 'consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue.' That reality has great relevance in the fields of medicine and public health, where information can save lives." *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 566 (2011) (quoting *Bates v. State Bar*, 433 U.S. 350, 364 (1977)); *Va. Citizens Consumer Council*, 425 U.S. at 763-64 ("When drug prices vary as strikingly as they do, information as to who is charging what becomes more than a convenience. It could mean the alleviation of physical pain or the enjoyment of basic necessities."). Disclosure, as the facts of this case show, can mean the difference between enjoying a protected right or losing it.

Thus, "[w]hen a State . . . requires the disclosure of beneficial consumer information," *44 Liquormart*,

517 U.S. at 501, such as information about the rights and services to which people are legally entitled, "the purpose of its regulation is consistent with the reasons for according constitutional protection to commercial speech," *id.* "Because the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides," *Zauderer*, 471 U.S. at 651, this Court has held that a professional's "constitutionally protected interest in not providing any particular factual information" related to his services "is minimal," *id.*; *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 114 (2d Cir. 2001) ("Protection of the robust and free flow of accurate information is the principal First Amendment justification for protecting commercial speech, and requiring disclosure of truthful information promotes that goal.").

So long as they do not chill protected speech, *see Milavetz*, 559 U.S. at 250; *Zauderer*, 471 U.S. at 651, or "distort [the] usual functioning," of the professional relationship for ideological ends, *see Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 543 (2001), laws that require disclosure of legal rights and of services to which persons are legally entitled fall well within the confines of this Court's First Amendment precedents. *See* Robert Post, *Compelled Commercial Speech*, 117 W. Va. L. Rev. 867, 877 (2015) ("[r]egulations that force a speaker to disgorge *more* information to an audience do not contradict the constitutional purpose of commercial speech doctrine. They may even enhance it" (emphasis in original)). Such laws "may increase the amount of information available to consumers," while "leav[ing] the speaker in greater control of her own message." Jonathan H. Adler, *Compelled Commercial Speech and the*

Consumer "Right to Know", 58 Ariz. L. Rev. 421, 436-37, 437 (2016); *see Milavetz*, 559 U.S. at 250 (emphasizing that challenged disclosure requirements "do not prevent debt relief agencies . . . from conveying any additional information"); *Keene*, 481 U.S. at 481 ("Disseminators of propaganda may go beyond the disclosures required by statute and add any further information they think germane to the public's viewing of the materials.").

Consistent with these settled First Amendment principles, Congress has often acted to ensure the free flow of information, imposing generally applicable disclosure requirements that ensure that important information about rights and benefits available under federal law is accessible to those who need it most. As the brief of the United States explains, federal law includes "numerous statutory and regulatory requirements that persons disclose information to the public related to goods or services they provide." U.S. Br. at 1; *id.* at 30 n.11.

Particularly relevant here, Congress—or regulatory agencies acting pursuant to congressional delegation—have repeatedly imposed disclosure requirements that require informing individuals of federal rights they possess and how to exercise them. The type of disclosure challenged here—a requirement to inform women about government-created rights and benefits and how to exercise them—represents a pervasive form of regulation designed to ensure that individuals are able to enjoy their legal rights. *See* Post, *supra*, at 883 (discussing "marked shift toward forms of regulation that force the disclosure of information believed necessary for educated participation in the marketplace"). Such requirements are well-tailored measures that serve substantial government interests—they ensure that

rights are not lost out of ignorance of the law—while imposing only a minimal burden on First Amendment rights. Such laws do not compel service providers to conform to a state-selected orthodoxy. They merely require them to inform consumers—in neutral, objective terms—about what the law provides.

First, in the health care context, "[m]any current disclosure laws are intended to help consumers exercise substantive rights." William M. Sage, *Regulating Through Information: Disclosure Laws and American Health Care*, 99 Colum. L. Rev. 1701, 1765 (1999); State Resp'ts Br. at 42 (observing that the "disclosure required by the FACT Act is simply one among many government-mandated notices in the healthcare context"). For example, the regulations implementing the Health Insurance Portability and Accountability Act of 1996 (HIPAA), Pub. L. 104-191, 110 Stat. 1936, give individuals "a right to adequate notice of the uses and disclosures of protected health information" and "of the individual's rights . . . with respect to protected health information." 45 C.F.R. § 164.520(a)(1). Entities covered by HIPAA "must provide a notice that is written in plain language," *id.* § 164.520(b)(1), that includes "a statement of the individual's rights with respect to protected health information and a brief description of how the individual may exercise these rights," *id.* § 164.520(b)(1)(iv), as well as "[a] statement that the covered entity is required by law to maintain the privacy of protected health information, to provide individuals with notice of its legal duties and privacy practices with respect to protected health information," *id.* § 164.520(b)(1)(v). These disclosures are a regular feature of the health care system, and millions of Americans receive them on a regular basis. They "provide individuals with a clearer

understanding of how their information may be used and disclosed and is essential to inform individuals of their privacy rights." Standards for Privacy of Individually Identifiable Health Information; Final Rule, 65 Fed. Reg. 82462, 82720 (Dec. 28, 2000) (codified at 45 C.F.R. § 164.520). They help ensure that individuals can exercise federal rights to medical privacy.

Second, Congress also has imposed disclosure requirements on employers to help ensure that eligible persons receive federal health benefits. For example, the Children's Health Insurance Program Reauthorization Act requires an employer that provides health insurance coverage in states which offer premium assistance through Medicaid or the Children's Health Insurance Program to "provide to each employee a written notice informing the employee of potential opportunities then currently available . . . for premium assistance under such plans for health coverage of the employee or the employee's dependents." 29 U.S.C. § 1181(f)(3)(B)(i)(I). The law requires the Secretary of Health and Human Services to write a model notice for employers that "include[s] information regarding how an employee may contact the State in which the employee resides for additional information regarding potential opportunities for such premium assistance, including how to apply for such assistance." *Id.* § 1181(f)(3)(B)(i)(II).

Third, federal law imposes a host of disclosure requirements on insurance companies, requiring companies to disclose to consumers their federal rights to insurance coverage and how to exercise those rights. For example, ERISA requires insurance companies to "provide, at the time of commencement of coverage under the plan, written

notice to each covered employee and spouse of the employee (if any) of the rights" to continuing coverage, guaranteed by the Consolidated Omnibus Budget Reconciliation Act, when insurance coverage is lost due to death, termination of employment, or other event. 29 U.S.C. § 1166(a); *see* 29 C.F.R. § 2590.606-1 (general notice requirement); *id.* § 2590.606-4 (notice requirement on plan administrators to provide "notice to each qualified beneficiary of the qualified beneficiary's rights to continuation coverage under the plan"); *see also id.* § 2590.701-6(c)(1) (requiring a plan to provide a "notice of special enrollment" that "must include a description of special enrollment rights," such as a right to enroll as a result of loss of coverage, or marriage, birth, or adoption).

Federal law also includes a number of other disclosure provisions designed to ensure that individuals are aware of certain federal rights and benefits. The Newborns' and Mothers' Health Protection Act of 1996, 29 U.S.C. § 1185, which requires insurance carriers to provide coverage for postpartum hospital stays of at least 48 hours for uncomplicated vaginal deliveries and 96 hours for caesarean sections, mandates that a group health plan "must disclose information that notifies participants and beneficiaries of their rights" under the Act, 45 C.F.R. § 146.130(d)(1); *see* 29 U.S.C. § 1185(d) (imposing on group health plans duty of "assuring notice of such requirements"); 29 C.F.R. § 2520.102-3(u) (requiring group health plan to disclose in the "summary plan" a "statement describing any requirements under federal or state law applicable to the plan, and any health insurance coverage offered under the plan, relating to hospital length of stay in connection with childbirth for the mother or newborn

child"). Similarly, the Women's Health and Cancer Rights Act of 1998, 29 U.S.C. § 1185b, requires a group health plan to provide "notice to each participant and beneficiary under such plan regarding the coverage" required under the Act for mastectomy-related reconstructive surgery, *id.* § 1185b(b), which "shall be in writing and prominently positioned in any literature or correspondence made available or distributed by the plan," *id.*

Fourth, federal consumer credit laws require credit agencies to inform consumers of their federal rights and how to exercise them. The Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681, requires the Bureau of Consumer Financial Protection to prepare "a model summary of the rights of consumers," including "the right of a consumer to obtain a copy of a consumer report," "the right of a consumer to dispute information in [his or her] file," and "the right of a consumer to obtain a credit score from a consumer reporting agency." 15 U.S.C. § 1681g(c)(1)(A), (c)(1)(B)(i), (c)(1)(B)(iii), (c)(1)(B)(iv). The FCRA not only requires the Bureau to "actively publicize the availability of the summary of rights," *id.* § 1681g(c)(1)(C)(i), it also imposes a disclosure requirement on "consumer reporting agenc[ies]," requiring them to inform consumers of their federal rights, which must be provided "with each written disclosure by the agency to the consumer" under the FCRA. *Id.* § 1681g(c)(2). The FCRA requires consumer reporting agencies to provide consumers with "the summary of rights prepared by the Bureau," "a list of all Federal agencies responsible for enforcing" the FCRA, and "the address and any appropriate phone number of each such agency, in a form that will assist the consumer in selecting the appropriate

agency." *Id.* § 1681g(c)(2)(A), (C). The required disclosures must also include "a statement that the consumer may have additional rights under State law, and that the consumer may wish to contact a State or local consumer protection agency or a State attorney general . . . to learn of those rights." *Id.* § 1681g(c)(2)(D).

The FCRA also requires the Bureau of Consumer Financial Protection to prepare a "model summary of the rights of consumers . . . with respect to the procedures for remedying the effects of fraud or identity theft." *Id.* § 1681g(d)(1). The FCRA requires a "consumer reporting agency" to "provide the consumer with a summary of rights . . . and information on how to contact the Bureau to obtain more detailed information" when "any consumer contacts a consumer reporting agency and expresses a belief that the consumer is a victim of fraud or identity theft." *Id.* § 1681g(d)(2).

Fifth, reflecting concerns that workers may not know their rights or how to exercise them, virtually every major piece of legislation governing the federal rights of employees requires employers to post notices designed to inform their employees of their rights under federal law, as well as how to exercise those rights. *See* Charlotte S. Alexander, *Workplace Information-Forcing: Constitutionality and Effectiveness*, 53 Am. Bus. L.J. 487, 490 (2016) (explaining that "notice-posting requirements" are "designed both to remedy workers' lack of legal knowledge and to . . . trigger[] enforcement activity by those same workers"). For example, Title VII of the Civil Rights Act of 1964 requires employers and others bound by the Act to "post and keep posted in conspicuous places upon its premises where notices to employees, applicants for employment, and members are

customarily posted a notice . . . setting forth excerpts, from or, summaries of, the pertinent provisions of this subchapter and information pertinent to the filing of a complaint." 42 U.S.C. § 2000e-10(a). Other laws and regulations contain similar disclosure requirements. *See* 8 U.S.C. § 1324b(l) (Immigration and Nationality Act); 29 U.S.C. § 627 (Age Discrimination in Employment Act); 42 U.S.C. § 12115 (Americans with Disabilities Act); 29 U.S.C. § 2003 (Employee Polygraph Protection Act); *id.* § 2619(a) (Family and Medical Leave Act); *id.* § 1821(b) (Migrant and Seasonal Agricultural Workers Protection Act); *id.* § 657(c)(1) (Occupational Health and Safety Act); 45 U.S.C. § 152 (Railway Labor Act); 38 U.S.C. § 4334(a) (Uniformed Services Employment and Reemployment Rights Act); 29 C.F.R. § 516.4 (Fair Labor Standards Act); *id.* § 1635.10(c) (Genetic Information Nondiscrimination Act).[3]

Other federal civil rights laws require disclosure of protected rights outside the employment context. For example, regulations implementing the Fair Housing Act require businesses that sell or rent real estate, or engage in residential real estate-related transactions and brokerage services, "to post and maintain a fair housing poster," 24 C.F.R. § 110.10(a), (c), (d), at their places of business which

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[3] In addition to these mandates, federal law also includes numerous disclosure requirements that require federal grantees to inform persons of federal rights and how to exercise them as a condition of receiving federal financial assistance. *See, e.g.*, 34 C.F.R. § 100.6(d) (Title VI of the Civil Rights Act); *id.* § 104.8 (Rehabilitation Act); *id.* § 106.9 (Title IX of the Education Amendments Act); *id.* § 108.9 (Boy Scouts Equal Access Act); *id.* § 110.25 (Age Discrimination Act); 42 C.F.R. § 124.604 (Hill-Burton Act); 45 C.F.R. § 92.8 (Affordable Care Act).

"shall be prominently displayed so as to be readily apparent to all persons seeking housing accommodations or seeking to engage in residential real estate-related transactions or brokerage services," *id.* § 110.15; *id.* § 110.25 (describing content of poster); *see* 12 C.F.R. § 202.9(a)(2), (b) (disclosures required under Equal Credit Opportunity Act). Likewise, the regulations implementing Title II of the Americans with Disabilities Act require state and local governments to "make available to applicants, participants, beneficiaries, and other interested persons information regarding the provisions of this part and its applicability to the services, programs, or activities of the public entity" in order to "apprise such persons of the protections against discrimination assured them by the Act." 28 C.F.R. § 35.106.

As the next section shows, petitioners' unyielding view of the First Amendment is so broad that it threatens to sweep away all of these forms of regulation. This Court should decline petitioners' invitation to rewrite First Amendment principles and deny government the authority to require service providers to inform consumers of their rights and benefits and how to exercise them.

II. PETITIONERS' INTERPRETATION OF THE FIRST AMENDMENT WOULD GUT A VAST ARRAY OF DISCLOSURE LAWS.

Petitioners insist that laws mandating disclosure of neutral, factual information about statutory rights and services are "precisely the kind of compelled speech that the Constitution forbids." Pet'rs Br. at 22. Any requirement of disclosure, in NIFLA's view, is a presumptively unconstitutional, content-based restriction on speech, because "[m]andating speech that a speaker would not otherwise make necessarily

alters the content of the speech." *Id.* at 28 (quoting *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 795 (1988)). But that has never been the law. As the United States recognizes, "petitioners' contention that all disclosure requirements are subject to strict scrutiny is . . . wrong and inconsistent with this Court's precedent." U.S. Br. at 10. It "would require overruling this Court's many precedents applying lower levels of scrutiny to required disclosures" and "would call into question countless federal, state, and local laws." State Resp'ts Br. at 48.[4]

Consistent with this Court's recognition that "disclosure is a less restrictive alternative to more comprehensive regulations of speech," *Citizens United*, 558 U.S. at 369, this Court has repeatedly upheld the authority of the government to impose disclosure requirements on service providers to ensure that consumers and others can make decisions based on accurate information. *See Milavetz*, 559 U.S. at 249-52; *Casey*, 505 U.S. at 884; *Zauderer*, 471 U.S. at 650-51. As these holdings reflect, disclosure

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[4] Petitioners also claim that strict scrutiny is appropriate because the Act discriminates on the basis of viewpoint. Pet'rs Br. at 31-39. But the Act's disclosure requirement applies to clinics based on the services they perform, not the views they espouse. *See* Cal. Health and Safety Code § 123471(a). "That petitioners all share the same viewpoint regarding abortion does not in itself demonstrate that some invidious . . . viewpoint-based purpose motivated" the Act. *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 763 (1994); *see McCullen*, 134 S. Ct. at 2531 (concluding that statute was content-neutral despite "'inevitable effect' of restricting abortion-related speech more than speech on other subjects"); U.S. Br. at 31-32. Further, as the United States observes, the record does not clearly show that the Act, in operation, discriminates on the basis of viewpoint. *Id.* at 32-33; State Resp'ts Br. at 49-51.

is often a constitutionally permissible means of furthering important governmental interests and is entirely in sync with "societal interests in broad access to complete and accurate commercial information that First Amendment coverage of commercial speech is designed to safeguard." *Edenfield*, 507 U.S. at 766. Indeed, "[b]ecause the First Amendment interests implicated by disclosure requirements are substantially weaker than those at stake when speech is actually suppressed," this Court has refused "to strike down such requirements merely because other possible means by which the State might achieve its purposes can be hypothesized." *Zauderer*, 471 U.S. at 651 n.14.[5]

Further, this Court has given the government leeway to tailor a factual disclosure requirement to a particular problem, proceeding one step at a time. As this Court's precedents reflect, a disclosure requirement is not "subject to attack" simply because "it does not get at all facets of the problem it is designed to ameliorate." *Id.* In this context, "governments are entitled to attack problems piecemeal," *id.*, as California has done here by imposing a

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[5] NIFLA insists that the Act cannot be treated as a regulation of commercial speech because the services it provides are offered free of charge. Pet'rs Br. at 21-22. But the point of disclosure laws, including the Act, is to ensure that consumers have access to complete and accurate information. The validity of these laws does not depend on whether a price is charged or not because the injury to consumers who are denied important information about available rights and benefits is the same, regardless of whether they pay for any services they receive. As the United States correctly recognizes, "the government's interest in requiring disclosure about the goods or services does not automatically disappear merely because they are offered without charge." U.S. Br. at 21; State Resp'ts Br. at 37.

disclosure requirement on licensed clinics that are unable to enroll women immediately into the state's publicly funded programs. "States adopt laws to address the problems that confront them. The First Amendment does not require States to regulate for problems that do not exist." *McCullen*, 134 S. Ct. at 2532 (quoting *Burson v. Freeman*, 504 U.S. 191, 207 (1992)).

NIFLA's invitation to apply strict scrutiny across-the-board turns a blind eye to these repeated holdings. Its argument would wreak havoc on a whole host of disclosure laws that help ensure consumers and others can make decisions fully aware of their rights and the benefits to which they are entitled. This would stifle the free flow of information and leave consumers in the dark, disserving "societal interests in broad access to complete and accurate commercial information," *Edenfield*, 507 U.S. at 766. As this Court's cases reflect, the First Amendment's guarantee of freedom of speech does not deny the government the authority to require that consumers be informed of their rights and how to exercise them.

Further, NIFLA's sweeping objection to the Act has no limiting principle and would open the door to a host of new challenges to disclosure laws. NIFLA insists that the Act runs afoul of First Amendment principles because it unnecessarily "intrudes upon private thought by mandating that Petitioners mouth ideas that contradict their own convictions." Pet'rs Br. at 24. In NIFLA's view, "the State could itself publish information about where women may obtain free and low-cost abortions in California . . . without forcing private citizens like Petitioners to be the messengers." *Id.* at 55. NIFLA's *amici* make similar arguments. *See* U.S. Br. at 25, 27-29; Members of

Cong. Br. in Supp. of Pet'rs at 19. Similar arguments could be levelled against many—if not virtually all—disclosure requirements that require informing persons of their rights and how to exercise them.

This reflects the fact that many rights spark bitter controversy. The many disclosure requirements Congress has enacted in the civil rights context are a case in point. For example, many view federal civil rights law as critical to ensuring the Constitution's promise of equal opportunity for all, regardless of race, gender, national origin, or religion. Others consider such laws an impermissible interference with the workings of the marketplace that tramples on rights of speech and association. *See, e.g., Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400 (1968) (constitutional challenge to public accommodations provisions of the Civil Rights Act on grounds that requirement to provide equal service infringed on religious beliefs); *Hishon v. King & Spalding*, 467 U.S. 69 (1984) (constitutional challenge by a law firm to prohibition on gender discrimination in employment contained in Title VII of the Civil Rights Act). That persons engage in robust debate on these issues does not turn federal disclosure requirements in the civil rights context into an unconstitutional abridgement of speech. An employer that believes that religion does not belong in the workplace still has to notify her employees of Title VII's prohibition on religious discrimination and how to exercise federal rights to obtain religious accommodations. An employer who believes war is sinful still has to post a notice informing persons of the federal prohibition on employment discrimination on the basis of military service enacted by Congress. The same is true here.

Disclosure requirements that inform persons of their rights and of services to which they are legally entitled do not cease to be constitutionally permissible simply because a service provider disagrees—even vehemently so—with the content of the statutory rights and benefits he is obligated to disclose. Many disclosure regulations deal with controversial matters, but that does not render them unconstitutional. A company "may differ with the wisdom of the law . . . even to the point as done here, of challenging its validity. . . . But the First Amendment which gives him the full right to contest validity to the bitter end cannot justify his refusal to post a notice Congress thought to be essential." *Lake Butler Apparel Co. v. Sec'y of Labor*, 519 F.2d 84, 89 (5th Cir. 1975) (rejecting First Amendment challenge to notice requirement contained in the Occupation Safety and Health Act). Requiring a First Amendment exemption whenever a person disagrees with the legal requirement he is required to disclose would wreak havoc on a whole host of disclosure requirements.

NIFLA's argument that the First Amendment requires the government to pay for a state-funded advertising campaign to inform persons of their rights, rather than impose a disclosure requirement, would upend a long list of disclosure requirements. Congress's considered judgment, reflected in the federal disclosure laws discussed above, is that the most effective way of ensuring that persons know their rights and how to access them is through disclosure requirements that require the posting of a notice. California here made that same judgment. Assembly Bill 775, § 1(d). As these enactments attest, a disclosure requirement is likely to be more effective in informing persons than a state-funded

advertising campaign, which is unlikely to reach as many people. *See* State Resp'ts Br. at 53 (noting limited effectiveness of "general advertising campaigns" on their own, as evidenced by the "high number of people who are eligible for publicly funded healthcare but remain unenrolled despite extensive marketing and outreach efforts"). Sometimes Congress utilizes a disclosure requirement together with a government-funded advertising program, *see, e.g.*, 15 U.S.C. § 1681g(c)(1)(C)(i); *id.* § 1681g(c)(2), but it has repeatedly refused to rely on advertising programs alone.

Indeed, under petitioners' view that the government should engage in an advertising campaign rather than mandate disclosure, HIPAA disclosure requirements as well as numerous federal insurance, consumer credit, and civil rights disclosure requirements would be unconstitutional. In each of these contexts, Congress and/or agencies acting pursuant to congressional delegation of power have imposed disclosure requirements on service providers and employers, reflecting their judgment that a government-advertising program alone would not adequately inform persons of their rights and how to exercise them. Rather than going down this path, this Court should decline the invitation to second-guess the legislative judgment—reflected in numerous enactments—that a disclosure requirement like the one at issue here is "tailored in a reasonable manner," *Edenfield*, 507 U.S. at 767, to the interest in protecting consumers and ensuring the effective vindication of protected rights.

The First Amendment "does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely." *Va. Citizens Consumer Council*, 425 U.S. at 772. The

government has considerable leeway to select the most conducive means of ensuring that consumers have complete and accurate information, including by imposing a disclosure requirement that requires informing persons of their rights and benefits. As this Court's cases reflect, government regulation of commercial and professional activity is "subject to 'modes of regulation that might be impermissible in the realm of noncommercial expression.' The ample scope of regulatory authority suggested by such statements would be illusory if it were subject to a least-restrictive-means requirement, which imposes a heavy burden on the State." *Bd. of Trs. of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 477 (1989) (quoting *Ohralik*, 436 U.S. at 456). Further, "because the First Amendment interests implicated by disclosure requirements are substantially weaker than those at stake when speech is actually suppressed," this Court has refused to "strike down" disclosure "requirements merely because other possible means by which the State might achieve its purposes can be hypothesized." *Zauderer*, 471 U.S. at 651 n.14. It would be a radical departure from these precedents to hold the Act's disclosure requirement unconstitutional on the ground that the government could fund an advertising campaign of its own. Under such a holding, no disclosure regime would be safe from invalidation.

In short, the applicable First Amendment standards permit the government to require a service provider to inform consumers of their rights and how to exercise them. Petitioners' challenge to the Act should be rejected.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

ELIZABETH B. WYDRA
BRIANNE J. GOROD*
DAVID H. GANS
ASHWIN P. PHATAK**
CONSTITUTIONAL
ACCOUNTABILITY CENTER
1200 18th Street NW
Suite 501
Washington, D.C. 20036
(202) 296-6889
brianne@theusconstitution.org

Counsel for Amici Curiae

February 27, 2018

* Counsel of Record
** Not admitted in D.C.; supervised by principals of the firm

APPENDIX:
LIST OF *AMICI*

U.S. Senate

Harris, Kamala D.
Senator of California

Feinstein, Dianne
Senator of California

Murray, Patty
Senator of Washington

Blumenthal, Richard
Senator of Connecticut

Booker, Cory
Senator of New Jersey

Cortez Masto, Catherine
Senator of Nevada

Duckworth, Tammy
Senator of Illinois

Hassan, Margaret Wood
Senator of New Hampshire

Hirono, Mazie K.
Senator of Hawai'i

Kaine, Tim
Senator of Virginia

Markey, Edward J.
Senator of Massachusetts

LIST OF *AMICI* – cont'd

Sanders, Bernard
Senator of Vermont

Shaheen, Jeanne
Senator of New Hampshire

Smith, Tina
Senator of Minnesota

Warren, Elizabeth
Senator of Massachusetts

Wyden, Ron
Senator of Oregon

U.S. House of Representatives

Nadler, Jerrold
Representative of New York

Chu, Judy
Representative of California

Pelosi, Nancy
Representative of California

Slaughter, Louise M.
Representative of New York

DeGette, Diana
Representative of Colorado

Adams, Alma S.
Representative of North Carolina

Aguilar, Pete
Representative of California

LIST OF *AMICI* – cont'd

Barragán, Nanette Diaz
Representative of California

Bass, Karen
Representative of California

Bera, Ami
Representative of California

Beyer Jr., Donald S.
Representative of Virginia

Bonamici, Suzanne
Representative of Oregon

Brownley, Julia
Representative of California

Capuano, Michael E.
Representative of Massachusetts

Carbajal, Salud O.
Representative of California

Carson, André
Representative of Indiana

Clarke, Yvette D.
Representative of New York

Clay, Wm. Lacy
Representative of Missouri

Cohen, Steve
Representative of Tennessee

LIST OF *AMICI* – cont'd

Costa, Jim
Representative of California

Crowley, Joseph
Representative of New York

Davis, Danny K.
Representative of Illinois

Davis, Susan A.
Representative of California

DeLauro, Rosa L.
Representative of Connecticut

DelBene, Suzan
Representative of Washington

Demings, Val Butler
Representative of Florida

DeSaulnier, Mark
Representative of California

Deutch, Theodore E.
Representative of Florida

Ellison, Keith
Representative of Minnesota

Eshoo, Anna G.
Representative of California

Engel, Eliot L.
Representative of New York

LIST OF *AMICI* – cont'd

Espaillat, Adriano
Representative of New York

Foster, Bill
Representative of Illinois

Frankel, Lois
Representative of Florida

Fudge, Marcia L.
Representative of Ohio

Gomez, Jimmy
Representative of California

Grijalva, Raúl M.
Representative of Arizona

Gutiérrez, Luis V.
Representative of Illinois

Hastings, Alcee L.
Representative of Florida

Huffman, Jared
Representative of California

Jackson Lee, Sheila
Representative of Texas

Jayapal, Pramila
Representative of Washington

Jeffries, Hakeem
Representative of New York

LIST OF *AMICI* – cont'd

Johnson, Jr., Henry C. "Hank"
Representative of Georgia

Keating, William R.
Representative of Massachusetts

Khanna, Ro
Representative of California

Kuster, Ann McLane
Representative of New Hampshire

Lee, Barbara
Representative of California

Lieu, Ted W.
Representative of California

Lofgren, Zoe
Representative of California

Lowenthal, Alan
Representative of California

Lowey, Nita M.
Representative of New York

Maloney, Carolyn B.
Representative of New York

Matsui, Doris
Representative of California

McEachin, A. Donald
Representative of Virginia

LIST OF *AMICI* – cont'd

McNerney, Jerry
Representative of California

Meng, Grace
Representative of New York

Napolitano, Grace F.
Representative of California

Norton, Eleanor Holmes
Representative of District of Columbia

Payne, Jr., Donald M.
Representative of New Jersey

Peters, Scott H.
Representative of California

Pingree, Chellie
Representative of Maine

Pocan, Mark
Representative of Wisconsin

Raskin, Jamie
Representative of Maryland

Rice, Kathleen M.
Representative of New York

Richmond, Cedric L.
Representative of Louisiana

Rosen, Jacky
Representative of Nevada

LIST OF *AMICI* – cont'd

Ruiz, Raul
Representative of California

Sánchez, Linda T.
Representative of California

Schakowsky, Jan
Representative of Illinois

Schiff, Adam B.
Representative of California

Serrano, José E.
Representative of New York

Sherman, Brad
Representative of California

Speier, Jackie
Representative of California

Swalwell, Eric
Representative of California

Takano, Mark
Representative of California

Thompson, Mike
Representative of California

Titus, Dina
Representative of Nevada

Tonko, Paul
Representative of New York

LIST OF *AMICI* – cont'd

Vargas, Juan
Representative of California

Velázquez, Nydia M.
Representative of New York

Wasserman Schultz, Debbie
Representative of Florida

Waters, Maxine
Representative of California

Welch, Peter
Representative of Vermont

Yarmuth, John
Representative of Kentucky

CASE NO. 16-1140

IN THE SUPREME COURT OF THE UNITED STATES

NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES, d/b/a NIFLA, et al.,

Petitioners,

v.

XAVIER BECERRA, ATTORNEY GENERAL, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF AMICI CURIAE MOUNTAIN RIGHT TO LIFE, BIRTH CHOICE OF THE DESERT AND HIS NESTING PLACE IN SUPPORT OF PETITIONERS

Mathew D. Staver
(Counsel of Record)
Anita L. Staver
Horatio G. Mihet
LIBERTY COUNSEL
P.O. Box 540774
Orlando, FL 32854
(407) 875-1776
court@lc.org

Mary E. McAlister
Daniel J. Schmid
LIBERTY COUNSEL
P.O. Box 11108
Lynchburg, VA 24506
(434) 592-7000
court@lc.org

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INTEREST OF AMICI[1]

Amici are Mountain Right to Life, Inc., dba Pregnancy and Family Resource Center, Birth Choice of the Desert and His Nesting Place, which are Petitioners in *Mountain Right to Life, et. al. v. Becerra,* Supreme Court Case No. 17-211, which seeks a Petition for a Writ of Certiorari to the Ninth Circuit Court of Appeals on the same issues related to California's AB775 that are at issue in this case. As pregnancy resource centers subject to AB775, Amici will be directly affected by this Court's decision.

Because of the gravity of the threat that AB775 poses to the free speech rights of non-profit pregnancy resource centers in California, Amici want to provide this Court with

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[1] Counsel for a party did not author this Brief in whole or in part, and no such counsel or party made a monetary contribution to fund the preparation or submission of this Brief. No person or entity, other than *Amici Curiae* or their counsel made a monetary contribution to the preparation and submission of this Brief. Petitioners have filed a blanket consent to the filing of Amicus Briefs in favor of either party or no party. Respondents have consented to the filing of this Brief.

additional information that will be critical to its determination of this case. Amici therefore respectfully submit this Brief to the Court.

SUMMARY OF ARGUMENT

In validating AB775's content-based compelled speech requirements using only intermediate scrutiny, the Ninth Circuit has exemplified that, to borrow from George Orwell, some fundamental rights are more fundamental than others.[2] In this case, according to the Ninth Circuit, the "fundamental right" of abortion is more fundamental than is the fundamental right of freedom of speech despite the fact that the former has only been considered fundamental for 45 years while the latter has been constitutionally established for 227. Casting aside this Court's precedents, including *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), and *McCullen v. Coakley*, 134 S.Ct. 2518 (2014), the Ninth Circuit proclaimed that content-based compelled speech provisions need not satisfy strict scrutiny when they relate to abortion. *National Institute of Family & Life Advocates v. Harris*, 839 F.3d 823 (9th Cir. 2016) ("*NIFLA*").

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[2] "All Animals are Equal, but Some Animals are More Equal Than Others," George Orwell, ANIMAL FARM, 118 (Houghton-Mifflin 1990 ed.).

The Ninth Circuit's brazen departure from precedent is the most recent manifestation of a phenomenon that members of this Court have chronicled over the last 42 years, *i.e.*, the evolution of abortion from a "fundamental right" arising from those spelled out in the Bill of Rights to a "super fundamental right" more powerful than the explicit pre-existing rights. Through the years it has become apparent that when legitimate state interests in, *e.g.*, protecting the health of pregnant women, ensuring that those undergoing medical procedures give informed consent and requiring that minors obtain parental consent before medical treatment collide with the right of abortion, the state interests are no longer legitimate and must yield to the abortion right.

In this case, the Ninth Circuit has determined that the fundamental right of freedom of speech protected from intrusion by strict scrutiny review must yield to the right of abortion so that pregnancy resource centers can be compelled to utter state-prescribed messages promoting abortion. The Ninth Circuit's disregard for this Court's precedent and attempt to undermine the fundamental right of free speech should be rejected by this Court.

LEGAL ARGUMENT

I. THE NINTH CIRCUIT ADMITTEDLY DEFIED THIS COURT'S PRECEDENT WHEN IT ASSERTED THAT STRICT SCRUTINY DOES NOT APPLY TO CONTENT-BASED COMPELLED SPEECH WHEN IT RELATES TO ABORTION.

This Court's decision in *Reed* should have put to rest any question regarding the proper level of scrutiny for content-based speech restrictions:

> Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified *only* if the government proves that they are narrowly tailored to serve compelling state interests.

Reed v. Town of Gilbert, 135 S. Ct. 2218, 2226 (2015) (emphasis added). Both the majority and concurring opinions confirmed the firm rule that laws which are content-based on their face must satisfy strict scrutiny. *Id.*; *see also id.* at 2233 ("As the Court holds, what we have termed 'content-based' laws *must satisfy strict scrutiny*.") (Alito, J., concurring) (emphasis added); *id.* at 2234 (content discrimination is

"an *automatic* strict scrutiny trigger, leading to almost certain legal condemnation" (Breyer, J., concurring) (emphasis added)); *id.* at 2236 ("Says the majority: When laws single out specific subject matter, they are 'facially content based'; and when they are facially content based, *they are automatically subject to strict scrutiny*." (Kagan, J., concurring) (emphasis added)).

This Court has permitted limited exceptions to strict scrutiny review of content-based speech restrictions, *i.e.*, incitement to lawless action, obscenity, defamation, child pornography, speech integral to criminal conduct, "fighting words," fraud and true threats. *United States v. Alvarez*, 567 U.S. 709, 717 (2012). Conspicuously absent from that list is content-based speech restrictions related to abortion. In fact, this Court put that idea to rest in *McCullen*, 134 S.Ct. at 2530. While the Massachusetts abortion buffer zone speech restriction was found to be content-neutral and subject to only intermediate scrutiny, this Court explained that if the statute were content-based, then it would have to survive strict scrutiny. *Id.* As was true in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), and *Gonzales v. Carhart*, 550 U.S. 124 (2007), this Court did not announce that abortion related restrictions were an exception to the rule.

In fact, not only did the *Casey* court not adopt a lower level of scrutiny, but it actually affirmed that abortion regulations must be subjected to strict scrutiny. *Casey*, 505 U.S. at 926 (Blackmun, J., concurring and dissenting).

> Today, no less than yesterday, the Constitution and decisions of this Court require that a State's abortion restrictions be subjected to the strictest of judicial scrutiny. ***Our precedents and the joint opinion's principles require us to subject all non-de-minimis abortion regulations to strict scrutiny.*** Under this standard, the Pennsylvania statute's provisions requiring content-based counseling, a 24-hour delay, informed parental consent, and reporting of abortion-related information must be invalidated.

Id. (emphasis added).

> The Court has held that limitations on the right of privacy are permissible only if they survive "strict" constitutional scrutiny—that is, only if the governmental entity imposing the restriction can demonstrate that the limitation is

> both necessary and narrowly tailored to serve a compelling governmental interest. *Griswold v. Connecticut*, 381 U.S. 479, 485, 85 S.Ct. 1678, 1682, 14 L.Ed.2d 510 (1965). We have applied this principle specifically in the context of abortion regulations. *Roe v. Wade*, 410 U.S., at 155, 93 S.Ct., at 728.

Id. at 929.

> *Strict scrutiny of state limitations on reproductive choice still offers the most secure protection of the woman's right to make her own reproductive decisions, free from state coercion. No majority of this Court has ever agreed upon an alternative approach.*

Id. at 930 (emphasis added). *Casey* dealt with content-based requirements aimed at discouraging abortion, *id.*, and AB775 deals with content-based requirements aimed at directing women toward free and low cost abortions. However, that distinction is constitutionally irrelevant if the right being protected is, as Justice Blackmun said, a "woman's right to make her own reproductive decisions, free from state coercion." *Casey*, 505

U.S. at 930. If the women of Pennsylvania have the right to decide to choose abortion free of state coercion, then *ipso facto*, the women of California have the right to decide to not choose abortion free of state coercion. AB775 interferes with that right in the same way that the content-based restrictions interfered with the right in *Casey*, and therefore should be subjected to strict scrutiny.

The Ninth Circuit agreed that neither *Casey* nor *Gonzales* established a different level of scrutiny for content-based speech restrictions in the abortion context. *NIFLA*, 839 F.3d at 838. Nevertheless, it insisted that strict scrutiny is not the proper standard for AB775, even though it is content-based, because:

> In interpreting these cases, courts have not applied strict scrutiny in abortion-related disclosure cases, even when the regulation is content-based. *See Stuart [v. Camnitz]*, 774 F.3d [238] at 248–49 [(4th Cir. 2014)] (applying intermediate scrutiny); *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 576 (5th Cir. 2012) (applying a reasonableness test); *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 734–35 (8th

> Cir. 2008) [en banc] (applying a reasonableness test).

NIFLA, 839 F.3d at 837. In other words, according to the Ninth Circuit, it does not need to follow this Court's precedents prescribing strict scrutiny review of content-based speech provisions, even in the abortion context, because it and other lower courts have applied lower standards. *Id.* at 837-38.

However, even the other circuit court decisions it cites do not support the Ninth Circuit's conclusion. In fact, *Lakey* and *Rounds* recognized that state regulations which compel ideological speech as opposed to merely regulating medical practice are subject to strict scrutiny. *Lakey*, 667 F.3d at 576; *Rounds*, 530 F.3d at 734–35. In *Rounds*, the Eighth Circuit, sitting *en banc* clarified that *Casey* and *Gonzales* establish that the State cannot compel an individual simply to speak the State's ideological message. 530 F.3d at 734–35. Similarly, in *Lakey*, the Fifth Circuit confirmed that laws which compel "ideological" speech trigger First Amendment strict scrutiny. 667 F.3d at 576.

In this case, requiring that pregnancy resource centers devoted to providing pregnant women with alternatives to abortion conspicuously post the message that women

can receive free and low cost abortions crosses the line from information to ideology, placing it squarely under strict scrutiny. The Ninth Circuit's attempt to circumvent this Court's unequivocal determination that content-based restrictions must survive strict scrutiny should be rejected.

II. THE NINTH CIRCUIT'S DIFFERENTIAL, MORE DEFERENTIAL TREATMENT OF ABORTION-RELATED CONTENT-BASED SPEECH REFLECTS THE "SUPER-PROTECTED" STATUS THAT HAS BEEN ACCORDED ABORTION RIGHTS, EVEN TO THE DETRIMENT OF EXPRESS FUNDAMENTAL RIGHTS IN THE BILL OF RIGHTS.

While the *Roe* court found that the right to choose whether to have an abortion was part of the fundamental right to privacy, it also said that the right is not absolute. *Roe v. Wade*, 410 U.S. 113, 155 (1973), *holding modified by Planned Parenthood of SE. Pennsylvania v. Casey*, 505 U.S. 833 (1992).

> Although the results are divided, most of these courts have agreed that the right of privacy, however based, is broad enough to cover the

> abortion decision; *that the right, nonetheless, is not absolute and is subject to some limitations; and that at some point the state interests as to protection of health, medical standards, and prenatal life, become dominant.* We agree with this approach.

Id. (emphasis added).[3] Despite the *Roe* court's

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[3] The *Roe* Court's recognition of a right to choose abortion was based in part on its observation of "a trend toward liberalization of abortion statutes [that] has resulted in adoption, by about one-third of the States, of less stringent laws, most of them patterned after the ALI Model Penal Code, s 230.3." *Id.* at 140, n.37. The ALI Model Penal Code ("MPC") was also used to support the decriminalization of same-sex sodomy in *Lawrence v. Texas*, 539 U.S. 558, 572 (2003). The MPC, in turn, was based upon the now discredited research of Dr. Alfred Kinsey chronicled in SEXUAL BEHAVIOR OF THE HUMAN MALE (1948), which promoted decriminalization or reduction of punishment for most sex-based offenses, including abortion and same-sex sodomy. *See* Dr. Judith Reisman, *The Kinsey Culture: Sex-on-Demand, Abortion-on-Demand*, in BACK TO THE DRAWING BOARD, THE FUTURE OF THE PRO-LIFE MOVEMENT, 273 (Teresa Wagner, ed. 2003).

assertion that there are limitations on the right to decide whether to abort, in actuality the right has become all but absolute, and other constitutional rights and what are otherwise deemed state interests of the highest order have had to yield to the right to choose an abortion. In this case, the Ninth Circuit is continuing that trend with its insistence that content-based restrictions which are subject to strict scrutiny under *Reed* are not to be so strictly analyzed when they involve abortion. *NIFLA*, 839 F.3d at 837.

A. The Ninth Circuit Is Sacrificing Free Speech On The Altar Of Abortion Rights.

The Ninth Circuit's determination that AB775's abortion-related content-based speech restriction need not satisfy strict scrutiny is the most recent manifestation of a trend that began only shortly after *Roe* was decided, resulting in what legal scholars have called the "super protected" status of abortion.[4]

> The point of this analysis is that the justifiable limitations on first,

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[4] James Bopp Jr., Richard E. Coleson, *The Right to Abortion: Anomalous, Absolute, and Ripe for Reversal*, 3 BYU J. PUB. L. 181 (1989).

> fourth, and fifth amendment privacy rights are numerous and significant. The limitations allowed on the abortion right are few and insignificant. The absolute right to be secure in one's person and possessions may be abridged by getting a warrant. It may even be abridged without a warrant in certain circumstances. Nevertheless, if the state has "probable cause" to believe that it could protect both potential life and maternal health by requiring two physicians to be present at post-viability abortions, it might be prohibited from doing so. This, and the striking down of most of the abortion regulations, seems inconsistent with the permissible limits on other rights as noted above.[5]

The special treatment accorded to abortion is cogently illustrated by contrasting the regulation of the fundamental right to marry. While states may require marriages to be licensed, this Court in *Doe v. Bolton* declared that states could not require hospitals

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[5] Bopp *Id.* at 230.

performing abortions to be licensed.[6] Similarly, states may require that a couple wait three to five days from the time that a marriage license is issued until the ceremony is performed, but a pregnant woman cannot be required to wait 24 hours for an abortion.[7] States may institute residency requirements for marriage and divorce, but not for abortions.[8] States can require parental consent for minors to marry, but not for minors to get an abortion.[9] A mother cannot arrange for the adoption of her child without notifying the father, but cannot be constitutionally required to notify the father before aborting the child.[10]

The dissonance between the post-*Roe* decisions striking down virtually every proposed regulation of abortion and the non-absolute nature of the right described in *Roe* has been described by several members of the Court who have questioned the "super

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[6] *Id.* at 232, citing *Doe v. Bolton*, 410 U.S. 179, 194 (1973).

[7] *Id.*, citing *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 451 (1983).

[8] *Id.*, citing *Bolton*, 410 U.S. at 200.

[9] *Id.*, citing *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 75 (1976).

[10] John Noonan, A PRIVATE CHOICE, ABORTION IN AMERICA IN THE SEVENTIES, 91 (1979), citing *Danforth*, 428 U.S. at 69.

protected" status given to abortion. For example, dissenting from the decision overturning a regulation giving the father of the unborn child a right to notice and consent before his child is killed in abortion, Justice White said:

> A father's interest in having a child perhaps his only child may be unmatched by any other interest in his life. *See Stanley v. Illinois*, 405 U.S. 645, 651, 92 S.Ct. 1208, 1212, 31 L.Ed.2d 551 (1972), and cases there cited. It is truly surprising that the majority finds in the United States Constitution, as it must in order to justify the result it reaches, a rule that the State must assign a greater value to a mother's decision to cut off a potential human life by abortion than to a father's decision to let it mature into a live child. Such a rule cannot be found there, nor can it be found in *Roe v. Wade, supra*. These are matters which a State should be able to decide free from the suffocating power of the federal judge, purporting to act in the name of the Constitution.

Danforth, 428 U.S. at 93 (White, J. dissenting).

> Missouri has a law which prevents a woman from putting a child up for adoption over her husband's objection, Mo.Rev.Stat. §453.030 (1969). This law represents a judgment by the State that the mother's interest in avoiding the burdens of child rearing do not outweigh or snuff out the father's interest in participating in bringing up his own child. That law is plainly valid, but no more so than s 3(3) of the Act now before us, resting as it does on precisely the same judgment.

Id. at 94. Justice White further noted the disconnect between the majority's striking down of a provision requiring parental consent before minors can have abortions and the purported purpose of the right announced in *Roe*.

> But the purpose of the parental-consent requirement is not merely to vindicate any interest of the parent or of the State. The purpose of the requirement is to vindicate the very right created in *Roe v. Wade, supra* the right of the pregnant woman to decide "whether *or not* to terminate her

> pregnancy." 410 U.S., at 153, 93 S.Ct., at 727 (emphasis added). The abortion decision is unquestionably important and has irrevocable consequences whichever way it is made. Missouri is entitled to protect the minor unmarried woman from making the decision in a way which is not in her own best interests, and it seeks to achieve this goal by requiring parental consultation and consent. This is the traditional way by which States have sought to protect children from their own immature and improvident decisions; and there is absolutely no reason expressed by the majority why the State may not utilize that method here.

Id. at 94-95 (emphasis in original).

In *Thornburgh*, Justice White again expounded on the dissonance between the nature of the abortion right described in *Roe* and the Court's post-*Roe* invalidation of abortion restrictions.

> One searches the majority's opinion in vain for a convincing reason why the apparently laudable policy of promoting informed consent becomes unconstitutional when the

subject is abortion.

Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 799 (1986) (White, J., dissenting).

> [F]or the ostensible objective of *Roe v. Wade is not maximizing the number of abortions, but maximizing choice.* Moreover, our decisions in *Maher, Beal,* and *Harris v. McRae*[11] all indicate that the State may encourage women to make their choice in favor of childbirth rather than abortion, and the provision of accurate information regarding abortion and its alternatives is a reasonable and fair means of achieving that objective.

Id. at 801-02 (emphasis added). Then Chief Justice Burger further explained how the right to abortion in *Roe* has become a *de facto* absolute right that tramples on other fundamental rights:

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11 *Harris v. McRae*, 448 U.S. 297 (1980); *Maher v. Roe*, 432 U.S. 464 (1977); *Beal v. Doe*, 432 U.S. 438 (1977).

In short, every Member of the *Roe* Court rejected the idea of abortion on demand. The Court's opinion today, however, plainly undermines that important principle, and I regretfully conclude that some of the concerns of the dissenting Justices in *Roe*, as well as the concerns I expressed in my separate opinion, have now been realized.

The extent to which the Court has departed from the limitations expressed in *Roe* is readily apparent. In *Roe*, the Court emphasized

> "that the State does have an important and legitimate interest in preserving and protecting the health of the pregnant woman...." [410 U.S.] *Id.*, at 162, 93 S.Ct., at 731.

Yet today the Court astonishingly goes so far as to say that the State may not even require that a woman contemplating an abortion be

provided with accurate medical information concerning the risks inherent in the medical procedure which she is about to undergo and the availability of state-funded alternatives if she elects not to run those risks. Can anyone doubt that the State could impose a similar requirement with respect to other medical procedures? Can anyone doubt that doctors routinely give similar information concerning risks in countless procedures having far less impact on life and health, both physical and emotional than an abortion, and risk a malpractice lawsuit if they fail to do so?

Yet the Court concludes that the State cannot impose this simple information-dispensing requirement in the abortion context where the decision is fraught with serious physical, psychological, and moral concerns of the highest order. Can it possibly be that the Court is saying that the Constitution forbids the communication of such critical information to a woman? *We have apparently already passed the point at which abortion is available*

> *merely on demand. If the statute at issue here is to be invalidated, the "demand" will not even have to be the result of an informed choice.*

Id. at 783-84 (Burger, C.J., dissenting) (emphasis added). Justice O'Connor added that:

> Today's decision goes further, and makes it painfully clear that no legal rule or doctrine is safe from ad hoc nullification by this Court when an occasion for its application arises in a case involving state regulation of abortion.

Id. at 814 (O'Connor, J. dissenting).

> [Section] 3205(a)(1)(iii) requires that the woman be informed, "when medically accurate," of the risks associated with a particular abortion procedure, and § 3205(a)(1)(v) requires the physician to inform the woman of "[t]he medical risks associated with carrying her child to term." *This is the kind of balanced information I would have thought all could agree is relevant to a woman's informed consent.*

Id. at 830 (emphasis added) (citations omitted). The rejection of the informed consent provision in *Thornburgh* was "further evidence of the super-protected nature of the abortion right."[12]

While a plurality of the *Casey* court overruled *Thornburgh* with respect to the unconstitutionality of a 24-hour waiting period and parental consent, it sustained the invalidity of spousal notification and, most importantly, upheld the "central holding" of *Roe* that the abortion decision is a fundamental right. *Casey,* 505 U.S. at 879-900 (plurality decision). Other members of the Court, including Justice Blackmun, the author of the majority opinion in *Roe*, argued that the restrictions in the Pennsylvania statute invalidated in *Thornburgh* remained invalid in *Casey*, thus confirming the continuing preferred status of the purported right to choose abortion. *See id.*, at 918-21 (Stevens, J., concurring and dissenting); 933-40 (Blackmun, J., concurring and dissenting). As Justice Scalia said, the abortion decision should not be a liberty interest protected by the Constitution because "1) the Constitution says absolutely nothing about it, and 2) the longstanding traditions of American society have permitted it to be legally proscribed." *Id.* at 980 (Scalia, J., dissenting).

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12 Bopp, *The Right to Abortion,* at 294.

Nevertheless, this Court and lower appellate courts, including the Ninth Circuit here, continue to afford abortion that preferred status, "bend[ing] the rules when any effort to limit abortion, or *even to speak in opposition to abortion,* is at issue." *Stenberg v. Carhart*, 530 U.S. 914, 954 (2000) (Scalia, J., dissenting) (emphasis added). That includes rules regarding standing, res judicata and severability. *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2321 (2016) (Thomas, J. dissenting). "[T]oday's decision perpetuates the Court's habit of applying different rules to different constitutional rights—especially the putative right to abortion." *Id.* "This suit is possible only because the Court has allowed abortion clinics and physicians to invoke a putative constitutional right that does not belong to them—a woman's right to abortion." *Id.* at 2321-22. The "Court has shown a particular willingness to undercut restrictions on third-party standing when the right to abortion is at stake." *Id.* at 2322. The special status of abortion also means doctrines such as *res judicata* and severability are relaxed or disregarded. *Id.* at 2330 (Alito, J. dissenting).

> Under the rules that apply in regular cases, petitioners could not relitigate the exact same claim in a second suit. As we have said, "a

> losing litigant deserves no rematch after a defeat fairly suffered, in adversarial proceedings, on an issue identical in substance to the one he subsequently seeks to raise." *Astoria Fed. Sav. & Loan Assn. v. Solimino*, 501 U.S. 104, 107, 111 S.Ct. 2166, 115 L.Ed.2d 96 (1991). In this abortion case, however, that rule is disregarded.

Id.

> If a statute says that provisions found to be unconstitutional can be severed from the rest of the statute, the valid provisions are allowed to stand. H.B. 2 contains what must surely be the most emphatic severability clause ever written. This clause says that every single word of the statute and every possible application of its provisions is severable. But despite this language, the Court holds that no part of the challenged provisions and no application of any part of them can be saved. Provisions that are indisputably constitutional—for example, provisions that require facilities performing abortions to follow basic fire safety measures—

> are stricken from the books. There is no possible justification for this collateral damage.

Id. at 2330-31.

Another victim of the "'ad hoc nullification machine' that the Court has set in motion to push aside whatever doctrines of constitutional law stand in the way of that highly favored practice," *i.e.* abortion, is free speech. *Hill v. Colorado*, 530 U.S. 703, 741 (2000) (Scalia J., dissenting, citing *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 785, (1994) (Scalia, J., concurring in judgment in part and dissenting in part)).

> Having deprived abortion opponents of the political right to persuade the electorate that abortion should be restricted by law, the Court today continues and expands its assault upon their individual right to persuade women contemplating abortion that what they are doing is wrong.

Id. at 741-42. "There is apparently no end to the distortion of our First Amendment law that the Court is willing to endure in order to sustain this restriction upon the free speech of abortion opponents." *Id.* at 753.

The Ninth Circuit's determination that, contrary to *Reed* and *McCullen*, the strict scrutiny required for content-based speech restrictions must give way when the speech concerns abortion illustrates the truth in Justice Scalia's observation.

As the Fourth Circuit said in a decision invalidating a Baltimore city ordinance that sought to compel pregnancy centers to speak the city's message, California's enactment of AB775 is an attempt to weaponize the First Amendment in order to promote ideology. *Greater Baltimore Center For Pregnancy Concerns, Inc., et al. v. Mayor And City Council Of Baltimore, et. al.*, No. 16-2325, slip op. at 20-21 (4th Cir. Jan. 5, 2018), 2018 WL 298142 . It is an attempt that the Ninth Circuit has sanctioned to the detriment of the First Amendment rights of California citizens.

> The abortion debate in our country has a long and bitter history. Vast disagreement on the merits has led both sides to retributive speech restrictions and compulsions. *See, e.g., Stuart*, 774 F.3d at 242. To be sure, states must have room for reasonable regulation.
>
> But there is a limit to how much they can dictate core beliefs. This

court has in the past struck down attempts to compel speech from abortion providers. *Id.* And today we do the same with regard to compelling speech from abortion foes. We do so in belief that earnest advocates on all sides of this issue should not be forced by the state into a corner and required essentially to renounce and forswear what they have come as a matter of deepest conviction to believe.

Weaponizing the means of government against ideological foes risks a grave violation of one of our nation's dearest principles: "that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." [*W. Virginia State Bd. of Educ. v.*] *Barnette*, 319 U.S. [624,] at 642 [(1943)]. It may be too much to hope that despite their disagreement, pro-choice and prolife advocates can respect each other's dedication and principle. But, at least in this case, as in *Stuart*, it is not too much to ask

> that they lay down the arms of compelled speech and wield only the tools of persuasion. The First Amendment requires it.

Id.

B. The Ninth Circuit's Deferential Review Of A Pro-Abortion Regulation Promotes A Super-Protected Right To Abortion, Not A Right To Independent Choice.

The Ninth Circuit's decision also reflects a skewing of the right announced in *Roe* in favor of promoting abortion rather than protecting "choice." As Justice White observed, the ostensible objective of *Roe* is "not maximizing the number of abortions, but maximizing choice." *Thornburgh*, 476 U.S. at 801-02. This Court has emphasized that the heart of the liberty interest announced in *Roe* is "independence in making certain kinds of important decisions." *Casey*, 505 U.S. at 859.

> While the outer limits of this aspect of [protected liberty] have not been marked by the Court, it is clear that among the decisions that an individual may make without unjustified government

> interference are personal decisions 'relating to marriage, procreation, contraception, family relationships, and child rearing and education.'"

Id. (citing *Carey v. Population Services International*, 431 U.S. 678, 684–685 (1977)).

> Our cases recognize "the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Eisenstadt v. Baird, supra,* 405 U.S [438]., at 453, 92 S.Ct., at 1038 [(1972)]. Our precedents "have respected the private realm of family life which the state cannot enter." *Prince v. Massachusetts*, 321 U.S. 158, 166, 64 S.Ct. 438, 442, 88 L.Ed. 645 (1944). These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.

Id. at 851. "It was this dimension of personal liberty that *Roe* sought to protect, and its

holding invoked the reasoning and the tradition of the precedents we have discussed, granting protection to substantive liberties of the person." *Id.* at 852.

In other words, it is the decision-making processes related to pregnancy, family relationships and contraception, *not merely decisions in favor of abortion*, that are to be protected against governmental interference according to *Roe*.

> Part of the constitutional liberty to choose is the equal dignity to which each of us is entitled. A woman who decides to terminate her pregnancy is entitled to the same respect as a woman who decides to carry the fetus to term.

Id. at 920 (Stevens, J., concurring and dissenting). That has not been the case, however, as this case and cases decided by this Court attest. Rather than according equal respect to the choice to have an abortion and the choice to *not* have an abortion, courts have given far greater deference to the choice to have an abortion, finding that virtually any regulation that could be said to possibly cause a women to re-think her choice to abort her child must be invalidated.

In *Akron* this Court strictly scrutinized and invalidated provisions requiring that doctors present information about the status of the pregnancy and the nature of the abortion procedure. The Court found that providing such information was an attempt by the state to interject an anti-abortion message into the doctor-patient relationship. The informed consent provision required that physicians describe the gestational age of the unborn child, the nature of the abortion procedure and the risks associated with it. This was a bridge too far according to the Court. *Akron*, 462 U.S. at 445.

> [W]e believe that § 1870.06(B) attempts to extend the State's interest in ensuring "informed consent" beyond permissible limits. First, it is fair to say that much of the information required is designed not to inform the woman's consent but rather to persuade her to withhold it altogether. Subsection (3) requires the physician to inform his patient that "the unborn child is a human life from the moment of conception," ...
>
> Moreover, much of the detailed description of "the anatomical and physiological characteristics of the

> particular unborn child" required by subsection (3) would involve at best speculation by the physician. And subsection (5), that begins with the dubious statement that "abortion is a major surgical procedure" and proceeds to describe numerous possible physical and psychological complications of abortion, is a "parade of horribles" intended to suggest that abortion is a particularly dangerous procedure.

Id. at 444-45.

> Consistent with its interest in ensuring informed consent, a State may require that a physician make certain that his patient understands the physical and emotional implications of having an abortion. But Akron has gone far beyond merely describing the general subject matter relevant to informed consent. *By insisting upon recitation of a lengthy and inflexible list of information,* Akron unreasonably has placed "obstacles in the path of the doctor upon whom [the woman is] entitled to rely for advice in connection with her decision." *Whalen v. Roe*, 429

U.S. 589, 604 n. 33, 97 S.Ct. 869, 879 n. 33, 51 L.Ed.2d 64 (1977).

Id. at 445 (emphasis added). In other words, according to the *Akron* Court, reciting an "inflexible" list of information about pregnancy and the abortion procedure is unconstitutional because it might cause a woman to change her mind and not have an abortion.

However, in this case, according to the Ninth Circuit, posting of multiple copies of an inflexible statement about the availability of free and low cost abortions is not unconstitutional even though it might cause a woman to change her mind and have an abortion. That is not respecting equally the woman's decision not to have an abortion or to have an abortion, as Justice Stevens alluded to in *Casey*.

The regulations invalidated in *Thornburgh* cast even further doubt on the courts' adherence to the notion that the decision to abort and the decision not to abort are equally respected. In *Thornburgh*, the Court repeated the adage that, "the State may not require the delivery of information designed 'to influence the woman's informed choice between abortion or childbirth.'" 476 U.S. at 760 (citing *Akron*, 462 U.S. at 443-44). The

regulation invalidated in *Thornburgh* required that women be told, *inter alia*, the following:

> There are many public and private agencies willing and able to help you to carry your child to term, and to assist you and your child after your child is born, whether you choose to keep your child or place her or him for adoption. The Commonwealth of Pennsylvania strongly urges you to contact them before making a final decision about abortion. The law requires that your physician or his agent give you the opportunity to call agencies like these before you undergo an abortion.

Id. at 761. These provisions were invalidated as "nothing less than an outright attempt to wedge the Commonwealth's message discouraging abortion into the privacy of the informed-consent dialogue between the woman and her physician." *Id.* at 762.

However, in this case, similar language pointing women to free and low cost abortions was found to be constitutional. If the State cannot direct that women be told that there are agencies available to help them *not* abort their children, then it should not be able to direct

that women be told that there are free and low cost services available that will help them abort their children. If the language in *Thornburgh* represented "an outright attempt to wedge the Commonwealth's message discouraging abortion into the privacy of the informed-consent dialogue between the woman and her physician," then the language required under AB775 should be viewed as an outright attempt to wedge the state's message encouraging abortion in the informed consent dialogue. The fact that the Ninth Circuit did not so view the AB775 language illustrates that abortion remains on its pedestal as a "super fundamental right."

The Ninth Circuit's conclusion reflects not constitutional analysis, but a value judgment that it is required to protect the right to get an abortion, not the right to make an informed decision. The Ninth Circuit is thus perpetuating the rule bending that enables abortion to maintain its status as a preferred right, even when free speech rights are at stake.

C. The Ninth Circuit's Deference To And Validation Of Onerous Requirements Placed On Pro-Life Expression Further Promote A Super Protected Right In Favor Of Abortion.

By refusing to apply strict scrutiny to AB775's content-based compelled speech provisions, the Ninth Circuit endorsed what the bill's sponsorship, legislative history and burdensome requirements show to be a state sponsored message promoting abortion targeted at what the legislative sponsor called deceptive non-profit pro-life pregnancy resource centers. Apparently counting on the continuing viability of the "ad hoc nullification machine" that distorts even First Amendment rights when abortion is involved, the state did little to mask its disdain for pro-life pregnancy resource centers and its intent to compel them to promote abortion.

From the co-sponsors of the bill, to the legislative sponsor's obvious disdain for pro-life pregnancy centers, to the onerous requirements placed upon centers, to the exemptions for centers that perform or refer for abortions, to the prohibitive fines imposed against those who will not utter the state's message, it is readily

apparent that the state sought to work with abortion providers to undermine the effectiveness of organizations seeking to provide alternatives to abortion.

1. Bill Sponsors Express Animus Toward Pro-Life Speech.

AB775 was co-sponsored by Black Women for Wellness and NARAL Pro-Choice California. (Appendix to Petition for Writ of Certiorari at 93a, *Mountain Right to Life v. Becerra,* Supreme Court of the United States Case No. 17-211 (pending) "*Mountain Right to Life* Appendix" herein). Black Women for Wellness' description of its sponsorship indicates an animus against organizations which do not support abortion and a desire to compel them to speak a pro-abortion message:

> Unfortunately, the day after our bill was signed, the *anti-choice* community sued California's state legislature over the bill. However we are confident that *their argument, which is please let us legally deceive women*, will not have

> a leg to stand on, and this law will go into effect on Jan 1, 2016.[13]

Co-sponsor NARAL Pro-Choice California expresses similar animus toward any organization that will not perform or refer women for abortions.

> Anti-choice extremists will stop at nothing. They have opened thousands of fake health-care "clinics" that lie to and mislead women to prevent them from considering abortion as an option.[14]

It is these attitudes, not a benevolent concern that women be provided with "health care information," that underlie AB775.

The legislative sponsor, Assemblyman Ted Lieu, expressed similar animus toward

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[13] Black Women for Wellness, Reproductive Justice, Reproductive FACT Act, http://www.bwwla.org/reproductive-justice-rj-policy-work/. (last visited December 20, 2017) (emphasis added).

[14] NARAL Pro-Choice California, Abortion Access, https://prochoicecalifornia.org/issue/abortion-access/ (last visited December 20, 2017).

pro-life pregnancy centers in his comments in support of the bill.

> The author contends that, *unfortunately*, there are nearly 200 licensed and unlicensed clinics known as crisis pregnancy centers (CPCs) in California whose goal is to *interfere with women's ability to be fully informed* and exercise their reproductive rights, and that CPCs *pose as full-service* Women's health clinics, but *aim to discourage* and prevent women from seeking abortions. The author concludes that these *intentionally deceptive* advertising and counseling practices often confuse, misinform, and even intimidate women from making fully-informed, time-sensitive decisions about critical health care. (*Mountain Right to Life* Appendix at 90a (emphasis added)).

The legislative history offers further evidence of the state's true intent of working with NARAL and other pro-abortion organizations to quell pregnancy resource centers' efforts to counsel women about alternatives to abortion.

Crisis Pregnancy Centers. CPCs are facilities, both licensed and unlicensed, which *present themselves* as comprehensive reproductive health centers, but are commonly affiliated with, or run by organizations whose stated goal is to prevent women from accessing abortions. A 2015 NARAL Pro-Choice America report on CPCs notes that the National Institute of Family and Life Advocates (an organization with over 1,300 CPC affiliates) states on its website that it is on the front line of the cultural battle over abortion, and its vision is to provide [CPCs] with legal resources and counsel, with the aim of developing a network of life-affirming ministries in every community across the nation in order to achieve an abortion-free America. The NARAL report also sent several researchers into CPCs to receive the counseling offered, and they widely reported that they were provided with inaccurate information, including only being given information regarding the risks of abortion, being told that many women commit suicide after

having an abortion, and being told abortions can cause breast cancer.

University of California, Hastings College of Law research report. In fall of 2009 the Assembly Business, Professions and Consumer Protection Committee, concerned that CPCs throughout California were disseminating medically inaccurate information about pregnancy options available in the state, requested a report by the University of California, Hastings College of Law regarding CPCs' practices and potential legislative options for regulating them. Completed in December of 2010, "Pregnancy Resource Centers: Ensuring Access and Accuracy of Information," discusses several options for regulation of CPCs, ranging from creating new regulations, leveraging existing regulations aimed specifically at medical services, as well as creating a new statute. Because approaches that have treated CPCs and full-service pregnancy centers differently have been challenged as violating the First Amendment, the report

> concludes that the best approach to a statutory change would regulate all pregnancy centers, not just CPCs, in a uniform manner, which is the approach that this bill adopts.

(*Mountain Right to Life* Appendix at 90a-92a) (emphasis added)).

In fact, the bill did not adopt the approach of regulating all pregnancy centers in a uniform manner. Instead, it exempted those which perform or refer women for abortions:

> (c) This article shall not apply to either of the following:
> (1) A clinic directly conducted, maintained, or operated by the United States or any of its departments, officers, or agencies.
>
> (2) A licensed primary care clinic that is enrolled as a Medi-Cal provider and a provider in the Family Planning, Access, Care, and Treatment Program.

California Health and Safety Code §123472(c)(2017). The bill's sponsors claimed that the exemptions were justified because of pre-emption concerns as to the federally affiliated clinics. (*Mountain Right to Life*

Appendix at 124a). As for the Medi-Cal and FPACT Program clinics, the sponsors claimed that the exemption was justified because those facilities provide "the entire spectrum of services," *i.e.* abortions, contraceptives and other pregnancy related services, echoing the comments of the sponsors about pregnancy research centers deceiving women by not providing abortions or abortion referrals. (*Id.* at 125a).

In other words, according to the California legislature, if a clinic provides or refers for abortions then it automatically provides notice to clients about the availability of *free and low-cost* abortions. *Id.* The legislature apparently assumed that clinics which make money, in part, by performing abortions would benevolently advertise for free and low cost services at other facilities. This, of course, is not how the market works. Just because a facility offers abortions or referrals does not mean that its clients know about free and low cost services or have any less entitlement to immediate notification of the availability of such subsidies. Centers which charge for these services have an incentive to not tell clients about free and low cost services, which would cut into their income. Consequently, the need for women contemplating abortion to be informed of free or low cost abortions would arguably be greater at

these clinics than it would be at pro-life pregnancy resource centers that do not perform or refer for abortions but specifically state that they provide alternatives to abortion.

The exemption for facilities already providing abortions, therefore, does not arise from a concern about women being ill-informed about state abortion services. If it is critical that all women know that they can call a certain number and obtain information about free and low cost abortions, then the notice requirement should apply to all facilities that pregnant women might visit. Singling out for exemption those that provide abortions indicates that the state has made a value judgment that facilities which do not object to abortion are more acceptable than those that do have such objections.

These facts gleaned from the legislative history belie the state's attempt to publicly couch the purpose of the bill in neutral terms: "The purpose of this act is to ensure that California residents make their personal reproductive health care decisions knowing their rights and the health care services available to them." (*Mountain Right to Life* Appendix at 77a). In reality, the law's exemptions and the pejorative discussions about "deceptive" pro-life pregnancy resource centers should remove any doubt that AB775

was specifically targeted at chilling the speech of the pro-life centers and forcing them to utter the state's message favoring abortion. This further illustrates the Ninth Circuit's continuing allegiance to the idea that abortion is a "super fundamental" right which supersedes even free speech rights.

2. The Onerous Requirements of the Required Notices Indicate an Intent to Quell Pro-Life Speech.

The true intent of AB775, *i.e.*, to chill the speech of those who will not promote abortion, is further borne out by the arduous requirements for the required notices and the steep fines imposed on those who do not comply. Again, as an acknowledgement of the preferred status of the abortion right, the requirements for the notices required by AB775 are detailed and taxing, requiring not only notices posted on walls and at entrances, but also, in the case of unlicensed centers, on all advertising, both digital and printed.

AB775 requires that pregnancy resource centers which are licensed by the state post notices with the following requirements:

(1) The notice shall state:

> "California has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women. To determine whether you qualify, contact the county social services office at [insert the telephone number]."
>
> (2) The information shall be disclosed in one of the following ways:
>
> (A) A public notice posted in a conspicuous place where individuals wait that may be easily read by those seeking services from the facility. The notice shall be at least 8.5 inches by 11 inches and written in no less than *22-point type.*
>
> (B) A printed notice distributed to all clients in no less than *14-point type.*

California Health and Safety Code §123472(a) (2017) (emphasis added). Pregnancy resource centers that are not licensed by the state must "disseminate to clients on site and in any print

and digital advertising materials including Internet Web sites, the following notice:

> (1) The notice shall state: "This facility is not licensed as a medical facility by the State of California and has no licensed medical provider who provides or directly supervises the provision of services."
>
> (2) The onsite notice shall be a sign at least 8.5 inches by 11 inches and written in n*o less than 48-point type*, and shall be posted conspicuously in the entrance of the facility and at least one additional area where clients wait to receive services.
>
> (3) The notice in the advertising material shall be clear and conspicuous. "Clear and conspicuous" means in larger point type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from the surrounding text of the same size by symbols or other marks that call attention to the language.

California Health and Safety Code §123472(b) (2017) (emphasis added). The legislature has specified that the notices must be posted at the entrance, meaning that before a person can even be seen, let alone receive a message from a center representative she must be immediately confronted with the state-mandated message that will become part of what she hears if and when she seeks services. As the photograph attached as Exhibit A reveals, a pregnant woman, or anyone, who has questions about options for an unplanned pregnancy will barely place their hands on the door handle when they are confronted with the state-mandated advertisement for free and low cost abortions. Those seeking information on the "full range" of options will immediately believe that the facility they are entering will promote abortion as an option when in fact such promotion is antithetical to the facility's core beliefs.

Both types of notices must be "in English and in the primary threshold languages for Medi-Cal beneficiaries as determined by the State Department of Health Care Services for the county in which the facility is located. *Id.* The multiple language requirement in AB775 means that centers will be required to post notices in anywhere from one to *eleven (11)*

languages.[15] In the case of centers, such as His Nesting Place, which are located in Los Angeles County and are unlicensed, *AB775 requires that they post at the entrance and waiting room eleven (11) copies (22 total) of a notice printed in 48 point type.*[16] That would require that two 8 foot by 10 foot sections of wall space be taken up by the notices. In addition, every brochure, flier, newspaper advertisement, email, social media posting and Web page would have to have 11 statements in "conspicuous" type, whatever that is interpreted to mean. For non-profit centers that do not accept any government funds, having to produce or include the statements in already limited advertising space would be cost prohibitive and would take away from funds needed to provide services to women.

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[15] *See* California Department of Health Care Services, *Threshold and Concentration Languages For Two Plan, GMC, and COHS Counties as of July 2016,* http://www.dhcs.ca.gov/formsandpubs/Documents/MMCDAPLsandPolicyLetters/APL2017/APL17-011.pdf (last visited July 26, 2017).

[16] The threshold and concentration languages listed for Los Angeles County are Arabic, Armenian, Cambodian, Chinese, English, Farsi, Korean, Russian, Spanish, Tagalog and Vietnamese. *Id.*

In addition, if the centers do not comply with the requirements, which many cannot do because of sincerely held religious beliefs, *NIFLA*, 839 F.3d at 831, then they are subject to fines of $500 for the first violation and $1,000 for *each* subsequent violation. California Health and Safety Code §123473(a) (2017) (emphasis added). The legislative sponsor of the bill called the fines "modest." (*Mountain Right to Life* Appendix, 102a, 109a, 136a). However, if a center fails to post the state-mandated message because of a religious proscription, then it faces the potential of being fined $1,000 every 30 or so days as the state notifies the center of the violation, waits 30 days and imposes the fine as required by the law. There is no cap on the fines, just a statement that they would be assessed at $1,000 for *each* subsequent violation.

Therefore a center could be perpetually fined $1,000 a month, or $12,000 a year. Such fines are certainly not "modest," particularly for non-profit organizations that rely on donations. Many of the centers would be compelled to close, thereby reducing choices available to women seeking to make informed decisions "into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Casey*, 505 U.S. at 851.

Far from equally respecting women who make the choice not to abort and women who make the choice to abort, the Ninth Circuit and the State of California are stating that the decision not to abort is due no respect. In the words of Justice Scalia, the Ninth Circuit is continuing and expanding "its assault upon their [abortion opponents'] individual right to persuade women contemplating abortion that what they are doing is wrong." *Hill v. Colorado*, 530 U.S. at 742 (Scalia J., dissenting).

Indeed, in California, those who want to talk to women about alternatives to abortion cannot do so unless they first ensure that the women know that they can call a number and get a free or low cost abortion. After delivering that message, it will be difficult for a center representative to be taken seriously when counseling the woman that she should not seek an abortion. The State of California has been used by pro-abortion activists to do their bidding by inserting political ideology into the Health and Safety Code. That should be less tolerable than was the Commonwealth of Pennsylvania's efforts to inform women of the risks inherent in abortion. *See Thornburgh*, 476 U.S. at 761-62.

CONCLUSION

The Ninth Circuit's failure to apply strict scrutiny to an admittedly content-based speech restriction because it addresses abortion conflicts with this Court's clear precedent. The Ninth Circuit's decision also perpetuates a skewed version of the right to make decisions regarding abortion that has created a "super fundamental right" which supersedes even the fundamental right of free speech.

For these reasons, this Court should reverse the decision of the Ninth Circuit.

Dated: January 15, 2018.

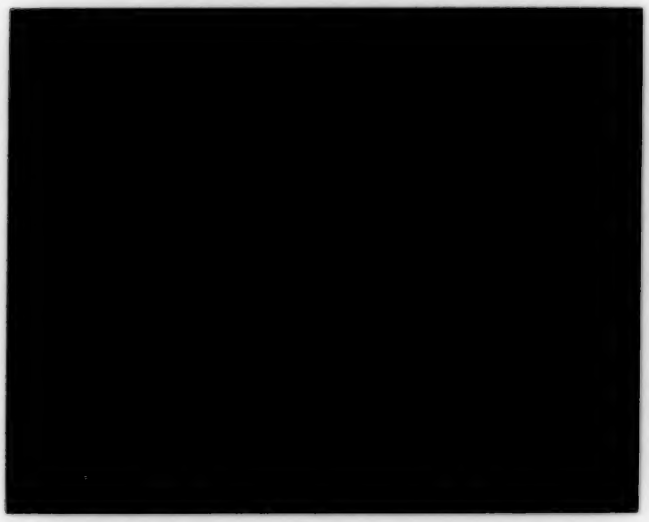
Respectfully Submitted,

Mathew D. Staver
(Counsel of Record)
Anita L. Staver
Horatio G. Mihet
LIBERTY COUNSEL
P.O. Box 540774
Orlando, FL 32854
(407) 875-1776
court@lc.org

Mary E. McAlister
Daniel J. Schmid
LIBERTY COUNSEL
P.O. Box 11108
Lynchburg, VA 24506
(434) 592-7000
court@lc.org

Exhibit A

Notices posted at Mountain Right to Life's Pregnancy and Family Resource Center In English and Spanish



No. 16-1140

In the Supreme Court of the United States

NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES, D/B/A NIFLA, ET AL.,

Petitioners,

v.

XAVIER BECERRA, ATTORNEY GENERAL, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF EVANGELICALS, CONCERNED WOMEN FOR AMERICA, THE NATIONAL LEGAL FOUNDATION, THE ETHICS & RELIGIOUS LIBERTY COMMISSION OF THE SOUTHERN BAPTIST CONVENTION, AND SAMARITAN'S PURSE IN SUPPORT OF PETITIONERS

Steven W. Fitschen
James A. Davids
The National Legal Foundation
2224 Virginia Beach Blvd., Ste. 204
Virginia Beach, Virginia 23454
(757) 463-6133

David A. Bruce, Esq.
205 Vierling Drive
Silver Spring, Maryland 20904

Frederick W. Claybrook, Jr.
Counsel of Record
Claybrook LLC
1001 Pa. Ave., NW, 8th Floor
Washington, D.C. 20004
(202) 250-3833
rick@claybrooklaw.com

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INTERESTS OF *AMICI CURIAE*[1]

National Association of Evangelicals ("NAE") is the largest network of evangelical churches, denominations, colleges, and independent ministries in the United States. It serves 40 member denominations, as well as numerous evangelical associations, missions, social-service charities, colleges, seminaries, and independent churches. NAE serves as the collective voice of evangelical churches and other religious ministries. It believes that human life is sacred because made in the image of God, that civil government has no higher duty than to protect human life, and that duty is particularly applicable to the life of unborn children because they are helpless to protect themselves.

Concerned Women for America ("CWA") is the largest public policy organization for women in the United States, with approximately half a million supporters from all 50 States. Through its grassroots organization, CWA encourages policies that strengthen women and families and advocates for the traditional virtues that are central to America's cultural health and welfare. CWA actively promotes legislation, education, and policymaking consistent with

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[1] The parties have consented to the filing of this brief in writing. No counsel for any party authored this brief in whole or in part. No person or entity other than *Amici* and their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

its philosophy. Its members are people whose voices are often overlooked—everyday, middle-class American women whose views are not represented by the powerful elite. CWA is profoundly committed to the intrinsic value of every human life from conception to natural death, including the life and wellbeing of every woman in America.

The **Ethics & Religious Liberty Commission of the Southern Baptist Convention** ("ERLC") is the moral concerns and public policy entity of the Convention ("SBC"), the nation's largest Protestant denomination, with over 50,000 churches and 15.8 million members. The ERLC is charged by the SBC with addressing public policy affecting such issues as religious liberty, marriage and family, the sanctity of human life, and ethics. Scripture teaches that every person is an image-bearer of God and that the womb is his domain. SBC members believe God's knowledge of unborn life even precedes the creative act of conception. Therefore, abortion is incongruent with SBC beliefs. The ERLC is committed to upholding the freedom of Christian ministries who care for women in unplanned pregnancies because we believe mothers and their unborn children are known and loved by God.

The **National Legal Foundation** ("NLF") is a public interest law firm dedicated to the defense of First Amendment liberties, including the freedoms of speech, assembly, and religion. The NLF and its donors and supporters, in particular those from California, are vitally concerned with the outcome of this case because of its effect on the speech and assembly rights of charitable and religious organizations, especially with respect to contentious issues like abortion.

Samaritan's Purse is a nondenominational, evangelical Christian organization formed in 1970 to provide spiritual and physical aid to hurting people around the world. The organization seeks to follow the command of Jesus to "go and do likewise" in response to the story of the Samaritan who helped a hurting stranger. Samaritan's Purse operates in over 100 countries providing emergency relief, community development, vocational programs and resources for children, all in the name of Jesus Christ. Samaritan's Purse's concern arises when any state government compels the speech of faith-based organizations to make statements wholly contradictory to their exempt mission and purpose of helping vulnerable persons, including distressed women and unborn children.

SUMMARY OF THE ARGUMENT

The Courts of Appeals are in conflict over the proper standard of review in compelled speech cases involving abortion notices. Some use strict scrutiny, some apply intermediate scrutiny of varying definitions, and others use rational-basis review. Often, the court identifies no standard at all.

The standard applied should be uniform across all courts. Moreover, cases involving abortion should not have a different standard than other speech cases, and *Casey*[2] does not require otherwise. Compelled

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[2] *Planned P'hood of Se. Pa. v. Casey*, 505 U.S. 833 (1992). The question on which this Court granted *certiorari* in this case was limited to the First Amendment (Continued...)

speech, in this area as in others, should be subject to strict scrutiny, especially so when it involves viewpoint discrimination. California's statute compelling pro-abortion speech at pregnancy centers committed to a pro-life viewpoint does not satisfy strict scrutiny and is, therefore, unconstitutional. However, other laws, especially those requiring informed consent to the serious surgical procedure of abortion, foster several compelling state interests and will pass strict scrutiny analysis as narrowly tailored to that situation.

ARGUMENT

This Court should enforce a uniform standard for all compelled speech cases involving viewpoint discrimination, including those dealing with abortion notices and surgery. The standard, as has been ably articulated by the Petitioners in this case, is strict scrutiny.[3]

That does not mean that all such regulation is unconstitutional, even though it sounds the death knell for the California statute here. Many laws, especially those requiring a woman's informed consent before she undertakes surgery, serve compelling interests in a suitably tailored manner. Even though many informed consent laws have been upheld under lesser standards of review, they typically satisfy

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question, and this Brief does not address due process aspects of abortion regulation.

[3] Pet. Br. 20-49.

strict scrutiny as well. This Court, therefore, when finding the California statute unconstitutional, should be careful to reserve judgment on other abortion compelled speech laws.

I. The Courts of Appeals Have Adopted Conflicting Standards.

Amici need not present an exhaustive cataloguing of the various approaches taken by the Courts of Appeals when dealing with abortion compelled speech regulations. By way of example, some courts have applied a rational basis or reasonableness test[4] and some intermediate scrutiny,[5] while

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[4] *E.g.*, *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 575 (5th Cir. 2012) (satisfies reasonableness test if regulation is truthful, not misleading, and relevant; rejects strict scrutiny analysis); *Planned P'hood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724 (8th Cir. 2008) (en banc) (same); *see also Casey*, 505 U.S. at 906 (Rehnquist, C.J., dissenting) (articulating that the State should be able to regulate abortion procedures in any way rationally related to a legitimate state interest); *Thornburgh v. Am. Coll. of OBGYNs*, 476 U.S. 747, 802 (1986), *overruled in part by Casey*, 505 U.S. 833 (1992), (White, J., dissenting) (articulating that the State's regulation of the practice of medicine is subject to review only for rationality), 828 (O'Connor, J., dissenting) (articulating that regulation only requires a rational relationship to State's interest unless it puts undue burden on abortion decision, which would be allowed if it can satisfy strict scrutiny).

[5] *E.g.*, *NIFLA v. Harris*, 839 F.3d 823 (9th Cir. 2016); *Stuart v. Camnitz*, 724 F.3d 238, 248-49 (4th Cir. (Continued...)

others have suggested that strict scrutiny is appropriate and have applied it in some circumstances.[6] Some courts applying the same level of scrutiny to very similar legislation have reached different conclusions.[7] Still other Courts of Appeals have announced no particular standard when reviewing abortion compelled notice regulations.[8]

2014) (adopting a sliding scale standard depending on the interests and circumstances and applying intermediate scrutiny in particular case).

[6] *E.g.*, *Greater Balto. Ctr. for Pregnancy Concerns, Inc. v. Mayor of Balto.*, No. 16-2325, slip op. at 9-16 (4th Cir. Jan. 5, 2018) (applying strict scrutiny review to city's compelled speech regulation of pregnancy center); *Evergreen Ass'n, Inc. v. City of N.Y.*, 740 F.3d 233, 244-49 (2d Cir. 2014) (suggesting strict scrutiny but avoiding determination by ruling that most of challenged ordinance did not meet intermediate scrutiny, but finding one part of ordinance met strict scrutiny); *Stuart*, 724 F.3d at 246 (suggesting strict scrutiny may be appropriate when compelled speech by doctor is ideological); *Centro Tepeyac v. Mtgmy. Cnty.*, 772 F.3d 184, 188-93 (4th Cir. 2013) (en banc) (upholding required notice of no doctor on staff under strict scrutiny); *Rounds*, 530 F.3d at 743 (Murphy, J., dissenting).

[7] *Compare Stuart*, 724 F.3d at 249, 251 (rejecting Fifth Circuit's decision regarding very similar regulation in *Lakey* and Eighth Circuit's in *Rounds*), *with Evergreen*, 740 F.3d at 249-51.

[8] Courts articulating no particular standard have principally compared the regulation in question to the regulations upheld in *Casey*. *E.g.*, *A Woman's Choice–East Side Women's Clinic v. Newman*, 305 F.3d 684 (7th Cir.

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This cacophony of approaches is detrimental to freedom of speech and the public's perception of the Rule of Law. Abortion cases attract, and deserve, careful attention from the general public. When our courts cannot articulate a common standard—or when abortion cases have special rules for no discernable reason—it engenders a belief that rulings are result-oriented, rather than principled. An important antidote to such a perception is to apply the same standard to abortion speech regulation as applies in other compelled speech cases involving viewpoint discrimination.

II. Strict Scrutiny Should Apply in Compelled Speech Cases Involving Viewpoint Discrimination, Including Laws That Regulate Abortion Speech.

In *Reed v. Town of Gilbert*, this Court applied strict scrutiny in a case involving signage when the ordinance discriminated on the basis of content.[9] The *Reed* Court repeated the admonition from *Rosenberger v. Rector and Visitors of University of Virginia*[10] that viewpoint regulation is a "more blatant" and "egregious form of content discrimination."[11] Ac-

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2002); *Planned P'hood, Sioux Falls Clinic v. Miller*, 63 F.3d 1452, 1467 (8th Cir. 1995); *Barnes v. Moore*, 970 F.2d 12, 14-15 (5th Cir. 1992).

[9] 135 S. Ct. 2218 (2015).

[10] 515 U.S. 819, 829 (1995).

[11] 135 S. Ct. at 2230.

cordingly, strict scrutiny must also be applied when government engages in viewpoint discrimination.

Almost all the abortion regulations involved in cases such as this are viewpoint discriminatory. Jurisdictions passing laws regulating pregnancy centers are motivated by the desire to reduce the effectiveness of the centers' message and to encourage women to have abortions.[12] Other jurisdictions have regulated speech in doctors' offices, including by informed consent laws requiring doctors to tell a pregnant woman of the development of her baby, the availability of an ultrasound sonogram, the ability to hear her baby's heartbeat, and risk factors in abortion.[13] Others have required informing a woman considering abortion of the existence of local pregnancy centers; the availability of funding for prenatal, delivery, and postnatal care; and that the father is responsible for financial assistance.[14] Although some courts have upheld these laws based on a lower standard of review for professional speech and stat-

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[12] *See NIFLA*, 839 F.3d at 829 (State of California); *Evergreen Ass'n, Inc. v. City of New York*, 740 F.3d 233, 245 (2d Cir. 2014); *Greater Balto. Ctr. for Pregnancy Concerns, Inc. v. Mayor and City Council of Balto.*, 721 F.3d 264 (4th Cir. 2013); *Tepeyac v. Montgomery Cnty.*, 5 F. Supp. 3d 745, 760 (D. Md. 2014).

[13] *E.g.*, *Casey*, 505 U.S. at 902 (Pa.); *Lakey*, 667 F.3d at 573 (Tex.); *Rounds*, 530 F.3d at 726-27 (S.D.); *A Woman's Choice*, 305 F.3d at 685 (Ind.).

[14] *E.g.*, *Thornburgh*, 476 U.S. at 763 (Pa.); *Stuart*, 774 F.3d at 242-43 (N.C.); *Rounds*, 530 F.3d at 726-27 (S.D.); *A Woman's Choice*, 305 F.3d at 685 (Ind.).

ing that the compelled speech by the doctor is strictly factual,[15] the obvious intent of the statutes is to encourage women to carry their pregnancy to term and live birth.[16] This is not to say that such an intent makes the statute objectionable.[17] But reciting "professional speech" as a shibboleth does not dispose of First Amendment concerns about viewpoint discrimination. Indeed, the *Reed* Court noted that, in *NAACP v. Button*,[18] "the Court rightly rejected the State's claim that its interest in the 'regulation of

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[15] *E.g.*, *Lakey*, 667 F.3d at 575-76; *Rounds*, 530 F.3d at 734-36.

[16] *See, e.g.*, *Akron v. Akron Ctr. for Reproductive Health, Inc.*, 462 U.S. 416, 443-44 (1983), *overruled in part by Casey*, 505 U.S. at 882; *Thornburgh*, 476 U.S. at 759, *overruled in part by Casey*, 505 U.S. at 882; *Stuart*, 774 F.3d at 245; *Rounds*, 350 F.3d at 747 (Murphy, dissenting) (noting probable intent of S.D. law is to discourage abortion).

[17] This Court in *Akron* that found regulation unconstitutional because it had the intent to favor childbirth and discourage abortion. 462 U.S. at 443-44. The *Casey* Court found that approach inconsistent with the State's legitimate interest in favoring childbirth and overruled. 505 U.S. at 882. Thus, a regulation is no longer susceptible to challenge solely because it expresses preference for protecting life of the unborn. *See id.* at 883 ("we permit a State to further its legitimate goal of protecting the life of the unborn by enacting legislation aimed at ensuring a decision that is mature and informed, even when in so doing the State expresses a preference for childbirth over abortion"); *Lakey*, 667 F.3d at 575.

[18] 371 U.S. 415, 438-39 (1963).

professional conduct' rendered the statute consistent with the First Amendment, observing that 'it is no answer . . . to say . . . that the purpose of these regulations was merely to insure high professional standards and not to curtail free expression.'"[19]

No special carve-out for abortion should be made to free speech law. Some courts (including the Ninth Circuit here) have interpreted the three-Justice joint opinion in *Casey* to have done just that.[20] But that is not a necessary reading of *Casey* for several reasons: The joint opinion did not articulate its standard of review under the First Amendment when upholding pro-life regulation;[21] it did not distinguish between regulations compelling speech and other regulation, basing its decision on due process grounds of whether the regulation put an undue burden on the woman's choice;[22] and *Casey*, decided

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[19] 135 S. Ct. at 2229; *see also Riley v. Nat'l Fed'n of Blind of N.C., Inc.*, 487 U.S. 781, 800 (1988) (holding that when commercial speech mixes with fully protected speech, it is entitled to strict scrutiny review); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 561 (1980) (holding that State's authority to regulate commercial speech extends only to "expression solely related to the economic interests of the speaker and its audience").

[20] *E.g.*, *NIFLA*, 839 F.3d at 835-38; *Lakey*, 667 F.3d at 575.

[21] 505 U.S. at 879-901.

[22] *Id.* The Fifth Circuit in *Lakey* pointed out that Petitioners in their briefs in *Casey* had raised a compelled speech argument under the First Amendment. 667 F.3d

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in 1992, obviously preceded this Court's latest articulation of First Amendment law in *Reed*. Furthermore, *Casey*'s due-process ruling, as discussed further below, can be harmonized with the First Amendment's strict scrutiny test for any regulation that does involve compelled speech.[23]

III. The California Law Is Viewpoint Discriminatory and Does Not Satisfy Strict Scrutiny.

Amici need not belabor Petitioners' point that the California law involved here is viewpoint discriminatory and warrants strict scrutiny.[24] The Ninth Circuit itself quoted from California's legislative findings that showed disapproval of the anti-abortion message of the pregnancy centers and the desire to rein in that speech by compelling the centers to declare a pro-abortion message.[25] As *Reed* explained, even when a statute is not discriminatory on its face (as the Ninth Circuit inaccurately held with respect to the California law[26]), it can warrant

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at 574. However, the justices in *Casey* did not address that directly, or try to harmonize its due process standard with First Amendment doctrines, in any of their various decisions.

[23] This Brief focuses on compelled speech by private persons. It does not deal with regulation of conduct.

[24] Pet. Br. 31-39.

[25] *NIFLA*, 839 F.3d at 829-30.

[26] *NIFLA*, 838 F.3d at 835-36. Petitioners demonstrate why this ruling is incorrect. Pet. Br. 31-39.

strict scrutiny if its "justification or purpose" is content- or viewpoint-based.[27]

Nor need *Amici* elaborate why the California law does not meet the strict scrutiny test. Even were it to be assumed that California has a compelling interest in encouraging abortions (an erroneous proposition, as discussed further below), there is no governmental need to have the message conveyed by those who are morally opposed to it. As Petitioners have set out, California has ample alternative methods to advertise its free abortion services.[28] Its forcing private parties to communicate the State's message is unjustified and unjustifiable.[29]

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[27] 135 S. Ct. at 2228.

[28] Pet. Br. 49-51. *See also, e.g.*, *Evergreen*, 740 F.3d at 250 (listing alternatives).

[29] This situation is to be distinguished from that in *Rust v. Sullivan*, in which government grantees were compelled as part of their agreement to voice the government's position. *Rust* involved government speech paid for by the government, and the government has no First Amendment rights. 500 U.S. at 193, 198-99. Here, the government is forcing a private citizen to speak a message, to which an objecting citizen may resort to the First Amendment. *See Wooley v. Maynard*, 430 U.S. 705 (1977).

IV. Other Abortion Speech Laws Will Likely Satisfy Strict Scrutiny Analysis Because the Interests Implicated Are Significantly Different Than Those Implicated by California's Law.

Because government action promoting pro-life or pro-abortion speech is viewpoint-discriminatory, *Amici* assume that strict scrutiny analysis would apply to all abortion-related speech regulation, whether pro- or anti-abortion. It does not follow, however, that because California's pro-abortion law fails strict scrutiny analysis, other regulations, and particularly those involving informed consent for the abortion procedure, do not pass muster if heightened scrutiny were applied to them. That is because the relevant interests and circumstances vary greatly between the two situations. In the following subsections, *Amici* will compare and contrast the interests involved with regulation of doctors who actually perform abortions to the interests involved with regulation of pregnancy centers that do not.

A. The Interests in Protecting Unborn Life Are Compelling, and the Interests in Encouraging Abortion Are Not.

This Court has recognized, including in *Roe*, that the State may foster a compelling interest in protecting fetal life.[30] Indeed, this Court has always

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[30] *See Roe v. Wade*, 410 U.S. 113, 163 (1973) (finding this "important" interest becoming "compelling" at vi-

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recognized the obvious, scientific truth that, if allowed to develop, a pregnancy normally results in a healthy child imbued with all the rights of personhood.[31] Stated negatively, the purpose of abortion is to stop that natural development of the fetus and to prevent live birth. But while this Court has held that the government cannot create an undue burden on a woman obtaining an abortion prior to her child's viability, that does not mean that the State must finance or encourage the killing of the fetus.[32] Instead, as this Court reiterated in *Gonzales v. Carhart*, the "government may use its voice and its regulatory authority to show its profound respect for the life within the woman."[33]

This compelling interest in protecting the life of the fetus is logical and important. For one thing,

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ability); *see also Gonzales v. Carhart*, 550 U.S. 124, 145 (2007).

[31] *See, e.g., Gonzales*, 550 U.S. at 157-59 (recognizing fine line between late-term abortion and infanticide); *Roe*, 410 U.S. at 163.

[32] *See, e.g., Rust v. Sullivan*, 500 U.S. 173 (1991) (upholding Congress's funding of pro-childbirth services, but not abortion services); *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989) (upholding state law prohibiting use of public facilities and personnel for abortions); *Williams v. Zbarez*, 448 U.S. 358 (1980) (upholding state law prohibiting use of public funds for abortion); *Poelker v. Doe*, 432 U.S. 519 (1977) (upholding city's refusal to pay for abortions at its hospital).

[33] 550 U.S. 124, 157 (2007); *see also Casey*, 505 U.S. at 882.

abortion brings an abrupt halt to the natural development of a living organism.[34] For another, abortion has been linked with concerns about eugenics.[35] For another, a State may desire to increase its population for any number of reasons, including federal funding linked to population.[36] A State may also be con-

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[34] *See Roe*, 410 U.S. at 163 ("State regulation protective of fetal life after viability thus has both logical and biological justifications.").

[35] *See, e.g.*, Charles Camosy, *Is the Call for Zika Virus Abortions the New Eugenics?*, L.A. Times, Feb. 19, 2016, at http://www.latimes.com/opinion/ op-ed/la-oe-camosy-zika-abortion-eugenics-20160219-story.html; Wesley J. Smith, *No Girls Allowed! Sweden Okays Gender Eugenic Abortion*, First Things, May 13, 2009, at https://www.firstthings.com/blogs/firstthoughts/2009/05/no-girls-allowed-sweden-okays-gender-eugenic-abortion-1; David Harsanyi, *Pro-Choicers Should Explain Why They Think Eugenics is Acceptable—Iceland's 'Eradication' of Down Syndrome Raises Inconvenient Questions. At Least, it Should*, Aug. 16, 2007, at http://thefederalist.com/2017/08/16/icelands-eradication-syndrome-raises-inconvenient-questions-pro-choicers/.

[36] In fiscal year 2000, GAO found that 85 percent of federal government obligations in grants to state and local governments were distributed on the basis of formulas that use data such as state population and personal income. *Testimony on the 2010 Census*, https://www.gao.gov/assets/120/118299.pdf. "It has been understood for some time that a substantial proportion of federal domestic assistance is distributed on the basis of population data gathered through the decennial census . . . ." *Counting for Dollars: The Role of the Decennial Census in the Distribution of Fed. Funds*, at https://www.brookings.edu/re

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cerned about low birth rates and declining population, as many European countries are experiencing currently.[37]

The State has no similar interest in fostering abortion. The "objective of *Roe v. Wade* is not maximizing the number of abortions, but maximizing choice."[38] As President Clinton memorably put it, the government's interest is that abortion be "legal, safe, but rare."[39] All members of the *Casey* Court con-

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[37] "The population of the EU is expected to peak by 2050 and then gradually decline, suggesting a dim future for that body. . . . The most important EU country, Germany, has endured demographic decline for over a generation. Germany's population is forecast to drop 7.7% by 2050. . . . The main problem is the very low fertility rate of the EU's superpower, which . . . was 1.4 between 2010 and 2015. It takes a fertility rate of 2.1% to replace your own population. . . . [M]any of Europe's tinier 'frontier' countries have abysmal fertility rates. . . . Things are not that much better in Western Europe, where fertility rates are also below replacement rates . . . ." Joel Kotkin, *Death Spiral Demographics: The Countries Shrinking the Fastest*, Feb. 1, 2017, at https://www.forbes.com/sites/joelkotkin/2017/02/01/death-spiral-demographics-the-countries-shrinking-the-fastest/ #180b57f3b83c.

[38] *Thornburgh*, 476 U.S. at 801 (White, J., dissenting), *overruled in part by Casey*, 505 U.S. at 882.

[39] *See, e.g.*, http://www.nytimes.com/1996/ 08/30/us/clinton-s-speech-accepting-the-democratic-nomination-for-president.html.

firmed that a woman does *not* have a right to an abortion on demand.[40] Rather, under *Roe* and its progeny, a woman has "a right to terminate a pregnancy free of undue interference by the State."[41] She has no right to a free abortion.[42]

The State has no compelling interest in increasing the incidence of abortion. After all, under the common law and in every jurisdiction of this country until well into the last century, abortion was a crime.[43]

The woman's right to abortion without undue interference from the State as identified by this Court's case law has been justified by a minority of justices on the basis of equal rights for women,[44] with the implied syllogism being, because a man after having sexual intercourse can walk away without becoming pregnant, a woman should not have to bear that consequence, either. The syllogism is faulty. It does not state a compelling interest for the State, at

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[40] 505 U.S. at 887; *see also Doe v. Bolton*, 410 U.S. 179, 189 (1973); *Roe*, 410 U.S. at 153 (rejecting argument that women's right to abort is absolute).

[41] *Id.*

[42] *See Rust*, 500 U.S. at 201-03; *Webster*, 492 U.S. at 507, 510-11.

[43] *See generally* Joseph W. Dellapenna, *Dispelling the Myths of Abortion History* (Carolina Academic Press 2006).

[44] *See Gonzales*, 550 U.S. at 171-72 (Ginsberg, J., dissenting, with Stevens, Souter, and Breyer, JJ.).

least in those situations in which the sexual relations are consensual between the man and the woman.[45]

It is simple biology that women can carry children and men cannot. The genders stand on equal footing before they have consensual sex, but not after.[46] And men and women both know that one of

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[45] Of course, there are the tragic cases of pregnancy after rape, but those instances are, thankfully, rare. *See Casey*, 505 U.S. at 850-51 (noting that non-consensual pregnancies are rare). The Guttmacher Institute reports that rape was cited as the primary reason for having an abortion in one percent of cases in 1987 and in less than one-half of one percent in 2004. https://www.guttmacher.org/sites/default/files/pdfs/tables/370305/3711005t3.pdf.

[46] The necessity for the sexes to be equally situated in order for there to be an equal protection problem is demonstrated in *Schlesinger v. Ballard*, 419 U.S. 498 (1975). There, this Court considered a challenge to the Navy policy of making females serve longer than men to attain promotions. This Court noted, "[T]he different treatment of men and women naval officers . . . reflects, not archaic and overbroad generalizations, but, instead, the demonstrable fact that male and female line officers in the Navy are not similarly situated with respect to opportunities for professional service. Appellee has not challenged the current restrictions on women officers' participation in combat and in most sea duty." *Id.* at 508. As this Court later observed in *Rostker v. Goldberg*, 453 U.S. 57 (1981), commenting on *Schlesinger*, "In light of the combat restrictions, women did not have the same opportunities for promotion as men, and therefore it was not unconstitutional for Congress to distinguish between them." *Id.* at 67. Similarly here, men do not have the same "oppor-

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the consequences of having such relations is childbearing. Willing participants in intercourse have no more fundamental right to expunge the natural results of their sexual act than they have to escape the natural consequences of any other voluntary act. Thus, a state has no legitimate, compelling interest in fostering a belief that a woman is denied equality because, by nature, she can bear a child and a man cannot. At the same time, all the States (and the District of Columbia and Puerto Rico) appropriately recognize that the consequences of an unwanted pregnancy fall more heavily on the woman and provide for her the opportunity to drop off an unwanted baby at designated locations through "safe haven" laws.[47]

In sum, California has not justified its challenged regulation on an attempt to discourage women to carry their children to term, and any such implied interest should be given no weight. California's

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tunities" for pregnancy as do women. *See also Gen. Elec. Co. v. Gilbert*, 429 U.S. 125 (1976) (holding there was no sex discrimination under Title VII when company did not include pregnancy in disabilities coverage); *Geduldig v. Aiello*, 417 U.S. 484 (1974) (upholding from equal protection attack California not including pregnancy in covered disability risks because there was no discrimination based on sex).

[47] *See* Children's Bureau, *Infant Safe Haven Laws*, 2016, at 2-64, *available at* https://www.childwelfare.gov/pubPDFs/safehaven.pdf#page=2&view=Who%20May%20Leave%20a%20Baby%20at%20Safe%20Haven (last visited Jan. 9, 2018).

only legitimate interest here is to inform women of where they can get free abortion services, an available government benefit. But whatever minimal interest a woman has in obtaining a free abortion and a State has in advertising it, those interests are not compelling. On the other hand, a State's expressed interest in protecting and encouraging life by having the woman carry her pregnancy to full term is.

B. The Interest in Preventing Sex-selection Discrimination Against Females Is Implicated by Abortion Speech Laws, but That Interest Is Not Implicated Here.

States also have a compelling interest that abortion is not used as a tool to discriminate against females. Several states have outlawed abortions whose motivation is sex discrimination,[48] and social

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[48] As reported by the Guttmacher Institute, ten states (Arizona, Arkansas, Illinois, Indiana, Kansas, North Carolina, North Dakota, Oklahoma, Pennsylvania, and South Dakota) currently have laws that ban abortions for reason of sex selection at some point in pregnancy. https://www.guttmacher.org/print/state-policy/explore/abortion-bans-cases-sex-or-race-selection-or-genetic-anomaly. The law in Arkansas has been preliminarily enjoined and is the subject of ongoing litigation. *See Hopkins v. Jegley*, No. 4:17–cv–00404, 2017 WL 3220445 (E.D. Ark., July 28, 2017), appeal filed, No. 17-2879 (8th Cir., Aug. 28, 2017). The laws of Indiana and Illinois have been permanently enjoined, although an appeal of the Indiana case is currently pending. *See Planned P'hood of Ind. and Ky., Inc. v. Comm'r of the Ind. State Dep't of* (Continued...)

science studies have shown that parents, when limiting the size of their families, often prefer one sex over another, normally male.[49] The most prominent example is China, where abortion has been officially encouraged, even mandated, as part of its one-child policy (recently modified to a two-child limit).[50] The result of that policy has been a significant skewing of the gender composition of China's population toward males.[51] That, in turn, has had adverse consequences for its society at large.[52]

Health, No.1:16-cv-00763, 2017 WL 4224750 (S.D. Ind., Sept. 22, 2017), appeal pending, No. 17-3163 (7th Cir., Oct. 19, 2017).

[49] "If Americans could have only one child, they would prefer that it be a boy rather than a girl, by a 40% to 28% margin, with the rest having no preference or no opinion on the matter." Frank Newport, *Americans Prefer Boys to Girls, Just as They Did in 1941*, June 23, 2011, at http://news.gallup.com/poll/148187/americans-prefer-boys-girls-1941.aspx (reporting on results of Gallup poll).

[50] China began its one-child policy in 1980, restricting most families to only one child. Beginning in late 2013, China allowed couples to have two children if one of the parents had been an only child. In October 2015, the Chinese Government announced that it would allow all couples to have no more than two children beginning in 2016. *See generally* https://www.brookings.edu/articles/the-end-of-chinas-one-child-policy/ (Mar. 30, 2016).

[51] "According to China's 2010 Census, men currently outnumber women by at least 34 million, an imbalance in large part due to China's fertility policy (known as the one-child policy) and a preference for sons." Wash. Post, Apr. 30, 2014, https://www.washingtonpost.cm/news/mon

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The laws and public policies of this country uniformly militate against sex discrimination.[53]

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key-cage/wp/2014/04/30/the-security-risks-of-chinas-abnormal-demographics/?utm_term=.5439d7504f17.

[52] "[O]ver the next 20 years in large parts of China . . . there will be a 10%–20% excess of young men. . . . It has also been assumed that a combination of psychologic vulnerability and sexual frustration may lead to aggression and violence in these men. There is good empirical support for this prediction: cross-cultural evidence shows that the overwhelming majority of violent crime is perpetrated by young, unmarried, low-status males. In China . . . the sheer numbers of unmated men are a further cause for concern. Because they may lack a stake in the existing social order, it is feared that they will become bound together in an outcast culture, turning to antisocial behavior and organized crime, thereby threatening societal stability and security. . . ." Therese Hesketh, *et al.*, *The Consequences of Son Preference and Sex-selective Abortion in China and Other Asian Countries*, Canadian Med. Ass'n J., 2011 Sep. 6; 183(12): 1374–1377, at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3168620/ (footnotes omitted). "The crime rate has almost doubled in China during the past 20 years of rising sex ratios. . . . A study into whether these things were connected [*Sex Ratios and Crime: Evidence from China's One-child Policy*, by Lena Edlund, *et al.*, Institute for the Study of Labour, Bonn. Discussion Paper 3214] concluded that they were, and that higher sex ratios accounted for about one-seventh of the rise in crime." *The Worldwide War on Baby Girls*, Mar. 4, 2010, at http://www.economist.com/node/15636231.

[53] *See, e.g.*, Title VII of the Civil Rights Act of 1964, *as amended*, 42 U.S.C. *§§* 2000e *et seq.* (prohibiting employment discrimination based on sex); Title IX of the (Continued...)

States can legitimately regard it a compelling interest to protect against this discrimination against females by, for example, requiring a doctor to inform women that abortion is impermissible when the sex of the fetus is the motivating cause.[54]

Educ. Amends. of 1972, *as amended*, 20 U.S.C. §§ 1681 *et seq.* (prohibiting sex discrimination in education programs or activities that receive federal financial assistance); Cal. Fair Emp't and Hous. Act, Cal. Gov't Code §§ 12900 *et seq.* (making it illegal for employers of five or more employees to discriminate against job applicants and employees on the basis of sex).

[54] For example, Arizona bans sex-selection abortions and requires both doctor and patient to sign an affidavit stating that the unborn child is not being aborted because of her or his sex or race. Ariz. HB2443, § 2 (2011), at https://www.azleg.gov/legtext/50leg/1r/bills/ hb2443p .pdf. As Arizona's prohibition of race as a motivation for abortion indicates, the disparity between abortion rates among the races also raises serious concerns that can legitimately be taken into account by a State. The most recent "Abortion Surveillance" report (for the year 2013) from the Centers for Disease Control and Prevention indicates that non-Hispanic black women have the highest abortion rate (27.0 abortions per 1,000 women aged 15–44 years) and ratio (420 abortions per 1,000 live births), both significantly higher than that for non-Hispanic white women. The CDC reports that non-Hispanic white women are the category with the lowest abortion rate (7.2 abortions per 1,000 women aged 15–44 years) and the lowest ratio (121 abortions per 1,000 live births). CDC, *Surveillance Summaries* 65(12);1–44, Nov. 25, 2016, at https://www.cdc.gov/mmwr/volumes/65/ss/ ss6512a1.htm.

C. The State's Interest in Regulating the Medical Profession Is Often Implicated by Abortion Speech Laws, but It Is Not Implicated Here.

States have a compelling interest in regulating the medical profession and, in particular, in making sure that patients have adequate, truthful information about the risks and benefits of serious surgeries.[55] This interest stems from the facts that (a) doctors have specialized knowledge and expertise that is unavailable to the patient, (b) only doctors can perform most surgeries and so are the best individuals to convey the information to the patient, and (c) surgeries have serious risks and can be life altering. The District of Columbia Circuit put it this way:

> The root premise is the concept, fundamental in American jurisprudence, that "[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body. . . ." True consent to what happens to one's self is the informed exercise of a choice, and that entails an opportunity to evaluate knowledgeably the options available and the risks attendant upon each. The average patient has little or no understanding of the medical arts, and ordinarily has only his

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[55] "There can be no doubt the government 'has an interest in protecting the integrity and ethics of the medical profession.'" *Gonzales*, 550 U.S. at 157 (quoting *Wash. v. Glucksburg*, 521 U.S. 702, 731 (1997)).

> physician to whom he can look for enlightenment with which to reach an intelligent decision. From these almost axiomatic considerations springs the need, and in turn the requirement, of a reasonable divulgence by physician to patient to make such a decision possible.[56]

Patients must make difficult choices about whether to have surgery performed, and whether to ask for a second opinion or additional information. States have a compelling interest in making sure that patient choices are informed and voluntary. These elements are the undergirding interests supporting States constitutionally being able to compel doctors to give information to patients in certain circumstances.

This Court has recognized that these interests are at their height when abortion is being considered. As this Court wrote in *Gonzales*, abortion for a woman has long-term physical, emotional, and psychological implications:

> Whether to have an abortion requires a difficult and painful moral decision. While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude that some women come to regret their choice to abort the infant life they once created and sus-

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[56] *Canterbury v. Spence*, 464 F.2d 772, 780 (D.C. Cir. 1972) (footnotes omitted; quoting *Schloendorff v. Sec'y of N.Y. Hosp.*, 211 N.Y. 125, 105 N.E. 92, 93 (1914)).

> tained. Severe depression and loss of esteem can follow.
>
> In a decision so fraught with emotional consequence some doctors may prefer not to disclose precise details of the means that will be used, confining themselves to the required statement of risks the procedure entails. From one standpoint this ought not to be surprising. Any number of patients facing imminent surgical procedures would prefer not to hear all details, lest the usual anxiety preceding invasive medical procedures become the more intense. This is likely the case with the abortion procedures here at issue [partial-birth abortions]. . . . The State's interest in respect for life is advanced by the dialogue that better informs the political and legal systems, the medical profession, expectant mothers, and society as a whole of the consequences that follow from a decision to elect a late-term abortion.[57]

These same interests apply not just to late-term abortions, but to all abortions.

Compelling truthful speech by doctors to enable women to make informed choices about abortion also satisfies the least restrictive means test. When meeting with a doctor to discuss an abortion, the procedure is not just being contemplated (like when a woman comes to a pregnancy center) but also can be

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[57] 550 U.S. at 157-59 (citations omitted).

promptly performed. Moreover, the only way to assure that women have the information they need before making a choice that may alter their lives forever is to make sure disclosure is provided by their physicians. Physicians are the only ones licensed to perform abortions and, thus, they are the only failsafe to make sure women are provided the information they need to make an informed, voluntary decision. Indeed, this Court has "stressed repeatedly the central role of the physician, both in consulting with the woman about whether or not to have an abortion, and in determining how any abortion was to be carried out."[58]

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[58] *Colautti v. Franklin*, 439 U.S. 379, 387 (1979). Similarly, the Second Circuit in *Evergreen*, 740 F.3d at 247-48, and the Fourth Circuit in *Centro Tepeyac*, 722 F.3d at 188-93, found regulation requiring pregnancy centers to disclose to clients whether they had a doctor on staff to be narrowly tailored because that was the one place the client could be expected to receive the information. It follows that a requirement to have the doctor tell a woman carrying a child about the risks of abortion, the current gestational development of her baby, and her financial options if she foregoes abortion is narrowly tailored because that is the only way to make sure that she gets the information to make an informed choice. The Ninth Circuit in this case relied on those precedents. 839 F.3d at 843-44. However, Petitioners demonstrate why the California regulation is distinguishable, overly broad, not narrowly tailored in other ways, and otherwise inconsistent with strict scrutiny analysis. Pet. Br. 49-62.

Women coming to non-surgical pregnancy centers will not be getting immediate abortions. They will be advised of the various risks of the procedure and given information about their fetuses, but, before a woman has an abortion, she will also talk with her doctor. There is no need for pro-life pregnancy centers to declare the availability of free abortion services provided by the State, because pro-life pregnancy centers are not minutes away from putting women into the operating room and cannot do so. The State has ample other ways of providing that information, including by having the doctor who is to perform the abortion provide notice of the free services.[59]

D. Pecuniary and Non-pecuniary Interests Are Significantly Different for Pregnancy Centers and Abortion Providers.

In furthering the compelling interests just discussed, States may legitimately take into account that doctors specializing in abortions have a pecuniary interest in the woman choosing to have an abortion. There is a logical concern that, but for regulation specifying what doctors must tell their patients about an abortion, doctors may be inclined, because of the financial incentives to perform the operation,

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[59] *See Evergreen*, 740 F.3d at 250 (listing several alternatives to having pregnancy centers disclose the State's message).

either to avoid or minimize discussion of all the risks and other relevant factors.

Pro-life pregnancy centers present no such concerns. They are non-profit organizations and do not perform abortions. Thus, they have no incentives to downplay the risks of abortion or to avoid discussing fetal development, showing sonograms, or facilitating mothers' listening to fetal heartbeats.

For purposes of the First Amendment, this Court has recognized a distinction between the regulation of for-profit and non-profit organizations. In *Ohralik v. Ohio State Bar Association*[60] and *In re Primus*,[61] decided the same day, this Court contrasted (a) legitimate regulation of for-profit, in-person solicitation of clients by attorneys; with (b) illegitimate sanctioning of an ACLU attorney for writing letters to prospective clients offering free legal services. This Court relied on its previous teaching in *NAACP v. Button*[62] that non-profit organizations and their clients had "expressive and associational" interests "at the core of the First Amendment's protective ambit,"[63] noting that the State had to justify such regulation by exacting standards and precision, as there was a "danger of censorship" and because "First Amendment freedoms need breathing space to

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[60] 435 U.S. 447 (1978).

[61] 436 U.S. 412 (1978).

[62] 371 U.S. 415 (1963).

[63] *Primus*, 436 U.S. at 424 (citing *Button*, 371 U.S. at 433).

survive."[64] By contrast, this Court found that a "lawyer's procurement of remunerative employment is a subject only marginally affected with First Amendment concerns" that, "[w]hile entitled to some constitutional protections, . . . is subject to regulation in furtherance of important state interests."[65]

These teachings from the regulation of the legal profession have applicability to the abortion compelled speech situation. On the one hand, doctors are performing in-person, for-fee communications when they meet with a woman considering abortion. On the other hand, pregnancy centers are non-profit organizations, and the First Amendment rights of expression and association are at their height when a pregnant woman visits a pregnancy center. These centers and their employees are not part of the individually licensed medical profession, they provide no threat to perform an irreversible medical procedure, and they have no financial inducement to encourage women to do so. The State's interests in compelling non-profit centers to articulate the government's message are minimal in comparison to the interests in regulating the speech of surgeons who could promptly perform an abortion for a medical fee.[66]

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[64] *Id.* at 432-33 (quoting *Button*, 371 U.S. at 433).

[65] *Ohralik*, 436 U.S. at 459.

[66] *See also Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781 (1988) (striking down State's regulation of professional non-profit fundraisers by licensing and compelled speech as violating their First Amendment rights).

E. Pregnancy Center Employees Generally Have Moral Objections to Encouraging Abortions, While Doctors Generally Have No Moral Objections to a Woman Declining an Abortion.

Abortion is a surgical procedure like few others. To remove an appendix or a wisdom tooth does not normally embrace ethical quandaries; whether to secure an abortion does so for a large segment of Americans. This, also, is a legitimate factor when balancing the acceptability of compelled speech in this context.

The calculus is not the same on both sides of the issue. As this Court has recognized, for many, abortion is unethical in almost every instance, because it is the taking of an innocent life that was generated by a prior, voluntary choice.[67] On the other hand, few consider it unethical in almost every instance to carry a child to term and give it birth. This consideration is important when balancing the interests of compelled speech, and it puts doctors and pregnancy centers at opposite poles of the analysis. Asking doctors to give truthful information about the abortion procedure and the fetus does not require them to violate their consciences. Moreover, such regulation gives doctors full play to advise their clients by taking into account the woman's particular

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[67] *See, e.g.*, *Casey*, 505 U.S. at 850-51; *Roe*, 410 U.S. at 116.

situation, including recommending abortion if the doctor considers it to be so indicated in the circumstances by either professional, social, or ethical concerns. In contradistinction, compelling those staffing pro-life pregnancy centers to voice a pro-abortion message invariably foists on them a conflict of conscience. "The First Amendment protects the rights of individuals . . . to refuse to foster . . . an idea they find morally objectionable."[68]

The different physical settings presented by pregnancy centers and doctors' offices are also relevant. If it ever occurred that a woman made a mistake about what services a pregnancy center offered,[69] she would undoubtedly have no compunction about walking out of the waiting room and not giving the center's employees the opportunity to communicate their pro-life message to her.[70] That same woman would likely find it much more uncomfortable to walk out of a private consultation with a doctor,

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[68] *Wooley*, 430 U.S. at 715.

[69] *See Greater Balto. Ctr.*, slip op. at 17 (noting that after seven years of litigation the city did not identify a single example of a woman coming to the pregnancy center who had incorrectly believed she could obtain an abortion there).

[70] *See Riley*, 487 U.S. at 795-801 (holding unconstitutional a regulation requiring a fundraiser to disclose his cut before making an appeal for funds because it would "almost certainly" hamper fundraising efforts for charities and noting that such a required notification might end conversations with a prospective donor before they even got started).

highlighting the need for the doctor to supply the relevant information to the woman to allow her to make an informed choice.

CONCLUSION

This Court should strike down California's regulation of pro-life pregnancy centers as viewpoint-discriminatory, compelled speech that cannot withstand strict scrutiny. When doing so, this Court should recognize that the interests involved in informed consent laws that allow women to make an informed choice are markedly different and normally will further compelling interests in a suitably tailored manner.

Respectfully submitted,

/s/ Frederick W. Claybrook, Jr.

FREDERICK W. CLAYBROOK, JR.
Counsel of Record
CLAYBROOK LLC
1001 Pa. Ave., N.W., 8th Floor
Washington, D.C. 20004
tel. (202) 250-3833
fax (202) 628-5116
Rick@claybrooklaw.com

STEVEN W. FITSCHEN
JAMES A. DAVIDS
THE NATIONAL LEGAL FOUNDATION
2224 Va. Beach Blvd.
Suite 204
Virginia Beach, Va. 23454
(757) 463-6133

DAVID A. BRUCE, Esq.
205 Vierling Drive
Silver Spring, MD 20904

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IN THE

Supreme Court of the United States

NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES *et al.*,

Petitioners,

v.

XAVIER BECERRA *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF NATIONAL LEAGUE OF CITIES, UNITED STATES CONFERENCE OF MAYORS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

LISA SORONEN
Executive Director
STATE & LOCAL LEGAL CENTER
444 North Capitol Street NW
Washington, DC 20001
(202) 434-4845
lsoronen@sso.org

JOHN M. BAKER
Counsel of Record
KATHERINE M. SWENSON
KARL C. PROCACCINI
HOLLEY C. HORRELL
VIRGINIA R. MCCALMONT
GREENE ESPEL PLLP
222 S. Ninth Street
Suite 2200
Minneapolis, MN 55402
(612) 373-0830
jbaker@greeneespel.com

Counsel for Amici Curiae

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INTEREST OF AMICI CURIAE[1]

Amici are not-for-profit organizations whose missions are to advance the interests of cities, counties, and other local governments. They file this brief to address the dangers presented to their members—and to the most cherished forms of free speech—by positions espoused by Petitioners in this matter. Those positions would greatly expand the circumstances in which laws must satisfy strict scrutiny, and ultimately dilute the meaning of strict scrutiny. The brief is intended to highlight both the differences between Petitioners' approach and this Court's well-established First Amendment jurisprudence, and the consequences if the Court were to adopt Petitioners' approach.

The National League of Cities ("NLC") is dedicated to helping city leaders build better communities. NLC is a resource and advocate for 19,000 cities, towns, and villages, representing more than 218 million Americans.

The U.S. Conference of Mayors ("USCM"), founded in 1932, is the official nonpartisan organization of all United States cities with a population of more than 30,000 people, which includes over 1,400 cities. Each city is represented in USCM by its chief elected official, the mayor.

The International City/County Management Association ("ICMA") is a non-profit professional and educational organization consisting of more than 11,000 appointed chief executives and assistants

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[1] Pursuant to Rule 37.6, these amici affirm that no counsel for a party authored this brief in whole or in part, and that no person other than *amici* made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for the parties have consented to this filing.

serving cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance by advocating and developing the professional management of local governments throughout the world.

The International Municipal Lawyers Association ("IMLA") has been an advocate and resource for local government attorneys since 1935. Owned solely by its more than 2,500 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters. IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before the Supreme Court of the United States, the United States Courts of Appeals, and State supreme and appellate courts.

SUMMARY OF THE ARGUMENT

Petitioners urge this Court to apply strict scrutiny to nearly any law regulating speech that is content-based as defined in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015). Pet'rs' Br. 28, 30-31. In their view, only laws regulating "rare 'historic and traditional categories' of expression recognized as criminal or dangerous" should be exempt from their proposed rule of law. Pet'rs' Br. 30 (quoting *United States v. Alvarez*, 567 U.S. 709, 717 (2012).[2] And they ask this Court to adopt

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[2] Petitioners' brief is not entirely consistent on this point. Despite Petitioners' arguments for a broadly-applicable strict scrutiny requirement for all speech that is not dangerous or criminal in nature, *see* Pet'rs' Br. 30-31, they also refer to "[t]he intermediate scrutiny standard that governs restrictions on commercial speech," *id.* at 41. Amici construe this as urging that this Court adopt the former while acknowledging, perhaps

a *per se* rule that any law that treats different viewpoints differently should be *per se* unconstitutional, whether the regulated speech is commercial or not. *Id.* at 42, 57, 59 n.18. For the sake of local governments across the nation and those who freely express core speech, the Court should firmly reject Petitioners' approach.

Longstanding decisions of this Court apply intermediate scrutiny, not strict scrutiny, to certain categories of laws that would be considered content-based under *Reed*, without requiring regulators to show that the expression is recognized as criminal or dangerous. This Court's refusals to adopt such a broadly-applicable strict-scrutiny requirement reflect the practical danger that, over time, doing so would cause strict scrutiny to become less strict. *Reed* did not involve regulation of any of the established categories of protected expression for which intermediate scrutiny has applied for many decades. It did not mention, let alone overrule, any of this Court's precedents that applied intermediate scrutiny to laws that differentiated by certain subjects or topics. This Court should not construe *Reed* as having silently done so, nor explicitly do so here.

Petitioners also urge the adoption of another sweeping rule of law, under which all regulations of compelled speech would be subject to strict scrutiny. Pet'rs' Br. 22. Such a broad-brushed approach would have unintended consequences for unquestionably important and pervasive legal obligations, including familiar notification requirements of local laws and basic *informed*-consent requirements of state tort law.

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inadvertently, that the Court's current jurisprudence includes the latter.

The application of those state and local requirements should not be overshadowed by the prospect of a federal judge's de novo review of whether the disclosure required also would have furthered a compelling interest and was narrowly tailored toward that end. Instead, the Court should proceed cautiously, not polemically, with due regard for the potential implications of its own words.

ARGUMENT

I. THIS COURT HAS NOT TAKEN A "ONE SIZE FITS ALL" APPROACH GOVERNING ALL FREE SPEECH CASES.

Applying strict scrutiny to content-based laws is an important principle of this Court's modern First Amendment jurisprudence, but not an absolute principle. The Court has recognized that extending strict scrutiny to all content-based regulations would eventually decrease the degree of protection provided by strict scrutiny. Consistent with that anti-dilution principle, this Court has long recognized that certain categories of speech should be protected by intermediate scrutiny, even for regulations that differentiate by topic or subject, without insisting that the speech in question be dangerous or criminal in nature.

A. As this Court has repeatedly recognized, applying strict scrutiny to all protected speech "could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to" core speech.

In five separate rulings, this Court has justified, for special categories of protected speech, standards that fall short of strict scrutiny, based on the danger that

subjecting too much protected expression to strict scrutiny will in the long run make strict scrutiny less than strict.

This reasoning first appeared in *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 456 (1978), as this Court evaluated the effect of its recent extension of First Amendment protection to commercial speech on state regulation of attorney advertising. Writing for the Court, Justice Powell explained:

> **To require a parity of constitutional protection** for commercial and noncommercial speech alike **could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech.** Rather than subject the First Amendment to such a devitalization, we instead have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression.

Id. (emphasis added). Two years later, when this Court articulated a four-element intermediate-scrutiny test for regulation of commercial speech, Justice Powell's opinion for the Court reiterated *Ohralik*'s anti-dilution rationale. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 562 n.5 (1980). The anti-dilution principle was again reiterated the following term, when the Court analyzed the City of San Diego's billboard regulations in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981). In a plurality opinion, Justice White reaffirmed that constitutional protection for commercial speech does not

require a parity of constitutional protection, in part so that protections for core speech are preserved and not diluted. *See id.* at 506.

Nearly a decade later, Justice Scalia again reiterated the anti-dilution principle when writing for the Court in *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469, 481 (1989):

> Far from eroding the essential protections of the First Amendment, we think this disposition strengthens them. "To require a parity of constitutional protection for commercial and non-commercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech."

Id. (quoting *Ohralik*, 436 U.S. at 456). The Court has continued to express approval for the anti-dilution principle. *See Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 623 (1995) (O'Connor, J.); *cf. Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 484 (1988) (O'Connor, Rehnquist & Scalia, JJ., dissenting) (quoting *Ohralik*'s anti-dilution principle when noting that "the Court has consistently purported to review laws regulating commercial speech under a significantly more deferential standard of review").

Although the anti-dilution principle arises from this Court's commercial-speech decisions, the same reasoning has been applied to justify providing only intermediate scrutiny to other forms of speech, such as obscenity. "[T]o grant obscenity fully protected status is to risk unintended, disagreeable, and potentially far-reaching consequences by inviting the dilution of protections for clearly non-obscene speech." Mark Huppin & Neil Malamuth, *The Obscenity Conundrum,*

Contingent Harms, and Constitutional Consistency, 23 Stan. L. & Pol'y Rev. 31, 59 (2012).

B. For decades, this Court has recognized exceptions where intermediate scrutiny applies to laws even if they single out specific subject matter for differential treatment.

1. Commercial speech

Ever since this Court first held that commercial speech is constitutionally protected, it has applied an intermediate level of scrutiny—not strict scrutiny—to laws regulating commercial speech. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, this Court concluded that a state cannot "completely suppress the dissemination of concededly truthful information about entirely lawful activity." 425 U.S. 748, 773 (1976). Yet it did not thereby elevate truthful commercial speech to the same level of protection given to types of core speech that the First Amendment had protected for decades. *See id.* at 771. As this Court explained two years later in *Ohralik*, in *Virginia Pharmacy* it had been "careful not to hold that [commercial speech] is wholly undifferentiable from other forms of speech," 436 U.S. at 455 (quotations omitted), and confirmed that it would continue to differentiate "between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech," *id.* at 455–56.

Two years after *Ohralik*, this Court in *Central Hudson* created a four-part test to analyze regulations of commercial speech. The *Central Hudson* test, with its references to "substantial" interests that are

"directly advance[d]" by the regulation, embodies intermediate, not strict, scrutiny:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

447 U.S. at 566.

The *Central Hudson* Court explained, consistent with the anti-dilution rationale articulated in *Ohralik*, why governments should receive greater leeway for content-based regulation of commercial speech:

> In most other contexts, the First Amendment prohibits regulation based on the content of the message. Two features of commercial speech permit regulation of its content. First, commercial speakers have extensive knowledge of both the market and their products. Thus, they are well situated to evaluate the accuracy of their messages and the lawfulness of the underlying activity. In addition, commercial speech, the offspring of economic self-interest, is a hardy breed of expression that is not particularly susceptible to being crushed by overbroad regulation.

Id. at 564 n.6 (quotations and citations omitted).

In *Metromedia*, this Court again declined to grant equivalent protection to commercial and noncommercial speech. There, seven justices explicitly concluded that cities could prohibit billboards, and a majority indicated that cities could do so without also banning on-premise commercial signs. *See Metromedia*, 453 U.S. at 512 (White, J., for plurality) ("Thus, offsite commercial billboards may be prohibited while onsite commercial billboards [signs] are permitted."); *id.* at 553 (Stevens, J., dissenting in part) (stating that "a wholly impartial total ban on billboards would be permissible"); *id.* at 560–61 (Burger, J., dissenting) ("[A] legislative body reasonably can conclude that every large billboard adversely affects the environment, for each destroys a unique perspective on the landscape and adds to the visual pollution of the city."); *id.* at 570 (Rehnquist, J., dissenting) ("In my view, aesthetic justification alone is sufficient to sustain a total prohibition of billboards within a community . . . .").

Although this Court has held that cities cannot arbitrarily prohibit commercial speech yet permit noncommercial speech where the effects of both types are identical, *see City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 425 (1993), it has never overruled the part of *Metromedia* that rejected the notion that a distinction between on-premise and off-premise commercial signs is subject to strict scrutiny. Nor did the majority in *Discovery Network* apply strict scrutiny to the Cincinnati ordinance after concluding that it was content-based—this Court applied the *Central Hudson* test because commercial speech was at issue. 507 U.S. at 416 (concluding that it was proper for the district court and court of appeals to apply *Central Hudson*).

In the following decades, this Court continued to apply the *Central Hudson* test to regulations affecting commercial speech. *See, e.g.*, *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 367–68 (2002); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 553–55 (2001); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 507–08 (1996); *Florida Bar*, 515 U.S. at 623–24 (1995); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 481–82 (1995).

In *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 580 (2011), this Court struck down a Vermont law that restricted the sale, disclosure and use of pharmacy records that reveal the prescribing practices of individual doctors. However, in reaching that conclusion, the Court reiterated that "commercial speech can be subject to greater governmental regulation than noncommercial speech," *id.* at 579 (quoting *Discovery Network*, 507 U.S. at 426), and plainly did not apply strict scrutiny, despite its recognition that the restrictions were both content- and speaker-based, *id.* at 563–64.

Notably, after *Sorrell* this Court has reiterated that *Central Hudson* is the appropriate standard to apply to regulations of commercial speech. In *Matal v. Tam*, Justice Alito, writing for a plurality in Part IV, analyzed "whether trademarks are commercial speech and are thus subject **to the relaxed scrutiny outlined in *Central Hudson*.**" 137 S. Ct. 1744, 1763 (2017) (emphasis added).

2. Sexually oriented businesses

For more than forty years, this Court has also applied an intermediate level of scrutiny to laws regulating sexually oriented businesses. In *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 52, 63 (1976), the Court held that municipal zoning ordinances that

"differentiate[d] between motion picture theaters which exhibit sexually explicit 'adult' movies and those which do not" did not violate the First Amendment. The Court focused on the government's interest in regulating the "secondary effect[s]" of such businesses, giving rise to the so-called "secondary effects" doctrine. *See id.* at 71 n.34. Similarly, in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 43, 54–55 (1986), the Court held that a zoning ordinance that "prohibit[ed] adult motion picture theaters from locating within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school" did not violate the First Amendment. Applying intermediate scrutiny, the Court concluded that such an ordinance would pass constitutional muster where it is "designed to serve a substantial governmental interest and allows for reasonable alternative avenues of communication." *Id.* at 50.

In *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 429 (2002), the Court again used the intermediate scrutiny framework to assess a municipal ordinance that prohibited more than one "adult entertainment business" from occupying the same building. The Court concluded that the city had produced evidence that "its ordinance is designed to serve a substantial government interest," *id.* at 441, and that the district court's grant of summary judgment to the plaintiff businesses was therefore improper, *id.* at 443.

The Court has applied intermediate scrutiny to regulations like those at issue in *Young*, *Renton*, and *Alameda Books* even where those ordinances are not, strictly speaking, content neutral. *See Alameda Books*, 535 U.S. at 448 (Kennedy, J., concurring in the judgment) (observing that categorizing such statutes "content neutral" is "something of a fiction"). As

Justice Kennedy has observed, "whether a statute is content neutral or content based is something that can be determined on the face of it," and by singling out sexually oriented businesses for differential treatment, the regulations at issue in *Young*, *Renton*, and *Alameda Books* plainly contained content-based restrictions. *See id.* Nonetheless, this Court and lower courts have routinely applied intermediate scrutiny to regulations of sexually oriented businesses as an exception to the general rule that content-based restrictions on speech are subject to strict scrutiny. *See id.* This exception is warranted because regulations of sexually oriented businesses "have a prima facie legitimate purpose" that is itself unrelated to the content of the speech being regulated. *Id.* at 449.

Thus, when this Court granted certiorari to review *Reed v. Town of Gilbert*, 707 F.3d 1057 (9th Cir. 2013), there were firmly-established categories of speech protected by the First Amendment as to which content-discrimination—however defined—triggered only intermediate scrutiny, as a way of preventing the dilution of protection for "core" forms of speech. In none of these cases was the government required, as a condition of avoiding strict scrutiny, to show that the speech was also dangerous or criminal in nature.

II. THIS COURT SHOULD FIRMLY REJECT THE NOTION THAT *REED V. TOWN OF GILBERT* SILENTLY OVERRULED ALL THIS COURT'S PRECEDENTS THAT APPLIED INTERMEDIATE SCRUTINY TO LAWS THAT WOULD BE CONTENT-BASED AS *REED* DEFINED IT.

A decision about differential treatment of a church's signs from election signs did not require or result in the near-extinction of intermediate scrutiny for certain

speech that, while protected, is not within the "core" of First Amendment protection. While this Court sometimes overrules one or more of its longstanding precedents, it does not do so in a case where none of them applied, and without even mentioning them.

A. *Reed* involved noncommercial, non-sexually-oriented speech.

In *Reed*, this Court held that a regulation of temporary speech in Gilbert, Arizona, which distinguished between ideological, political, and special-event signage, was content-based and thus unconstitutional. 135 S. Ct. at 2232. *Reed* did not involve commercial speech, sexually-oriented businesses, or any other category of speech for which this Court's modern decisions have accorded intermediate protection.

In essence, Petitioners and some (but not all) of their amici try to make something of the *Reed* majority's failure expressly to acknowledge established exceptions to the U.S. Supreme Court's general rules about content neutrality (in fields where content discrimination does not trigger strict scrutiny).[3] True, in *Reed*, the Court's opinion did not pause to acknowledge the continued vitality of its precedents involving categories of speech (not involved in the case) that receive intermediate protection. But this Court did not thereby abolish any of those exceptions.

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[3] For example, relying on the supposedly "unequivocal language" in *Reed*, the amicus brief of Human Coalition asserts that *Reed* "mandates that courts apply strict scrutiny when examining any content-based speech laws." Human Coalition Br. 23, 27. However, the amicus brief of Massachusetts Citizens for Life and others acknowledges that *Reed* does not apply where the regulated speech is commercial. Massachusetts Citizens for Life et al. Br. 2.

Notably, counsel for the Petitioners in *Reed* (who are also lead counsel for the petitioners in this case) did not seek to overrule any of this Court's prior rulings. In fact, during the *Reed* oral argument, in response to a question from Justice Alito about the relevance of commercial speech, Rev. Reed's attorney specifically distinguished the standard that he proposed from the rule that applies to commercial speech, acknowledging that "one of the important things" is that this Court's jurisprudence states that regulations on commercial speech "can be treated differently":

> JUSTICE ALITO: What if it's commercial and it relates to a one-time event. For example, for a yard sale.
>
> MR. CORTMAN: Right.
>
> JUSTICE ALITO: **If the State and the city allow election-related signs to be put up in the right-of-way, then anybody who has a yard sale has an equal right?**
>
> MR. CORTMAN: Well, I think—**I think commercial speech, under this Court's jurisprudence, can be treated differently, and that's one of the important things.** The category here is narrow because government speech—government can put up whatever signs that it would like. It doesn't trigger any problem under the First Amendment.
>
> We hear a lot in the other briefs about warning signs and other types of signs. The government is free to put up all the signs that it would like without triggering this problem.

Commercial speech is also in a different category, according to this Court.

Transcript of Oral Argument at 8–9, *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (January 12, 2015) (No. 13-502) (emphasis added).[4]

B. *Reed* did not expressly overrule any prior precedent, so the *Agostini* principle requires courts to continue to follow this Court's prior precedents in settings where they directly control.

Petitioners' interpretation of *Reed* is further undermined because the decision did not purport to overrule any prior precedent of this Court, including those which (unlike *Reed*) directly addressed and decided the constitutionality under the First Amendment of regulating speech that had not been proven to be dangerous or criminal in nature. The *Reed* decision did not cite, let alone diminish, any of this Court's precedents granting intermediate protection to commercial speech (such as *Central Hudson*, *Metromedia*, or *Ohralik*), or to speech involving adult businesses (such as *Young*, *Renton*, or *Alameda Books*), or to disclosure requirements (such as *Zauderer v. Office of Disciplinary Counsel of Supreme Ct. of Ohio*, 471 U.S. 626 (1985)), or to professional speech (such as *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992)).

In holding out *Reed* as implicitly overruling one or more of these exceptions to the strict scrutiny requirement, Petitioners overlook this Court's principle that

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[4] Transcript *available at* https://www.supremecourt.gov/oral_arguments/argument_transcripts/2014/13-502_2034.pdf

it does not overrule its own decisions by mere implication: "[I]f a precedent of [the] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions," lower courts "should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions." *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (citation omitted).

The *Agostini* principle against overruling decisions by implication should apply even more forcefully to interpretations of *Reed*, where speech entitled to only intermediate protection was not before this Court, and even the prevailing party readily acknowledged to the Court at oral argument that the one category of such speech questioned about—commercial speech—should continue to be treated differently.

C. By "confronting" the question in *Matal v. Tam* of "whether trademarks are commercial speech and are thus subject to the relaxed scrutiny outlined in" *Central Hudson*, this Court demonstrated that *Reed* had not impliedly overruled *Central Hudson*.

Matal v. Tam presented an opportunity for this Court to demonstrate whether the intermediate scrutiny test of *Central Hudson* survived *Reed*. *Matal* involved "the content of trademarks that are registered by the PTO," 137 S. Ct. at 1758, and a "dispute between the parties on the question whether trademarks are commercial speech," *id.* at 1763. Recognizing that the Court "must confront" that dispute, the plurality opinion reaffirmed that commercial speech is "subject to the relaxed scrutiny outlined in" *Central Hudson*, *id.*, then concluded that the statute "cannot withstand even *Central Hudson* review," *id.* at 1764.

No other justice joined Justice Thomas's opinion in *Matal* that reiterated his view that "when the government seeks to restrict truthful speech in order to suppress the ideas it conveys, strict scrutiny is appropriate, whether or not the speech in question may be characterized as 'commercial.'" *Id.* at 1769 (Thomas, J., concurring in part and concurring in the judgment) (quoting *Lorillard Tobacco Co.*, 533 U.S. at 572 (Thomas, J., concurring in part and concurring in judgment)).

III. IF THIS COURT FINDS STRICT SCRUTINY APPLICABLE IN THIS CASE, IT SHOULD REFRAIN FROM ANY PRONOUNCEMENTS THAT HOLD OR SUGGEST THAT STRICT SCRUTINY IS A UNIVERSAL TEST FOR LAWS REGULATING PROTECTED SPEECH.

Petitioners are not simply trying to win their case, but seek to win their case through blanket declarations that would reduce much of First Amendment law to two or three often-unattainable standards. A broad range of justices with differing perspectives have warned of the dangers of writing too broadly when deciding First Amendment cases. *See, e.g.*, *Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003) ("We recognize that the D.C. Circuit spoke too broadly when it declared copyrights 'categorically immune from challenges under the First Amendment.'") (Ginsburg, J.); *Roth v. United States*, 354 U.S. 476, 496–500 (1957) (Harlan, J., concurring in part and dissenting in part) (criticizing the majority opinion because, in upholding convictions in consolidated obscenity cases, "the opinion paints with such a broad brush," and even though "in the nature of things every such suppression raises an individual constitutional problem," the "Court merely

assimilates the various tests into one indiscriminate potpourri"); *id.* at 494 (Warren, C.J., concurring in the result) (criticizing the majority's "broad language" in a case where "we are operating in a field of expression").

Here, there is a further reason for the Court to choose its words with special care. Since *Reed*, courts around the country have correctly continued to rely on the recognized exceptions noted above. Changing course now would upend not only existing Supreme Court precedent but the holdings of numerous lower courts around the country. It would also require local governments around the country to rewrite many of their ordinances that have relied on decades-old Supreme Court precedent.

A. Commercial speech

Intermediate and district federal courts have overwhelmingly recognized that *Reed* did not supplant the more deferential standards of review that have traditionally applied to commercial speech regulations. *See, e.g.*, *Dana's R.R. Supply v. Attorney Gen., Florida*, 807 F.3d 1235, 1246 (11th Cir. 2015) (acknowledging *Reed* but stating that "[c]ontent-based restrictions on certain categories of speech such as commercial and professional speech, though still protected under the First Amendment, are given more leeway" and are subject to intermediate scrutiny); *Boelter v. Hearst Commc'ns, Inc.*, 269 F. Supp. 3d 172, 196 & n.11 (S.D.N.Y. 2017) (reiterating and reapplying the district court's prior determination, *see* 192 F. Supp. 3d 427, 447 n.10 (S.D.N.Y. 2016), that "[a]bsent controlling precedent to the contrary, the [c]ourt continues to apply intermediate, rather than strict, scrutiny to content-based regulations targeting commercial speech"); *Vugo, Inc. v. City of Chicago*, 273 F. Supp. 3d 910, 915–16 (N.D. Ill. 2017) (holding that an ordinance

that "is a broad ban on commercial advertising that applies in a narrow medium: transportation network vehicles" should be analyzed under "the *Central Hudson* framework"); *RCP Publ'ns Inc. v. City of Chicago*, 204 F. Supp. 3d 1012, 1018 (N.D. Ill. 2016) (rejecting the argument that *Reed* "expressly modif[ied] or overrule[d]" *Central Hudson* and concluding that "*Central Hudson* and its progeny continue to control the propriety of restrictions on commercial speech"); *Geft Outdoor LLC v. Consol. City of Indianapolis*, 187 F. Supp. 3d 1002, 1014–16 (S.D. Ind. 2016) (first applying *Reed* to a later-amended ordinance that exempted noncommercial opinion signs from permit requirements that applied to commercial signs, and finding that the exemption violated the First Amendment, but in analyzing the amended ordinance, which applied an on-premise/off-premise distinction only to commercial speech, citing the *Agostini* principle to hold that the amended ordinance was "subject to intermediate rather than strict scrutiny" under *Metromedia*); *Mass. Ass'n of Private Career Sch. v. Healey*, 159 F. Supp. 3d 173, 192 (D. Mass. 2016) (applying intermediate scrutiny to regulation of commercial speech pursuant to *Central Hudson* and stating that "almost all" of the courts to have addressed the issue have "concluded that *Reed* does not disturb the Court's longstanding framework for commercial speech under *Central Hudson*"); *Peterson v. Village of Downers Grove*, 150 F. Supp. 3d 910, 928 (N.D. Ill. 2015) ("What is important for this case [involving regulation of a business's painted wall signs] is that, absent an express overruling of *Central Hudson*, which most certainly did not happen in *Reed*, lower courts must consider *Central Hudson* and its progeny—which are directly applicable to the

commercial-based distinctions at issue in this case—binding.").[5]

State courts have also taken this approach. *See Lamar Cent. Outdoor, LLC v. City of Los Angeles*, 199 Cal. Rptr. 3d 620, 625 (Ct. App. 2016) (stating, in rejecting a facial challenge to the city's stricter regulation of billboards over on-premise signage, that "*Reed* is of no help to plaintiff either" because "[l]ike *Sorrell*, it does not purport to eliminate the distinction between commercial and noncommercial speech," "does not involve commercial speech," and "does not even mention *Central Hudson*," nor cite, overrule or disapprove of *Metromedia*); *Expressview Dev., Inc. v. Town of Gates Zoning Bd. of Appeals*, 147 A.D.3d 1427, 1431 (N.Y. App. Div. 2017) (stating that *Reed* "did not overturn the prevailing intermediate scrutiny test for

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[5] *See also, e.g.*, *Nationwide Biweekly Admin., Inc. v. Owen*, 873 F.3d 716, 732 (9th Cir. 2017) (rejecting the argument that *Reed* "undermines both *Central Hudson* intermediate scrutiny and *Zauderer* rational basis review, and that all content-based restrictions (or compelled disclosures) of commercial speech are now subject to strict scrutiny"); *Airbnb, Inc. v. City of San Francisco*, 217 F. Supp. 3d 1066, 1078 (N.D. Cal. 2016) (stating that even after *Reed* and *Sorrell*, "commercial speech, even if content-based, need only withstand intermediate scrutiny under *Central Hudson*" (citing *Lone Star Sec. & Video, Inc. v. City of Los Angeles*, 827 F.3d 1192, 1198 n.3 (9th Cir. 2016)); *CTIA-The Wireless Ass'n v. City of Berkeley*, 139 F. Supp. 3d 1048, 1061 (N.D. Cal. 2015) (finding that "nothing in [the Supreme Court's] recent opinions, including *Reed*, even comes close to suggesting that" the "well-established distinction" between commercial and noncommercial speech "is no longer valid"); *Citizens for Free Speech, LLC v. County of Alameda*, 114 F. Supp. 3d 952, 969 (N.D. Cal. 2015) (explaining that "*Reed* was specifically concerned with a sign code's application of different restrictions . . . to permitted signs based on their content" and instead applying *Central Hudson* to regulation of billboards).

restrictions on commercial speech set forth in *Central Hudson*"); *Auspro Enters., LP v. Tex. Dep't of Transp.*, 506 S.W.3d 688, 703 (Tex. App. 2016) (stating that *Reed* "is necessarily limited to government regulation of noncommercial speech").

B. Sexually oriented businesses

Many courts have likewise concluded that *Reed* did not implicitly overrule 40 years of this Court's precedent related to regulations of sexually oriented businesses. In *BBL, Inc. v. City of Angola*, 809 F.3d 317, 326 n.1 (7th Cir. 2015), the court of appeals noted that Reed clarified the concept of "content based laws," but concluded: "We don't think *Reed* upends established doctrine for evaluating regulation of businesses that offer sexually explicit entertainment, a category the Court has said occupies the outer fringes of First Amendment protection." Similarly, in *Flanigan's Enters., Inc. of Georgia v. City of Sandy Springs*, 703 F. App'x 929, 935 (11th Cir. 2017), the court concluded that because *Reed* had not addressed the secondary effects doctrine—and the resulting application of intermediate scrutiny on regulation of sexually oriented businesses—it would continue to follow the rationale set forth in *Young*, *Renton*, and *Alameda Books*. Numerous district courts deciding cases after *Reed* have also reached the same conclusion. *See, e.g.*, *"Q"-Lungian Enters., Inc. v. Town of Windsor Locks*, 272 F. Supp. 3d 289, 29 (D. Conn. 2017); *Cinema Pub, LLC v. Petilos*, No. 2:16-CV-00318-DN, 2017 WL 3836049, at *10 (D. Utah Aug. 31, 2017); *Phantom Ventures LLC v. DePriest*, 240 F. Supp. 3d 239, 252 (D. Mass. 2017).

IV. THIS COURT SHOULD NOT SUBJECT DISCLOSURE REQUIREMENTS TO STRICT SCRUTINY.

This case directly challenges the constitutionality of a disclosure requirement. Many laws that impose disclosure requirements are aimed at commercial speech, because they require the inclusion of disclosures when companies propose a commercial transaction. *See Virginia Pharmacy*, 425 U.S. at 771 n.24. For the reasons set forth above, those kinds of disclosure requirements should not be subject to strict scrutiny in any scenario. *See, e.g., Zauderer*, 471 U.S. at 637–38; *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 249 (2010) (referring to *Zauderer* as providing for "less exacting scrutiny").

Local governments adopt (or are involved in enforcing) many important disclosure requirements that would be considered content-based under Petitioners' interpretation of *Reed*, and that do not likely fall within the scope of this Court's definition of commercial speech. Agreeing with Petitioners that all compelled speech must be subject to strict scrutiny would create a wake large enough to swamp these types of important and familiar laws:

- Ordinances and statutes that require restaurants to post signs explaining how to provide first aid to choking patrons. *See, e.g.*, Ky. Rev. Stat. Ann. § 217.285 (2017); N.H. Rev. Stat. Ann. § 155:43 (2018); Cincinnati, Ohio, Code of Ordinances § 601-33 (2018); *see also Parra v. Tarasco, Inc.*, 595 N.E.2d 1186, 1188-89 (Ill. Ct. App. 1992) (collecting states with similar statutes).

- Ordinances and laws in most states that require landlords to post or otherwise disclose the name and address of the managing agent or owner of residential rental buildings. *See, e.g.*, Ind. Code Ann. § 32-31-3-18(a) (2017); New York, N.Y., Health Code § 131.11 (2018).
- Laws that require restaurants to provide written notice to their patrons to use clean tableware for second portions at salad bars and buffets. *See, e.g.*, 25 Tex. Admin. Code Ann. § 228.68(f)(2) (2018).
- Ordinances requiring applicants for land-use approvals to post signs on the site that identify the approval sought and persons to contact to participate in the approval process. *See, e.g.*, Edina, Minn., Code of Ordinances § 36-194(a) (2018).
- Ordinances and laws that require businesses selling food to post signs directing employees to wash their hands. *See, e.g.*, New York, N.Y., Health Code § 81.21(c) (2018).
- Ordinances (including those based on a broadly-adopted standard building code) that require a sign of a particular size and typeface identifying the street address, so that first responders can find it without difficulty. *See, e.g.*, Margate, Fla., Code of Ordinances art. XXXIX, § 39.4(C) (2018); *see also* Int'l Prop. Maint. Code § 304.3 (2015) (adopted by reference in cities such as Rockford, Ill., Code of Ordinances § 105-197 (2017), and Allendale Township, Mich., Ordinance No. 2017-6).
- Ordinances and statutes that require holders of swimming pool permits to post safety information,

such as state-imposed rules for water slides and rules against underwater breath-holding contests. *See, e.g.*, Nev. Admin. Code § 444.1974 (2015) (requiring disclosure of fourteen water-slide use rules); New York, N.Y., Rules tit. 24, § 1-02 (2018) (requiring signage warning swimmers of the dangers of breath-holding contests).

In the medical setting as well, the fundamental requirement that physicians obtain informed consent from patients goes beyond commercial speech, because the duty does not cease once the financial arrangements are agreed upon. "The cases demonstrate that the physician is under an obligation to communicate specific information to the patient when the exigencies of reasonable care call for it. Due care may require a physician perceiving symptoms of bodily abnormality to alert the patient to the condition." *Canterbury v. Spence*, 464 F.2d 772, 781 (D.C. Cir. 1972) (footnotes omitted).

As a practical matter, informed-consent requirements are *necessarily* "content-based" as Petitioners would interpret *Reed*, because they do not simply require physicians to speak with patients on a topic of the physician's own choice, but require that they speak with patients about a particular subject—most often the risks and consequences of a potential medical procedure, and of foregoing the procedure.[6] "Just as

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[6] Contrary to the suggestion in the amicus brief of Texas and other states, under tort law informed consent is not simply "required specifically so that the patient can assess the risks and consequences of a procedure *that a doctor is seeking to perform*." State of Texas et al. Br. 14 (emphasis added). The doctrine can also require a healthcare provider to disclose the likely consequences of deciding *not to undergo* a procedure such as a vaccination, and alternative methods of protection. *See, e.g.*,

plainly, due care normally demands that the physician warn the patient of any risks to his well-being which contemplated therapy may involve." *Id.* As this Court held in *Casey*: "Our prior decisions establish that *as with any medical procedure*, the State may require a woman to give her written *informed* consent to an abortion." 505 U.S. at 881 (emphasis added).

Although requiring such disclosures often advances a fundamental interest in personal autonomy, *Canterbury*, 464 F.2d at 781, the Court should not interpret that as a reflection that informed-consent requirements are constitutional only because they would satisfy strict scrutiny. Strict scrutiny under the First Amendment of the application of informed-consent requirements would subject countless individualized communications to de novo judicial review. First Amendment strict scrutiny of such disclosure requirements would also add a substantial federal question into many ordinary malpractice cases, perhaps making a petition for certiorari the new final

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Unthank v. United States, 732 F.2d 1517, 1521 (10th Cir. 1984) ("We believe that encompassed in the duty to inform a patient of all material information, substantial and significant risks is the duty to inform not only of risks that might occur from the particular treatment in question, *but also, any alternative treatments and the risk of no treatment at all.*" (emphasis added)); *Matthies v. Mastromonaco*, 733 A.2d 456, 461 (N.J. 1999) ("Physicians thus remain obligated to inform patients of *medically reasonable treatment alternatives* and their attendant probable risks and outcomes. Otherwise, the patient, in selecting one alternative rather than another, cannot make a decision that is informed." (emphasis added)). Upholding laws that require disclosures before a *recommended* procedure is undertaken, but mandating First Amendment strict scrutiny of a disclosure requirement because it applies to those (like Petitioners) who recommend *against* that procedure, would render important and established state tort law doctrines presumptively unconstitutional.

phase for such matters. "[T]he Court has admonished that federal courts are not the repository for regulation of the practice of medicine." *Texas Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 579 (5th Cir. 2012) (citing *Gonzales v. Carhart*, 550 U.S. 124, 157–58 (2007)).

In light of these real-world examples, and the inherently content-based character of disclosure requirements, the Court should exempt disclosure requirements from the general rule that content-based requirements are presumptively unconstitutional.

CONCLUSION

The Court should affirm the judgment below, or in any case be cautious not to imply that *Reed* overruled longstanding exceptions to the application of strict scrutiny.

Respectfully submitted,

LISA SORONEN
Executive Director
STATE & LOCAL
LEGAL CENTER
444 North Capitol Street NW
Washington, DC 20001
(202) 434-4845
lsoronen@sso.org

JOHN M. BAKER
Counsel of Record
KATHERINE M. SWENSON
KARL C. PROCACCINI
HOLLEY C. HORRELL
VIRGINIA R. MCCALMONT
GREENE ESPEL PLLP
222 S. Ninth Street
Suite 2200
Minneapolis, MN 55402
(612) 373-0830
jbaker@greeneespel.com

Counsel for Amici Curiae

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IN THE
Supreme Court of the United States

NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES, dba NIFLA, et al.,

Petitioners,

v.

XAVIER BECERRA, Attorney General of California, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE STATES OF NEW YORK, CONNECTICUT, DELAWARE, HAWAI'I, ILLINOIS, IOWA, MAINE, MARYLAND, MASSACHUSETTS, MINNESOTA, NEW JERSEY, OREGON, PENNSYLVANIA, VERMONT, VIRGINIA, AND WASHINGTON, AND THE DISTRICT OF COLUMBIA AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

ERIC T. SCHNEIDERMAN
Attorney General
State of New York
BARBARA D. UNDERWOOD*
Solicitor General
STEVEN C. WU
Deputy Solicitor General
JUDITH N. VALE
Senior Assistant Solicitor General
120 Broadway
New York, NY 10271
(212) 416-8020
barbara.underwood@ag.ny.gov
**Counsel of Record*

(Additional counsel listed on signature page.)

QUESTION PRESENTED

The California Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act (FACT Act) requires certain state-licensed medical clinics to notify their patients that the county health department offers information about "public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women." Cal. Health & Safety Code § 123472(a)(1). The California Legislature adopted this modest disclosure requirement to protect public health and ensure that patients facing highly personal and time-sensitive decisions about pregnancy are fully informed of the medical-treatment options available to them.

The amici States address the following question:

Whether the FACT Act's requirement that state-licensed medical clinics notify their patients about the availability of public programs providing free or low-cost medical services is permissible under the Free Speech Clause of the First Amendment.

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INTEREST OF THE AMICI STATES

This case addresses whether the First Amendment permits California to require certain state-licensed medical clinics to disclose indisputably accurate information needed to enable patients to make time-sensitive decisions about the healthcare they will receive during their pregnancies. One of the statutory provisions at issue requires clinics to disclose a simple, uncontroverted fact: that patients may call the county health department to access information about public programs that provide free or low-cost healthcare services to women who are pregnant or planning to be pregnant—including prenatal care, contraception, and abortion.[1] Petitioners challenge this disclosure requirement under the Free Speech Clause of the First Amendment.

Amici States of New York, Connecticut, Delaware, Hawai'i, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Jersey, Oregon, Pennsylvania, Vermont, Virginia, and Washington, and the District of Columbia, have long used disclosure requirements to ensure that state residents receive the information they need to make timely, well-informed decisions involving their health, safety, and legal rights. For example, disclosure rules direct

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[1] Another provision of the statute requires unlicensed clinics to disclose that the facility "is not licensed as a medical facility by the State of California and has no licensed medical provider who provides or directly supervises the provision of services." (Pet. App. 81a.) Amici States agree with the arguments of California and the United States that this disclosure satisfies the First Amendment (Resps. Br. 16-27; U.S. Br. 33-36), and will not separately address the unlicensed-clinic disclosure at any length here.

hospitals to give parents information about safe parenting practices, mandate that physicians advise terminally ill patients about palliative-care options, and require health practitioners to notify people about vaccinations. Amici States have a compelling interest in ensuring that they may continue to rely on such modest disclosures of undisputed facts to provide important information to their residents.

Based on their extensive experiences crafting and implementing disclosure rules, the amici States are also well situated to inform the Court about the ways in which California's modest disclosure requirement appropriately protects both the informational interests of patients who are seeking pregnancy-related care and the speech interests of clinics that provide such care. The disclosure rule protects patients by providing them with important information about pregnancy-related services early enough that they can make fully informed decisions about the most appropriate medical care for their circumstances—whether prenatal care of various kinds, or abortion induced by medication or surgery. And the rule preserves clinics' speech interests by requiring only a neutral disclosure of uncontested facts about the availability of free or low-cost pregnancy-related services—including not only services provided by the clinics (such as prenatal care), but also other services that California has reasonably determined women should be aware of before committing to important healthcare choices affecting their pregnancies. In the States' experience, other disclosure methods—such as a general public information campaign—are less effective at reaching pregnant women during the precise time when they are seeking or receiving pregnancy care and thus most likely to pay attention to pregnancy-related information.

STATEMENT

This case addresses the California Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act (FACT Act), which the California Legislature enacted to ensure that women timely obtain the information they need to make fully informed decisions about pregnancy and care. (*See* Pet. App. 76a-78a; J.A. 54a-58a.) The FACT Act requires certain state-licensed clinics that offer pregnancy-related medical services to provide to their patients the following short disclosure (the Medical Services Disclosure):

> California has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women. To determine whether you qualify, contact the county social services office at [insert the telephone number].

(Pet. App. 80a.)

This disclosure rule applies to clinics that are licensed by California to provide medical care; operate with the "primary purpose" of "providing family planning or pregnancy-related services"; and satisfy two of six enumerated criteria. (Pet. App. 78a-79a.) Cal. Code Regs. tit. 22, § 75026 (clinics must provide medical services through persons authorized by law to provide such services); *id.* § 75027 (clinics must designate licensed physician as professional director and have licensed practitioners present when medical services are provided). The enumerated criteria are: (1) offering pregnancy testing or diagnosis; (2) offering

obstetric ultrasounds or prenatal care; (3) advertising pregnancy tests, prenatal sonography, or pregnancy options counseling; (4) offering abortion services; (5) providing contraceptive methods or counseling about contraception; and (6) collecting health information from patients. (Pet. App. 78a-79a.)

Clinics may provide the disclosure in one of three ways: a printed notice, digital notice, or a sign posted in the clinic. (Pet. App. 80a-81a.) Clinics also may provide the notice in combination with other mandated disclosures. (Pet App. 81a.)

In adopting this modest disclosure rule, the California Legislature determined that to make careful and fully informed decisions about pregnancy care, women need to know about the full spectrum of pregnancy-related services available to them, including prenatal care, health education, abortion, delivery, and contraception. (Pet. App. 76a-77a; *see* J.A. 66, 70.) As the American Nurses Association explained in supporting the Act, informing pregnant women about the full range of available options and funding resources ensures that "pregnant women receive the information they need to make an informed decision" about the healthcare they will receive. (J.A. 43-44.) *See* Act 200, § 1, 29th Leg., Reg. Sess. at 3 (Haw. July 11, 2017) (Hawai'i Legislature explaining that similar disclosure law allows pregnant patients to quickly obtain information needed to make informed and timely decisions about reproductive health).

The California Legislature found that the extremely time-sensitive nature of many pregnancy-related decisions renders receipt of information early in pregnancy particularly critical for patients. (Pet. App. 77a; *see* J.A. 70.) For example, patients who lack

sufficient information about free or low-cost medical-care services may not obtain prenatal care, even though "care early in pregnancy is important" to maintaining maternal and fetal health. (*See* Pet. App. 77a.) *See* Act 200, § 1, at 2 (Hawai'i Legislature's findings); National Insts. of Health, U.S. Dep't of Health & Human Serv., *What is prenatal care and why is it important?* (internet).[2] Women who remain unaware of accessible pregnancy services may not be able to make an informed decision about whether to undergo a medication-induced abortion, a procedure which is much less complex than a surgical abortion and which is often available only early in pregnancy. *See* American Coll. of Obstetrics & Gynecologists, *Frequently Asked Questions: Special Procedures* 2-3 (May 2015) (internet). And if a lack of information causes a woman to delay her pregnancy-related decisions too long, she may lose entirely her right to make the difficult and personal choice to undergo an abortion because many States generally prohibit abortion after a certain gestational age. *See* Guttmacher Inst., *An Overview of Abortion Laws* (Feb. 1, 2018) (internet).

The California Legislature also emphasized that these public-health and patient-protection concerns had been heightened by the practices of many limited-service clinics. (*See* J.A. 39-41). Limited-service clinics are facilities that provide only some pregnancy-related services—such as obstetric ultrasounds, pregnancy testing, and pregnancy diagnosis—but that do not provide or refer patients to the full range of available healthcare options, including abortion services, often

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[2] For sources available on the internet, full URLs are in the Table of Authorities.

because of their opposition to such options. *See* Family Research Council, *A Passion to Serve: Pregnancy Resource Center Service Report* 7-11, 16-21 (2nd ed. 2011).

Indeed, as the California Legislature explained, many limited-service clinics engage in practices that prevent pregnant women from learning about the full range of available pregnancy-related services, thereby delaying patients' ability to make fully informed decisions about the healthcare they can or will receive during pregnancy. (*See* J.A. 39-41, 85.) For example, as inquiries by state Attorneys General and federal and municipal legislators have confirmed, many limited-service clinics mislead or confuse patients into thinking that they can access abortion services by visiting such a clinic when it does not actually offer abortions. *See* N.Y. Att'y Gen., Press Release, Spitzer Reaches Agreement with Upstate Crisis Pregnancy Center (Feb. 28, 2002) (internet).[3] Some limited-service clinics mislead women into declining an abortion by telling patients that they "may be at risk for miscarriage and that abortion may therefore be unnecessary"—even when the likelihood of a miscarriage is low. *See* Joanne D. Rosen, *The Public Health Risks of Crisis Pregnancy Centers*, 44 Persps. on Sexual & Reprod. Health 202 (2012); *see also* Andrea Swartzendruber, et al., *Sexual and Reproductive Health Services and Related Health Information on Pregnancy Resource Center Websites: A Statewide*

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[3] *See also* U.S. House of Representatives, Comm. on Gov. Reform—Minority Staff, *False and Misleading Health Information Provided by Federally Funded Pregnancy Resource Centers* 1-2 (July 2006); N.Y. City Council, Comm. on Women's Issues, Report on Int. Local Law No. 371, at 5-6 (Nov. 16, 2010).

Content Analysis, 28 Women's Health Issues J. 14, 17-18 (2018). Some limited-service clinics falsely tell patients that an ultrasound provided by the clinic can predict the likelihood of miscarriage, despite the fact that ultrasounds do not provide such information. *See* Swartzendruber, *supra*, at 17-18. And limited-service clinics have told patients that "abortions are legal throughout pregnancy" and that patients can thus wait to decide whether to undergo an abortion—even though late-term abortions are often prohibited or severely restricted by state law. Rosen, *supra*, at 202.

The California Legislature concluded that "the most effective way to ensure that [pregnant] women timely obtain" the information they need to make decisions about pregnancy was to require licensed clinics that provide pregnancy-related services to notify patients about the full spectrum of free or low-cost pregnancy services available in the State. (J.A. 49; *see* J.A. 70.) As the Legislature explained, unlike a general statewide information campaign, the disclosure requirement ensures that pregnant patients learn about available pregnancy-related services while they are seeking or obtaining medical care for a pregnancy and thus likely to be paying attention to this information. (J.A. 70.)

SUMMARY OF ARGUMENT

I. California's Medical Services Disclosure fits squarely within a long tradition of disclosure requirements that have been widely adopted by the States and routinely upheld by the courts. States enact disclosure rules to ensure that their residents are properly equipped to make well-informed decisions affecting their own health, safety, and well-being.

Such laws arise in different contexts, but they share the common feature of providing people with important information at a time when they can still meaningfully consider that information in making a decision. And for healthcare in particular, disclosure requirements ensure that patients are fully informed about available treatment options before committing to a choice—thus ensuring that patients, not providers, have the final say over decisions affecting their own bodies.

California's Medical Services Disclosure operates in the same way and serves the same public purposes as many other valid disclosure rules. The disclosure notifies patients who are pregnant (or considering pregnancy) about the full range of free or low-cost pregnancy services that are available in California—indisputably accurate information that is critical for patients making highly personal and time-sensitive decisions about the healthcare they will receive during their pregnancies. And the disclosure conveys this information to patients early enough—when they are seeking or receiving pregnancy services from medical clinics—that they are still able to use this information to make time-sensitive choices about appropriate healthcare. Indeed, absent the disclosure, patients who remain unaware of available public services might lose the ability to make an informed decision about whether to obtain early prenatal care, a medication-induced rather than surgical abortion, or any abortion at all.

II. Like many other valid disclosure laws, the FACT Act comports with the First Amendment by requiring a modest disclosure of "purely factual and uncontroversial information" that is "reasonably related" to the State's patient-protection interests.

Zauderer v. Office of Disciplinary Counsel of the Sup. Ct. of Ohio, 471 U.S. 626, 651 (1985).

First, the Act requires clinics to disclose solely undisputed facts: that public programs in California offer free or low-cost comprehensive pregnancy services, including prenatal care, abortion services, and contraceptive methods, and that patients can obtain more information about such services by calling a county health department's telephone number. Contrary to the contentions of petitioners and their amici, these uncontroverted facts are not "controversial" under *Zauderer* simply because the topic of abortion is a matter of public debate. Many disclosure laws reference facts that touch on issues of public controversy, such as vaccination requirements, palliative-care options, or minimum-wage rules. Under *Zauderer*, such disclosures remain "uncontroversial" so long as they contain only uncontroverted facts, even if a regulated entity would prefer not to provide those facts to its customers. And beyond even what the First Amendment requires, the Medical Services Disclosure is particularly respectful of the clinics' speech: it describes comprehensive pregnancy-related services, rather than focusing on abortion alone; it gives clinics flexibility to provide the disclosure in multiple ways; it specifies that the comprehensive services referenced in the disclosure are offered by others, and thus not endorsed by the clinics; and it leaves clinics free to convey any additional information or messages that they wish.

Second, contrary to the arguments of petitioners and their amici, the fact that California requires clinics to mention certain services—i.e., abortion—that the clinics do not themselves provide directly supports, rather than undermines, the value of the

information conveyed by the Medical Services Disclosure to patients. The relevant question here is whether the facts required to be disclosed are material to the choice that patients are making when they arrive at these clinics. Facts about the clinic's own services certainly satisfy this standard. But so too do facts about other services that a State could reasonably believe are important for a patient to know in order to make a fully informed choice. Many other disclosure rules follow the same model and require regulated entities to provide information—including the availability of public or private resources offered by others—to give particular individuals the full spectrum of information relevant to the choice they are making.

Third, suggested alternative means of disseminating the information contained in the disclosure—such as a publicly funded education campaign—would be less effective than the Medical Services Disclosure. An education campaign aimed at the general public is likely to reach most women when they are not pregnant or considering becoming pregnant, and are thus not likely to pay attention to information about pregnancy services. The Medical Services Disclosure reasonably addresses this problem by ensuring that women receive pregnancy-related information when they seek or receive pregnancy care from a clinic and thus actively need the information to make pregnancy-related decisions.

ARGUMENT

I. Like Many Required Disclosures, the Medical Services Disclosure Ensures that State Residents Receive the Information They Need in a Timely Manner to Make Fully Informed Decisions.

California's Medical Services Disclosure fits squarely within a vast array of disclosure rules that the States have adopted and that the courts have routinely upheld. Disclosure requirements serve critical public purposes by timely and effectively providing individuals with important information that they need to make well-informed decisions about not only the products or services they use but also their own health, safety, and well-being. In doing so, disclosure rules further important state interests in a far less intrusive manner than outright prohibitions on speech or direct regulations of conduct. *See Zauderer*, 471 U.S. at 650-51; *see also Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 369 (2010) ("The Court has explained that disclosure is a less restrictive alternative to more comprehensive regulations of speech"). And disclosure requirements respect the autonomy of individuals by giving them the full breadth of information they need to make a free choice, rather than dictating their choices for them.

Disclosure mandates accomplish these public purposes by requiring the entities that offer goods and services to the public to provide their consumers with factual information relevant to the choices that these individuals are about to make. Timing is critical for such disclosures: if they come too early, when the intended audience is not yet considering the relevant issue, it is unlikely that people will retain the

information; but if the disclosure comes too late, the decision may already be made, and the information no longer useful.

The state interests that justify disclosure laws are sometimes triggered by aspects of the specific products or services that an entity offers. For example, entities that offer products that expose people to health or safety risks are often required to disclose those risks. Manufacturers must label products that contain hazardous materials. *See, e.g.*, 15 U.S.C. § 1261(p) (disclosure includes signal words such as "danger" or "poison" and first-aid instructions); *National Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 107, 113-16 (2d Cir. 2001) (disclosure of mercury and disposal instructions). Establishments or companies that sell alcoholic beverages must warn patrons that drinking alcohol may cause health problems and birth defects. *See* 27 C.F.R. § 16.21; 24 Rules of City of N.Y. § 1-01. Food purveyors must notify customers about the health implications of consuming certain foods. *See, e.g.*, 21 U.S.C. § 343(q) (food labels must list calories, total fat, cholesterol, sodium, and sugars); N.Y.C. Health Code § 81.50 (certain restaurants must post calorie content of menu items); N.J. Stat. § 26:3E-17 (same). And real-estate sellers must advise home-buyers about the presence and dangers of lead paint, lead pipes, asbestos, and other toxic substances in a residence. *See* 42 U.S.C. § 4852d (lead paint); 40 C.F.R. § 745.107 (lead paint); N.Y. Real Prop. Law § 462 (pipes, asbestos, toxic substances). As these examples demonstrate, such disclosure rules are crafted to provide information to state residents while they are considering buying or using a product or service, thereby maximizing the likelihood that people

will consider the risks when making decisions about what to buy or use.

Healthcare disclosures sometimes serve the same purpose—such as requirements that physicians inform patients about the risks of a particular medical procedure to ensure that a patient can give fully informed consent to undergo that procedure. *See* Texas Br. 6-7. But mandatory disclosures in this field are not limited to providing information about a physician's own services. States also often require disclosures to ensure that patients are aware of the full range of healthcare options available to them, and the consequences of each option—so that, for example, nobody selects a difficult and risky surgery without at least knowing that less invasive nonsurgical options are also available, even if those options may also be less effective. Thus, certain hospitals and healthcare facilities must inform patients about their rights under state law to "make decisions concerning such medical care, including the right to accept or refuse medical or surgical treatment and the right to formulate advance directives." 42 U.S.C. § 1395cc(f)(1)(A).[4] And in several States, including Massachusetts and Minnesota, healthcare providers must disclose the estimated costs of medical care options to patients who request such information. *See* Mass. Gen. Laws ch. 111 § 228; Minn. Stat. §§ 62J.81, 62J.823. Just like informed-consent laws, these disclosures advance the States' compelling interests in

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[4] *See also* Conn. Gen. Stat. § 19a-580h(c) (prior to requesting signature for life-sustaining treatment, provider must discuss patient's goals and documenting wishes for end-of-life treatment); Mass. Gen. Laws ch. 111 § 70E (disclosure of patients' rights); N.J. Stat. § 26:2H-12.9 (same).

promoting public health and protecting patients by providing patients with important information on which to base their healthcare decisions. And these disclosure rules do so by conveying the information to patients while they are seeking or receiving medical care and thus contemplating the very decisions for which the information is important—including the decision whether to go forward with the particular treatment option offered by a provider.

Because patients' healthcare decisions are often time sensitive, States routinely determine that the best avenue for making these disclosures is to have healthcare providers themselves give the information to patients directly, because the providers are likely interacting with the patient at the very moment when they are considering the choice that may be affected by that information. For example, in some States, maternal health facilities must post information about the rights of breastfeeding mothers or the dangers to pregnant women of eating foods containing mercury.[5] Many States require providers of childbirth services to give patients information about, among other things, shaken baby syndrome, sudden infant death syndrome, safe infant sleeping practices, or newborn hearing screening programs.[6] Healthcare facilities and schools (including private schools) that serve parents and children are often required to disseminate information

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[5] *See* N.Y. Pub. Health Law § 2505-a(1); N.J. Stat. § 26:2-179.

[6] *See* N.Y. Pub. Health Law § 2803-j(1-c), (1-d); Cal. Health & Safety Code § 1254.6; Fla. Stat. §§ 383.311, 395.1053; Ill. Comp. Stat. ch. 210, 85/11.7; *id.* ch. 410, 260/20; Mich. Comp. Laws § 333.5885; Neb. Revised Stat. §§ 71-2101, 71-2103; N.J. Stat. § 26:2-103.5; Ohio Rev. Code § 3701.64; Tex. Health & Safety Code § 161.501; Wis. Stat. § 253.15.

about vaccinations—such as the risks and benefits of immunizations or a list of state-mandated inoculations.[7] And in several States, physicians who diagnose a patient with a terminal illness must offer to discuss palliative-care options with the patient, such as hospice care and the patient's legal rights to "comprehensive pain and symptom management at the end of life."[8] In each of these examples, requiring the provider to disclose specific factual information to its patients will funnel such information to the right people at the right time.

The Medical Services Disclosure operates in the same way and serves the same goals as the many other disclosures that States rely on to protect patients and promote public health. Like other disclosure requirements that address safety, health, or medical treatment, the Medical Services Disclosure provides patients with basic facts that are critical to making highly sensitive and difficult decisions. Any patient seeking or receiving pregnancy-related medical

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[7] *See* N.Y. Pub. Health Law § 2167(2)(c) (colleges must distribute information about meningitis immunizations); N.J. Stat. §§ 26:2N-3, 26:2N-7.1 (hospitals and birthing facilities must provide information about pertussis vaccine, including risks of pertussis, mortality rates among infants suffering from pertussis, and efficacy of vaccine); Tex. Health & Safety Code § 161.501(a) (provision of resource pamphlet containing list of diseases subject to mandatory immunizations).

[8] *See* N.Y. Pub. Health Law §§ 2997-c(2)(a), 2997-d; Cal. Health & Safety Code § 442.5(a)(1) (disclosure of right to "comprehensive information and counseling regarding legal end-of-life options"); Mich. Comp. Laws § 333.5655(c) (disclosure that patient may choose palliative-care treatment); Vt. Stat. tit. 18, § 1871(b) (terminally ill patient has "right to be informed by a clinician of all available options related to terminal care").

services faces a host of choices "fraught with consequences," *see Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 852 (1992) (plurality op.), such as whether to obtain prenatal care and, if so, which types of care to pursue. And a patient whose pregnancy is unintended faces one of "the most intimate and personal choices a person may make in a lifetime": the choice either to continue her pregnancy or to terminate it. *Id.* at 853. To ensure that such choices are "mature and informed," *id.* at 881, the Medical Services Disclosure apprises pregnant women of the full range of free or low-cost pregnancy services that may be available to them—including prenatal care, contraception, and abortion.

The Medical Services Disclosure is also structured to provide this crucial information to pregnant patients while they are seeking or receiving pregnancy-related medical services and thus actively in need of information about the available service options. The clinics that are subject to the notification requirement are licensed by California to provide medical procedures and have the primary purpose of providing family-planning and pregnancy-related services. See *supra* at 3-4. By their nature, the clinics thus serve the precise individuals who need information about comprehensive pregnancy-related services. And the clinics interact with those patients while they are facing the difficult decisions for which such information is required. Just as physicians who diagnose a terminal illness are well situated to inform the patient about palliative care, the clinics are well positioned to inform pregnant patients about public programs offering comprehensive pregnancy care. (*See* J.A. 70)

Indeed, by requiring the clinics to issue the disclosure, California's statute ensures that patients obtain the needed information as early as possible during their pregnancies—a critical feature given the time-sensitive nature of pregnancy decisions. Clinics may be the first medical professionals to diagnose or discuss a patient's pregnancy. (*See* Pet App. 78a-79a.) Understanding the full spectrum of available free or low-cost pregnancy-related services is crucial for patients at this critical moment. Absent such information, a patient may decline to obtain prenatal care or may choose to terminate her pregnancy based on the incorrect conclusion that she could not afford medical treatment—a decision she "may come to regret" when she learns that free prenatal services were available all along. *See Gonzales v. Carhart*, 550 U.S. 124, 159 (2007). A patient who remains unaware of the available treatment options early in her pregnancy might also lose the ability to make an informed decision about whether to obtain a medication-induced abortion rather than a surgical abortion—removing what might be the best option for her. And a patient who delays her pregnancy-related decisions too long based on a lack of knowledge about pregnancy services might lose entirely her constitutional right to make a dignified and autonomous choice about whether to terminate her pregnancy because many States, including California, generally prohibit or severely restrict abortion after a certain point in a pregnancy. *See* Cal. Health & Safety Code § 123468(b). The Medical Services Disclosure avoids such consequences from a simple lack of knowledge by equipping each clinic patient with the information she needs to decide matters of "serious and personal consequences of

major importance to her own future." *Casey*, 505 U.S. at 916 (plurality op.).

II. California's Requirement of a Modest Disclosure of Uncontroverted Facts Comports with the First Amendment.

It is well-established that a State may require disclosure of "purely factual and uncontroversial information" that is "reasonably related" to a state interest and that is not "unduly burdensome." *Zauderer*, 471 U.S. at 651; *see Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 249 (2010). Petitioners and their amici assert that this principle does not apply to California's Medical Services Disclosure because (a) the disclosure concerns a subject that petitioners strongly oppose; (b) the disclosure is not related to services that petitioners provide; and (c) there were other, better ways that California could have conveyed the same information to the intended audience. None of these limitations finds support in this Court's precedents, and accepting them would severely hobble the States' policymaking authority to use disclosures to convey critical information to their residents.

A. The First Amendment Permits Mandatory Disclosures of Uncontroverted Facts Even When the Regulated Entity Objects to Making the Disclosure.

1. The Medical Services Disclosure consists solely of uncontroverted factual information about services that are indisputably available to California residents.

By informing patients of medical services that are indisputably available in California, and providing them a telephone number they can call for more information, the Medical Services Disclosure contains "purely factual and uncontroversial information." *Zauderer*, 471 U.S. at 651. Because petitioners do not dispute the facts that they must disclose, *see American Meat Inst. v. United States Dep't of Agric.*, 760 F.3d 18, 27 (D.C. Cir. 2014) (en banc), the First Amendment allows California to mandate the disclosure of those facts.

Petitioners and their amici contend that the Medical Services Disclosure is controversial under *Zauderer*, and thus cannot permissibly be mandated, because the disclosure references a subject that petitioners strongly oppose—namely, abortion. *See* Pet'rs Br. 1-2, 17, 45, 49; *see, e.g.*, Texas Pregnancy Centers Br. 8. But the facts contained in the Medical Services Disclosure are not "controversial" under *Zauderer* simply because abortion is a matter of religious or public debate. *See* Pet'rs Br. 1, 17, 24-26, 39; U.S. Br. 24-25. Rather, the question under *Zauderer* is whether the facts in a mandatory disclosure are "uncontroversial" in the sense of being "uncontroverted"—i.e., not subject to dispute. *See*

Kimberly-Clark Corp. v. District of Columbia, No. 17-1901, – F. Supp. 3d –, 2017 WL 6558500, at *8 (D.D.C. Dec. 22, 2017) (disclosure is "controversial" when there is disagreement over "the facts required to be disclosed"). This limitation prevents States from requiring regulated entities to express opinions or values, rather than facts, or to support one side of a factual dispute. *See Zauderer*, 471 U.S. at 651; Jennifer M. Keighley, *Can You Handle the Truth? Compelled Commercial Speech and the First Amendment*, 15 U. Pa. J. Const. L. 539, 569-75 (2012) (*Zauderer* standards apply to factual information rather than opinions). But when a fact is not disputed, a regulated entity has only a "minimal" First Amendment interest in withholding that fact from the public. *Zauderer*, 471 U.S. at 651.

That interest is "minimal" even when, as here, the entity would strongly prefer not to disclose an indisputable fact. In *Milavetz*, this Court upheld a federal requirement that certain entities describe themselves as debt relief agencies despite the plaintiff's strong "preference...for referring to itself as something other than a 'debt relief agency'—e.g., an attorney or a law firm." 559 U.S. at 251. The disclosure complied with the First Amendment, despite the plaintiff's vehement objection to making it, because the facts conveyed were "necessarily accurate." *Id.* In other words, what was "uncontroversial" about the mandatory disclosure in *Milavetz* (as in *Zauderer*) was not the regulated entity's agreement with the disclosure, but rather the fact that the disclosure concerned an uncontroverted fact—even if it was one that the regulated entity would prefer not to have conveyed.

Indeed, disclosure requirements are often enacted precisely *because* regulated entities do not want to mention uncontested facts that a legislature has determined are important for people to know. For example, Congress determined that disclosing a food product's country of origin supplies consumers with critical food-safety information, and the D.C. Circuit upheld that mandatory disclosure even though food distributors strongly preferred not to make it. *See American Meat*, 760 F.3d at 21, 23-25. And New York City concluded that disclosing the calorie content in menu items provides restaurant patrons with important health and dietary information, even though restaurant owners did "not want to communicate... that calorie amounts should be prioritized" over other nutritional information. *New York State Rest. Ass'n v. New York City Bd. of Health*, 556 F.3d 114, 134-37 (2d Cir. 2009). Allowing such preferences to require application of strict scrutiny to disclosure rules, rather than the deferential scrutiny set forth in *Zauderer*, would impede the States' ability to make reasonable legislative judgments about the value of providing certain information to state residents in time to make personal decisions about their health and well-being.

Indeed, many mandatory disclosures of uncontroverted facts will touch on "important matter[s] of public concern" about which people will hold strong religious, political, or moral views. Pet'rs Br. 17; *see* U.S. Br. 24. Requiring those views to take precedence over the public interest in obtaining accurate information would significantly threaten the States' ability to rely on disclosure requirements. For example, employers could challenge labor-law disclosures based on vehement political objections to minimum-wage requirements, immigrant-worker

protections, or public enforcement of anti-discrimination laws. *See* Business Council of N.Y. State, Inc., Minimum Wage Legislative Memo in Opposition (Feb. 3, 2016) (internet) (opposing legislation to raise New York's minimum wage). And healthcare practitioners could undermine public-health disclosure rules by asserting strong religious or cultural opposition to vaccinations, palliative care, or certain medical treatments. *See* College of Physicians of Phila., *Cultural Perspectives on Vaccination, History of Vaccines* (Jan. 10, 2018) (internet); Steven M. Steinberg, *Cultural and Religious Aspects of Palliative Care*, 1 Int'l J. Critical Illness & Injury Sci. 154 (2011). Because the Free Speech Clause's protections are not limited "to religious activity and institutions alone" or to "any [particular] field of human interest," *Thomas v. Collins*, 323 U.S. 516, 531 (1945), all such objections would trigger heightened or even strict scrutiny under petitioners' view. *Cf. United States v. United Foods, Inc.*, 533 U.S. 405, 413 (2001) ("[S]peech need not be characterized as political before it receives First Amendment protection."). The sweeping and disruptive consequences of petitioners' theory demonstrate that the touchstone for *Zauderer* is not whether a disclosure touches on an issue of debate, but rather whether a disclosure contains only uncontroverted facts.

The information required by the Medical Services Disclosure falls squarely on the factual side of the line. There is no dispute that patients in California may access free or low-cost comprehensive medical services, including prenatal care, abortion services, and contraceptive methods; and there is no dispute that the telephone number listed in the disclosure will provide further information to interested individuals. The First Amendment permits California to require

licensed clinics to provide these uncontroverted facts about healthcare choices to their patients.

2. The narrow and cabined nature of the Medical Services Disclosure properly respects petitioners' strongly held views.

While a regulated entity's objection to conveying uncontroverted facts imposes no constitutional barrier to a disclosure requirement, States can and regularly do respect such strongly held views by crafting mandatory disclosures that come nowhere close to the limits imposed by the First Amendment. As California has explained (Resps. Br. 29), it strove to accommodate the moral beliefs of petitioners (and other similar facilities) by cabining the Medical Services Disclosure in several ways that further guard against any interference with petitioners' speech.

First, the Medical Services Disclosure is careful not to endorse any particular treatment for women. Rather, the disclosure simply informs patients of the availability of *comprehensive* pregnancy services, including not only abortion but also prenatal care for women who choose to maintain their pregnancies, and provides a telephone number to obtain more information. The disclosure thus does not put any thumb on the scale as to which options patients should choose. *Cf. Evergreen Ass'n v. City of New York*, 740 F.3d 233, 250-51 (2d Cir. 2014) (disclosure rule requiring clinics to state that health department "encourages" patients to "consult with a licensed provider" violated First Amendment).

Second, the statute provides clinics with considerable flexibility to provide the disclosure in one

of three ways, each of which is a familiar disclosure format that medical facilities already use to notify patients about many other undisputed facts. *See Milavetz*, 559 U.S. at 252 (upholding statute that provided "flexibility to tailor the disclosures to... individual circumstances"). Clinics may provide the notification by giving patients a simple form in hard copy or electronic format (Pet. App. 81a)—both of which are common methods for disclosing information to patients who are visiting healthcare facilities. *See* NYU Langone Health, *Patient Forms* (internet). Clinics are permitted to combine the notice with other required disclosures (Pet. App. 81a), such as information privacy notifications under the Health Insurance Portability and Accountability Act. *See* 45 C.F.R. § 164.520(c)(2). And clinics may post a small notice where patients may read the sign (Pet. App. 80a)—a disclosure format that abounds in a variety of contexts, including not only healthcare but also food service, construction, and employment. *See* Illinois Hosp. Ass'n, Hospital Patient and Visitor Signage: Illinois Requirements (2011) (internet) (listing seventeen signs that hospitals may need to post); New York City, NYC Checklist for Required Signs for Restaurants & Bars (2014) (internet) (listing forty nine signs that restaurant may need to post); N.Y. Dep't of Labor, Posting Requirements: New York State Posting Requirements (Non-Agricultural) (internet) (listing ten signs that employers may need to post).[9]

The ubiquity of the types of disclosure methods permitted under California's statute belies petitioners' contention (Pet'rs Br. 37-39) that complying with the

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[9] *See also* U.S. Dep't of Labor, *Workplace Posters* (internet) (listing ten signs that employers may need to post).

Medical Services Disclosure would be so burdensome as to "effectively rule[] out" the clinics' ability to convey their chosen messages about pregnancy and abortion to patients. *See Ibanez v. Florida Dep't of Bus. & Prof'l Regulation, Bd. of Accountability*, 512 U.S. 136, 146-47 (1994). As California explains (Resps. Br. 42-44), patients are already fully accustomed to receiving forms from their doctor or viewing signs in the doctor's office. Because these other familiar disclosures do not already interfere with petitioners' speech, there is no reasonable possibility that adding just one other form or sign would prevent petitioners from conveying their chosen message to their patients.

Third, the Medical Services Disclosure avoids burdening petitioners' speech by specifying that the medical services referred to in the notice are sponsored by California rather than the clinics, and that more information about those services may be accessed by contacting the county health department. (Pet. App. 80a.) This exclusive focus on public programs offered by others wards against any possible suggestion that the clinics offer or endorse any medical treatments that they actually oppose. The suggestion of the United States and petitioners' amici (*see* U.S. Br. 25-26; Tex. Br. 3, 14) that the disclosure is somehow *more* intrusive because it references state-sponsored programs thus gets the burden inquiry backwards. The disclosure is *less* burdensome because it makes plain that the State, rather than the clinics, is the source of the referenced factual information. No reasonable patient could mistake the disclosure as reflecting the clinics' views.

Fourth, the two-sentence Medical Services Disclosure does not prevent clinics "from conveying any additional information" to patients. *See Milavetz,*

559 U.S. at 250. Clinics remain free to encourage women to continue a pregnancy rather than obtain an abortion. *See* Pet'rs Br. 1, 5-6. They may continue to express their "profound moral and ideological disagreement" with abortion. *See id.* at 1. And they may advise patients to seek out pregnancy-related services other than the programs offered by California, and may provide patients with information about such services—including, for example, adoption agencies. *See id.* Because the Medical Services Disclosure does not affirmatively restrict *any* speech by the clinics, and instead requires only a modest disclosure alongside many other disclosures of equally uncontroverted facts, it imposes little if any burden on the clinics' speech.

Indeed, the Medical Services Disclosure is far less intrusive than the mandated disclosures that abortion providers often must give to their patients under other States' laws. Many of the rules applicable to abortion providers require physicians to disclose public programs and third-party resources aimed *solely* at encouraging a woman to continue rather than terminate her pregnancy—rather than, as here, requiring disclosure of a broad range of pregnancy-related healthcare options.[10] Likewise, many of the rules applicable to abortion providers dictate the precise format of the disclosures and require them to be

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[10] *See, e.g.*, Tex. Health & Safety Code § 171.012 (disclosures about medical assistance benefits for prenatal, neonatal, and childbirth care, and brochure listing agencies that offer alternatives to abortion); S.D. Codified Laws § 34-23A-10.1 (disclosure stating that, inter alia, "information on discontinuing a drug-induced abortion is available on the [State's] Department of Health website").

provided in a live oral conversation in which the physician must convey the state-mandated information through his or her own voice.[11] Such requirements intrude far more on the physician's own speech than a requirement to include a written notice in a packet of forms or a sign on the wall among other posters. And unlike the Medical Services Disclosure, the disclosures required of abortion providers are usually lengthy and complicated, mandating several different multi-pronged disclosures about not only various available resources but also the risks of abortion or the probable gestational age of the fetus.[12] If these more intrusive disclosure statutes withstand First Amendment scrutiny—a point on which the amici States take no position in this brief, but that petitioners and their amici assert—then California's modest and more balanced disclosure rule necessarily does as well.

In light of the undisputed accuracy of the facts conveyed in the Medical Services Disclosure, and the further limitations that California has placed on the disclosure, there is no basis for petitioners' complaint that they are being required to "advertise for abortion" (Pet'rs Br. 1; *see also id.* at 49; U.S. Br. 10, 24-25). The Medical Services Disclosure simply lacks any of the indicia of endorsement or encouragement that would cause a mandatory disclosure to cross the line from merely conveying facts to impermissibly "forc[ing] citizens to confess by word or act their faith" in a political message. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). Petitioners' opposition to the disclosure ultimately boils down to an assertion that licensed clinics are entitled to keep

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[11] *See* Tex. Health & Safety Code § 171.012(b).

[12] *See* Tex. Health & Safety Code § 171.012(a).

patients in the dark about the very medical choices for which they visited a clinic in the first place. But this Court has made clear that the opposite is true: the strong First Amendment interest in providing individuals with undisputed factual information that they need to make choices outweighs any minimal interest that a regulated entity might have in maintaining ignorance about such facts. *See Zauderer*, 471 U.S. at 651. And the States' interest in ensuring informed decision-making is particularly acute in the context of healthcare, where patients often must make highly personal decisions about whether to use the medical services offered by one practitioner, or choose different medical options provided by another practitioner. For this reason, a State may properly require a surgeon to inform patients about nonsurgical alternatives offered by other healthcare providers, or require a physician who diagnoses a patient with a terminal illness to notify the patient about palliative-care options as an alternative to aggressive treatment. In the healthcare context in particular, informing patients about the range of treatment options available to them does not impermissibly "advertise" those options, as petitioners contend; rather, it sensibly gives patients the comprehensive information they need to make fully informed decisions about their healthcare.

B. Mandatory Disclosures Can Provide Valuable Information Critical to an Individual's Choices Even When They Do Not Convey Information About the Speaker's Specific Services.

Petitioners and their amici contend that the Medical Services Disclosure does not satisfy *Zauderer*'s standards because the information provided by the disclosure does not concern the specific services offered by petitioners, but instead services provided by others. Pet'rs Br. 46-47; U.S. Br. 10, 24; Texas Br. 3, 14. But this asserted limitation takes too narrow a view of both the States' interest in mandating disclosures and the relationship between the services offered by the clinics and the services referenced in the Medical Services Disclosure. Disclosure requirements routinely mandate that regulated entities disclose services or resources that the entities do not themselves provide but that are available options to the individuals who are making decisions about the regulated entities' services.

Indeed, this Court made clear in *Casey* that a disclosure statute does not violate the First Amendment simply because it requires a medical practitioner to inform patients about resources that are offered by state agencies or other third parties rather than the practitioner. The statute challenged in *Casey* mandated that licensed physicians disclose to patients, prior to performing an abortion, not only the medical risks of abortion but also the availability of state-written materials listing information about "public and private agencies and services available to assist a woman through pregnancy," including adoption agencies, medical-assistance benefits, and paternal child support. 505 U.S. at 907; *see id.* at 881 (plurality op.).

Although the physicians did not themselves offer these other services, the Court upheld the statute as reasonably related to Pennsylvania's interests in promoting informed decision-making by patients. *See id.* at 884 (plurality op.).

Such disclosures about other options—even those not given by the provider in question—are common in the healthcare context. Hospitals and birthing centers must provide parents with information about third-party service providers who give vaccines, educate parents about health risks, or assist with installing child car seats.[13] Healthcare practitioners must disclose information about state-sponsored programs that help patients quit drinking, smoking, or using drugs. *See* N.Y. Pub. Health Law § 2997-b; *id.* § 2803-u. And physicians, nursing homes, and hospitals are required to inform terminally ill patients about hospice care and other end-of-life options that the regulated professionals do not necessarily provide. *See* N.Y. Pub. Health Law § 2997-d(2); *see* Cal. Health & Safety Code § 442.5(a)(1) (notification of patient's right to "comprehensive information and counseling regarding legal end-of-life options").

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[13] *See, e.g.*, Ill. Comp. Stat. ch. 410, 235/4 (disclosure of where parents may obtain pertussis vaccine); N.J. Stat. § 26:2N-7.1 (disclosure about "pertussis vaccine for adults"); Tex. Health & Safety Code § 161.501(a)(1) (disclosure of "names, addresses, and phone numbers of professional organizations that provide postpartum counseling and assistance to parents"); Cal. Veh. Code § 27363.5 (disclosure about services that provide "information and assistance relating to child passenger restraint system"); Pa. Cons. Stat. tit. 75, § 4583 (hospitals must disclose "loaner or rental programs for child restraint devices that may be available in the community").

In many other contexts as well, States require a regulated entity to make disclosures that reference public or private services that are closely related to the entity's services, even though the entity does not provide every service referenced by the disclosure. For example, employers must post signs informing employees about public enforcement agencies that provide resources related to minimum-wage requirements, antidiscrimination rules, migrant-worker protections, veteran rights, or workplace-safety rules—even though the employer does not offer these employee-protection services themselves (and may prefer that employees not avail themselves of those services). *See, e.g.*, N.Y. Lab. Law § 198-d (minimum wage); 12 N.Y.C.R.R. § 142-2.8 (minimum wage); N.Y. Dep't of Labor, Poster for Miscellaneous Industry Employees (internet) (stating that employees who "need more information or want to file a complaint" about minimum-wage violations may call state agency's listed telephone number).[14] And real-estate sellers must distribute a pamphlet listing public programs that test for lead paint and provide information about lead-paint hazards, although the sellers do not offer such testing or information. *See* 40 C.F.R. § 745.107(a)(1); U.S. EPA, et al., *Protect Your Family from Lead in Your Home* 8, 15-17 (internet).

These and many other disclosure rules demonstrate that a disclosure need not relate solely to the specific services provided by the regulated entity

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[14] *See also, e.g.*, 9 N.Y.C.R.R. § 466.1(a) (antidiscrimination); N.Y. Div. of Human Rights, Poster (internet) (stating that individuals who experience discrimination may call state agency's listed telephone numbers); N.Y. Workers' Comp. Law §§ 13-a(2), 51, 229(1).

to be "reasonably related" to a State's interests in protecting and informing state residents. *See Zauderer*, 471 U.S. at 651. Instead, the States have a broader interest in providing individuals with any information that is important to a choice that the individual may make. And it is reasonable for States to ask a regulated entity to make such a disclosure when its business or services necessarily involve a class of individuals who are making such choices—and who would directly benefit from receiving that information. For example, maternity wards serve patients who must care for an infant and need to make choices about how to set up their homes; physicians who diagnose a patient with a terminal illness provide medical care to patients who face end-of-life decisions; and employers provide a workplace to employees who experience labor-law violations and are trying to decide whether to file a complaint. Mandatory disclosures under these circumstances appropriately target an audience that the State may reasonably determine requires certain information because they are facing an important choice. And a disclosure can meaningfully inform that choice by letting individuals know about other options that are indisputably available to them.

The Medical Services Disclosure reflects such a state interest. The patients who visit the licensed medical clinics covered by the FACT Act typically need to decide which pregnancy-related services to use, including both the services offered by the clinics and other services that a particular clinic may not offer. The services offered by the clinics are thus part of "the full spectrum" of available pregnancy-related care that their patients are likely to be interested in, and that the Medical Services Disclosure addresses. (J.A.

70.) Requiring licensed clinics to notify patients about the full range of available medical treatments is thus reasonably related to the State's interest in ensuring that such pregnancy-related decisions are well informed.

The importance of the Medical Services Disclosure is heightened by the fact that limited-service clinics like petitioners often provide false or misleading information to patients—thus creating misimpressions that only a mandatory disclosure can timely dispel. As the legislative record of the FACT Act makes clear, and as amici States have learned through experience, some limited-service clinics have falsely suggested that they provide abortion services, misleadingly advised that a miscarriage could obviate the need for an abortion, and incorrectly stated that a sonogram could inform the patient about the likelihood of such a miscarriage. See *supra* at 5-7. These practices are often designed to discourage pregnant patients from seeking out information about available pregnancy services and encourage patients to instead delay their decisions about pregnancy. See *supra* at 6-7. The States have strong interests in combatting such practices, which not only confuse patients about pregnancy services but also undermine maternal and fetal health, erode women's ability to undergo a medication-induced abortion rather than a surgical abortion, and risk preventing women from exercising their constitutional right to choose abortion at all. The Medical Services Disclosure reasonably protects patients from such dangers by providing them with information about available pregnancy services before it is too late for patients to utilize this information to make thoughtful and fully informed decisions about pregnancy. *See Casey*, 505 U.S. at 884 (plurality op.); *see*

also Milavetz, at 559 U.S. at 251-52 (upholding disclosure rule that combatted consumer deception and confusion).

C. California Reasonably Determined That Other Methods, Such as a State-Sponsored Education Campaign, Would Be Less Effective Than the Medical Services Disclosure at Timely Notifying Patients About Pregnancy Services.

Because the Medical Services Disclosure reasonably furthers California's interests, no further tailoring must be shown to satisfy the First Amendment. *See Milavetz*, 559 U.S. at 250-51. But even if some further tailoring were necessary, petitioners and their amici are incorrect in arguing that alternative means of disseminating information about pregnancy-related services, such as a publicly funded education campaign, would accomplish California's goals as effectively as the Medical Services Disclosure. *See* Pet'rs Br. 55; Texas Br. 15-16; U.S. Br. 28-29. As the amici States have learned through experience, a general public-advertising campaign is often less effective than a targeted disclosure rule at reaching specific individuals who need information during a particular timeframe. Although general information campaigns help educate the public at large about a topic, the broad sweep of such campaigns results in the information reaching many state residents when they are not actually facing any decision for which the information is relevant and thus are unlikely to pay attention to the information. Disclosure laws remedy this problem by funneling information to specific individuals while they are making a time-sensitive decision.

For example, many people are unlikely to focus on calorie-count information if they receive such information in a state-sponsored sign or public advertisement. But people are more likely to understand and utilize such information if they receive it while they are "standing at a [fast-food] counter" or "sitting down at a table reviewing a menu" to decide which foods to eat. *See* Keystone Ctr., *The Keystone Forum on Away-From-Home Foods: Opportunities for Preventing Weight Gain and Obesity—Final Report* 77 (May 2006) (recommending point-of-sale calorie disclosures); *see also New York State Rest.*, 556 F.3d at 136. Disclosure laws that require restaurants to post calorie information at the point of sale thus reasonably further the government's public interests, notwithstanding the availability and distinct usefulness of a general public education campaign about obesity and calorie intake. *See New York State Rest.*, 556 F.3d at 134-36.

Common sense likewise dictates that most healthy people will not pay attention to a general information campaign about palliative care because they have no immediate need for end-of-life services—leaving them uninformed about pain management, hospice care, and other end-of-life options if they are later faced with a terminal diagnosis. *See* Letter from Richard Gottfried, Chair, N.Y. State Assembly Comm. on Health to Peter Kiernan, Counsel to the Governor of New York, *in* Bill Jacket for Ch. 331 (July 1, 2010), at 9. Unlike a general information campaign, requiring physicians to notify patients about palliative-care services when a terminal diagnosis is given provides patients with critical information when they are focused on end-of-life decisions and can utilize the information to make decisions about their own

medical treatment and personal comfort. *See id.*; *see also* Letter from Lois Aronstein, State Director AARP N.Y. to David Paterson, Governor of New York, *in* Bill Jacket for Ch. 331 (July 20, 2010), at 32.

The availability of pregnancy services is precisely the type of information that is simply not salient to most women unless they are pregnant or are anticipating pregnancy. A state-sponsored education campaign about available pregnancy services would thus reach many women when they are not paying attention to such information, leaving them without critical information when they unexpectedly become pregnant and need to make time-sensitive decisions about their medical care. The Medical Services Disclosure reasonably addresses this problem by ensuring that women receive information about available treatments when they are receiving pregnancy care from a clinic and thus actively in need of information about pregnancy-related services.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision of the court of appeals.

Respectfully submitted,

ERIC T. SCHNEIDERMAN
Attorney General
State of New York
BARBARA D. UNDERWOOD*
Solicitor General
STEVEN C. WU
Deputy Solicitor General
JUDITH N. VALE
Senior Assistant
Solicitor General
barbara.underwood@ag.ny.gov

February 2018

* *Counsel of Record*

(Counsel list continues on next page.)

GEORGE JEPSEN
Attorney General
State of Connecticut
55 Elm Street
Hartford, CT 06106

JANET T. MILLS
Attorney General
State of Maine
6 State House Station
Augusta, ME 04333

MATTHEW P. DENN
Attorney General
State of Delaware
Department of Justice
820 N. French St.
Wilmington, DE 19801

BRIAN E. FROSH
Attorney General
State of Maryland
200 Saint Paul Pl.
Baltimore, MD 21202

RUSSELL A. SUZUKI
Acting Attorney General
State of Hawai'i
425 Queen St.
Honolulu, HI 96813

MAURA HEALEY
Attorney General
Commonwealth of Massachusetts
One Ashburton Pl.
Boston, MA 02108

LISA MADIGAN
Attorney General
State of Illinois
100 W. Randolph St.
12th Floor
Chicago, IL 60601

LORI SWANSON
Attorney General
State of Minnesota
102 State Capitol
75 Rev. Dr. Martin Luther King Jr. Blvd.
St. Paul, MN 55155

THOMAS J. MILLER
Attorney General
State of Iowa
1305 E. Walnut St.
Des Moines, IA 50319

GURBIR S. GREWAL
Attorney General
State of New Jersey
Hughes Justice Complex
25 Market St., Box 080
Trenton, NJ 08625

ELLEN F. ROSENBLUM
Attorney General
State of Oregon
1162 Court St. N.E.
Salem, OR 97301

MARK R. HERRING
Attorney General
Commonwealth of Virginia
202 North Ninth St.
Richmond, VA 23219

JOSH SHAPIRO
Attorney General
Commonwealth of Pennsylvania
Strawberry Square, 16th Fl.
Harrisburg, PA 17120

ROBERT W. FERGUSON
Attorney General
State of Washington
P.O. Box 40100
Olympia, WA 98504

THOMAS J. DONOVAN, JR.
Attorney General
State of Vermont
109 State St.
Montpelier, VT 05609

KARL A. RACINE
Attorney General
District of Columbia
Suite 650 North
441 4th St., N.W.
Washington, DC 20001

No. 16-1140

IN THE

Supreme Court of the United States

NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES, D/B/A NIFLA, *et al.*,

Petitioners,

v.

XAVIER BECERRA, ATTORNEY GENERAL, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF 144 MEMBERS OF CONGRESS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

PATRICK STRAWBRIDGE
Counsel of Record
JENNIFER L. MASCOTT
CAROLINE A. COOK
CONSOVOY MCCARTHY PARK PLLC
GEORGE MASON UNIVERSITY
ANTONIN SCALIA LAW SCHOOL
SUPREME COURT CLINIC
3033 Wilson Blvd., Suite 700
Arlington, VA 22201
(703) 243-9423
patrick@consovoymccarthy.com

Attorneys for Amici Curiae

January 16, 2018

278067

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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INTEREST OF *AMICI CURIAE*[1]

Amici are 144 members of Congress, representing both political parties. The Appendix to this brief sets forth a complete list of *amici curiae*.

These members share an interest in upholding America's longstanding and bipartisan tradition of protecting freedom of speech and freedom of conscience. This case involves a state legislature's attempt to infringe on both of these freedoms. The California law at issue compels pregnancy centers opposed to abortion—and only those opposed to abortion—to comply with burdensome requirements that force these centers to provide non-medical information that contradicts their core message and moral beliefs. *Amici* members of Congress have an interest in ensuring that California does not infringe upon constitutional freedoms that Congress, for decades, has specifically legislated to protect. Moreover, as members of the legislative branch, *amici* possess a unique perspective regarding the complex task of drafting laws to ensure neutral, evenhanded treatment of individuals and entities of all viewpoints and faiths that comport with First Amendment guarantees.

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1. Pursuant to this Court's Rule 37.6, counsel for *amici curiae* certify that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amici curiae* or their counsel has made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

California's Reproductive FACT (Freedom, Accountability, Comprehensive Care, and Transparency) Act ("FACT Act") violates the First Amendment rights of pro-life pregnancy centers, forcing them to engage in speech that directly contradicts their own message and deeply held beliefs. It is well-established that the First Amendment proscribes compelled speech in non-commercial contexts. This is especially true in cases like this one in which the state forces conscientious objectors to carry messages that offend the speakers' moral convictions. By compelling pro-life centers to promote referrals for abortion and include burdensome disclosures in their advertising, the FACT Act violates the First Amendment.

Congress has a longstanding bipartisan tradition of enacting legislation that protects the rights of those whose conscience precludes participation in certain controversial actions, particularly in the abortion context. Since 1973, when the right to an abortion was first pronounced by the Supreme Court, Congress has repeatedly passed legislation shielding pro-life individuals and organizations from being forced to violate their consciences by performing, participating in, or referring for abortions. *See, e.g.*, Church Amendments, Health Programs Extension Act of 1973, Pub. L. No. 93-45, § 401, 87 Stat. 91, 95 (codified as amended at 42 U.S.C. § 300a-7(b)-(c), (e) (2000)); Coats/Snowe Amendment, Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 245(a)(1), 110 Stat. 1321, 1321-245 (codified at 42 U.S.C. § 238n); Hyde-Weldon Amendment, Consolidated Appropriations Act,

2005, Pub. L. No. 108-447, § 508(d)(1), 118 Stat. 2809, 3163 (2004); Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1303(b)(4), 124 Stat. 119, 899 (2010) (codified at 42 U.S.C. § 18023). In particular, many of these statutory provisions protect individuals and entities from discrimination based on their opposition to abortion. These laws recognize our society's deep disagreement over the issue of abortion and, consequently, aim to prevent both federal and state governments from infringing on the First Amendment conscience rights of those who oppose abortion. California's FACT Act creates precisely the constitutional dilemma these statutes seek to prevent.

In upholding the FACT Act, the Ninth Circuit erroneously applied intermediate scrutiny, despite its recognition that the statute is a content-based restriction. *Nat'l Inst. of Family & Life Advocates v. Harris*, 839 F.3d 823, 834 (9th Cir. 2016). The Ninth Circuit's analysis disregards this Court's clear instruction in *Reed v. Town of Gilbert*, that "strict scrutiny applies ... when a law is content based on its face." 135 S. Ct. 2218, 2228 (2015).

Further, the FACT Act is not only content-based but viewpoint-based. It imposes burdensome speech requirements that, in practice, apply exclusively to centers opposed to abortion; entities that agree to provide abortifacients and other abortion services are exempt. Moreover, it is evident from the statute's stated purpose that pro-life pregnancy centers were the explicit target of the Act. And it is well-established that government action targeting a specific viewpoint is subject to strict scrutiny, because it is "presumed to be unconstitutional." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828-29 (1995).

Nevertheless, under either intermediate or strict scrutiny, the FACT Act cannot survive. The requirements imposed on pro-life centers are far too restrictive regardless of the motivating state interest. Requiring pro-life centers to provide referrals for abortion services coercively compels the centers to engage in speech that contradicts their core message. By forcing pro-life centers to promote California's position on a hotly contested public issue, the law targets speech on the "highest rung of the hierarchy of First Amendment values." *Carey v. Brown*, 447 U.S. 455, 466-67 (1980). The state law also compels individuals and entities to violate their deeply held moral and religious beliefs. "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). The Ninth Circuit's decision flies in the face of this principle and should be reversed.

ARGUMENT

I. The First Amendment Proscribes Mandatory Speech Requirements, Especially When They Violate the Speaker's Conscience.

The First Amendment not only "guards the individual's right to speak his own mind" but also prevents the government from "compel[ling] him to utter what is not in his mind." *Barnette*, 319 U.S. at 634. This well-established principle is known as the compelled speech doctrine. It recognizes that the government cannot "force an American citizen publicly to profess any statement of belief or to engage in any [conduct] of assent." *Id.* Such

protection is crucial to free speech because "speech inherently involves choices of what to say and what to leave unsaid." *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 11 (1986).

In *West Virginia State Board of Education v. Barnette*, this Court held that a public school board's flag-salute requirement violated the First Amendment by forcing individuals to voice the government's preferred message. 319 U.S. at 642. Writing for the Court, Justice Robert Jackson explained that mandatory speech requirements "invade[] the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control." *Id.* at 642. In a constitutional republic, he wrote, "[a]uthority ... is to be controlled by public opinion, not public opinion by authority." *Id.* at 641.

The right to be free from compelled speech protects entities and organizations as well as individuals. In *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, a power company challenged the constitutionality of a requirement that the company include in its billing envelopes a newsletter promoting wildlife conservation and other "matters of public interest." 475 U.S. at 5. This Court held that the requirement violated the First Amendment because it "both penalize[d] the expression of particular points of view and force[d] speakers to alter their speech to conform with an agenda they [did] not set." *Id.* at 9.

The compelled speech doctrine also precludes regulations that would indirectly coerce speech by forcing a speaker to carry the message of another. For example,

the Court has held in the past that public-accommodations laws cannot be used to force parade organizers to include particular groups in a privately organized public demonstration. *See Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 559 (1995). Justice David Souter wrote for the Court that such use of a "State's power violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message." *Id.* at 573. The opinion further explains that "this general rule ... applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact that the speaker would rather avoid." *Id.* The state cannot use mandatory speech requirements to "promot[e] an approved message or discourag[e] a disfavored one, however enlightened either purpose may strike the government." *Id.* at 579.

Freedom from compelled speech is especially important in the context of conscientious objectors. At the core of the First Amendment is the right of individuals and entities to "refuse to foster ... an idea they find morally objectionable." *Wooley v. Maynard*, 430 U.S. 705, 715 (1977). Thus, the Court has repeatedly rejected states' and local governments' attempts to impose mandatory speech requirements that violate a speaker's conscience. *See, e.g., Barnette*, 319 U.S. at 642 (Jehovah's Witnesses could not be compelled to salute the American flag); *Maynard*, 430 U.S. at 716-17 (Jehovah's Witnesses had right to conceal the state motto "Live Free or Die" on their license plates); *Hurley*, 515 U.S. at 581 (organization could not be forced to include an LGBT-rights group in its parade); *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 655-61 (2000) (Boy Scouts could not be compelled to admit a same-sex marriage

activist as an assistant scoutmaster). It should do so again here, as California's FACT Act violates these core First Amendment rights by compelling pro-life pregnancy centers to engage in speech they oppose on moral and religious grounds.

II. Congress Has a Longstanding Bipartisan Tradition of Enacting Legislation to Ensure Freedom of Conscience is Protected, Particularly in the Abortion Context.

Pursuant to its members' oath to uphold the Constitution, *see* U.S. Const. art. VI, cl. 3, Congress plays a special role in ensuring citizens' free speech and conscience rights are secure. When drafting statutes, Congress must take care that they comport with the First Amendment and afford protections to conscientious objectors whenever necessary.

The Supreme Court has recognized the value of this congressional role in constitutional governance, even evaluating state and local speech regulations against the backdrop of federal law. In *Barnette*, the Court used federal conscience protections as a measuring stick when evaluating the constitutionality of a local school board's flag-salute requirement that had been challenged by religious adherents. *Barnette*, 319 U.S. at 637-38. The Court compared the local regulation with congressional legislation making flag observance voluntary, as well as federal law respecting conscientious military objectors. *Id.* The Court treated federal legislation as the superior guide for discerning First Amendment limits because "small and local authority may feel less sense of responsibility to the Constitution" than Congress. *Id.* at 637.

Likewise, the speech requirements of California's FACT Act should be evaluated against the backdrop of Congress's longstanding and bipartisan legislative tradition of protecting conscientious objectors in the abortion context. Since this Court's decision in *Roe v. Wade*, Congress has consistently sought to protect the speech and conscience rights of individuals and entities that oppose abortion. To that end, it has enacted numerous nondiscrimination laws and appropriations measures shielding pro-life individuals and organizations from being forced to violate their consciences and perform, participate in, or refer for abortions.

In the immediate wake of *Roe*, the Democrat-controlled House and Senate passed the Church Amendments almost unanimously. Church Amendments, Health Programs Extension Act of 1973, Pub. L. No. 93-45, § 401, 87 Stat. 91, 95 (codified as amended at 42 U.S.C. § 300a-7(b)-(c), (e) (2000)). The Amendments prohibit conditioning federal funding on an individual's willingness to "perform or assist in the performance of any sterilization procedure or abortion." *Id.* § 300a-7(b). They also prohibit conditioning funds on an entity's willingness to provide facilities or personnel for the performance of abortions. *Id.* Congress was concerned that, in light of the newly pronounced constitutional right to abortion, healthcare personnel and hospitals would be forced to perform or facilitate abortions and sterilizations as a condition of receiving federal funds. These provisions were aimed to protect such individuals and entities from being coerced by the government into violating their "religious beliefs or moral convictions." *Id.*

Numerous statutory provisions also prevent recipients of federal funds from discriminating against conscientious

objectors to abortion. Among the first of these were the Church Amendments, which include provisions prohibiting federal grantees or contract recipients from discriminating against healthcare personnel that object to abortion on moral or religious grounds. *Id.* § 300a-7(c), (e).

In 1996, the Coats/Snowe Amendment was enacted by a Republican-controlled Congress and signed into law by a Democratic president. Coats/Snowe Amendment, Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 245(a)(1), 110 Stat. 1321, 1321-245 (codified at 42 U.S.C. § 238n). It prohibits state and local-government recipients of federal funds from discriminating against healthcare entities that refuse to perform abortions, participate in abortion training, or refer for abortions. *Id.*

Then, in 2004, Congress first passed the Weldon Amendment as part of an appropriations act that had strong bipartisan support. Hyde-Weldon Amendment, Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, § 508(d)(1), 118 Stat. 2809, 3163 (2004). The provision bars the federal government and any state or local-government recipients of federal funds from discriminating against healthcare entities that refuse to "provide, pay for, provide coverage of, or refer for abortions." *Id.* The Amendment defines "health care entity" broadly and includes "any ... kind of health care facility, organization, or plan." *Id.* Congress has demonstrated its ongoing commitment to protecting conscience objectors by reapproving the Weldon Amendment every year since its original enactment. *See, e.g.*, Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, § 508(d)(1), 121 Stat. 1844, 2209 (2007); Consolidated Appropriations Act, 2010, Pub.

L. No. 111-117, § 508(d)(1), 123 Stat. 3034, 3280 (2009); Consolidated Appropriations Act, 2012, Pub. L. No. 112-74, § 507(d)(1), 125 Stat. 786, 1111 (2011); Consolidated Appropriations Act, 2014, Pub. L. 113-76, § 507(d)(1), 128 Stat. 5, 409 (2014); Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 507(d)(1), 129 Stat. 2242, 2649 (2015). The recently proposed Conscience Protection Act of 2017 seeks to amend the Public Health Service Act to make these spending policies permanent. Conscience Protection Act of 2017, S. 301, 115th Cong. (2017).

Finally, in 2010, the Democrat-controlled Congress included a provision in the Affordable Care Act prohibiting a qualified health plan from "discriminat[ing] against any individual health care provider or health care facility because of its unwillingness to provide, pay for, provide coverage of, or refer for abortions." Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1303(b)(4), 124 Stat. 119, 899 (2010) (codified at 42 U.S.C. § 18023). In addition, President Barack Obama issued Executive Order 13535 to ensure the enforcement of these protections, noting the Act's preservation of "longstanding Federal laws to protect conscience" and "protections prohibit[ing] discrimination against health care facilities and health care providers because of an unwillingness to provide, pay for, provide coverage of, or refer for abortions." Exec. Order No. 13535, 75 Fed. Reg. 15599 (March 24, 2010).

Taken together, these statutory provisions reflect Congress's solicitude for freedom of conscience in the context of abortion. Federal law has long protected a wide range of health-related entities and individuals from discrimination and from coerced engagement in any number of controversial acts related to abortion, including referring for abortion. Much like the federal

conscience protections noted in *Barnette*, these provisions "contrast[] sharply" with California's FACT Act, which both discriminates on the basis of entities' opposition to abortion and forces such entities to make referrals for abortion in violation of their deeply held beliefs. *Barnette*, 319 U.S. at 638.

III. The FACT Act Violates the First Amendment by Compelling Pregnancy Centers to Engage in Speech that Contradicts Their Message and Violates Their Moral Convictions.

The FACT Act forces pro-life pregnancy centers to promote the availability of abortion as an option for pregnant women. This mandatory speech requirement not only inhibits the centers' ability to communicate their own message, but also forces them to carry a message that violates their deeply held moral and religious beliefs. The Ninth Circuit erred in upholding the Act under intermediate scrutiny. The state requirement for licensed centers, which effectively applies only to pregnancy centers that oppose abortion, operates as both a content- and viewpoint-based regulation. Therefore, it must surpass strict scrutiny under the First Amendment. Nonetheless, because the FACT Act is prohibitively restrictive on the centers' freedom of speech, it cannot survive either strict or intermediate scrutiny.

A. The Ninth Circuit erred in applying intermediate scrutiny to this content-based regulation.

In *Reed v. Town of Gilbert*, this Court held that content-based restrictions on speech are "presumptively

unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." 135 S. Ct. at 2226; *see also Turner Broad. Sys. v. FCC*, 512 U.S. 622, 642 (1994) ("Laws that compel speakers to utter or distribute speech bearing a particular message are subject to the same rigorous scrutiny" as other laws that regulate speech "because of its content."). That decision made it abundantly clear that strict scrutiny applies to content-based regulations "regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech." *Reed*, 135 S. Ct. at 2228 (quoting *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993)).

The Ninth Circuit recognized that the FACT Act is a content-based regulation, but nevertheless disregarded this Court's unambiguous instruction to apply strict scrutiny to such laws. *Nat'l Inst. of Family & Life Advocates*, 839 F.3d at 834. Instead, the Ninth Circuit upheld the Act under intermediate scrutiny. It justified this departure from *Reed* not by reference to any other decision of this Court but by citing a Ninth Circuit decision. *Id.* at 837. It relied on *United States v. Swisher* for the proposition that "[e]ven if a challenged restriction is content-based, it is not necessarily subject to strict scrutiny." 811 F.3d 299, 313 (9th Cir. 2016). The Ninth Circuit's approach of offering its own precedent as justification for ignoring Supreme Court authority is both unpersuasive and mistaken. Strict scrutiny should have been applied upon recognition that the FACT Act was a content-based restriction.

B. Even if intermediate scrutiny were appropriate for content-based restrictions, strict scrutiny is the proper standard for this case because the FACT Act is a viewpoint-based restriction.

"[T]he First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others." *City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984). Such discriminatory regulation of speech "raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace." *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991); *see also Matal v. Tam*, 137 S. Ct. 1744, 1768 (2017) (Kennedy, J., concurring in part and concurring in the judgment) ("To permit viewpoint discrimination … is to permit Government censorship."). Consequently, strict scrutiny applies to any viewpoint-based restriction on speech. *See Reed*, 135 S. Ct. at 2229-30.

The Ninth Circuit erroneously concluded that the FACT Act is viewpoint-neutral. It claimed the Act does not "discriminate on the particular opinion, point of view, or ideology of a certain speaker," because it "applies to all licensed and unlicensed facilities, regardless of what, if any, objections they may have to certain family-planning services." *Nat'l Inst. of Family & Life Advocates*, 839 F.3d at 835. This is simply not true. Even a cursory examination of the FACT Act's terms and stated purpose makes clear that it targets those opposed to abortion.

The FACT Act requires licensed family-planning and pregnancy-related service centers to inform each client about her state-funded abortion options. However,

it exempts two categories of clinics from this mandate: those operated by the U.S. government and those enrolled as providers in California's Family Planning, Access, Care, and Treatment Program ("Family PACT"). *Id.* To qualify for Family PACT, providers must agree to offer "comprehensive clinical family planning services," which encompass all "federal Food and Drug Administration approved contraceptive drugs, devices, and supplies." Cal. Welf. & Inst. Code § 14132(aa)(1), (8). Some of these contraceptives are believed to operate as abortifacients.

Under these provisions, pro-life pregnancy centers can qualify for a FACT Act exemption only if they agree to offer to clients what they believe to be abortifacients. Thus, pro-life pregnancy centers in California are put to a choice: either participate in conduct that facilitates abortions or engage in speech promoting abortion. Meanwhile, clinics that do not hold pro-life views—and therefore do not object to providing abortifacients—can easily qualify for exempt Family PACT status without disavowing their convictions. The FACT Act thus "on its face" has the "inevitable effect" of commandeering pro-life centers—and only pro-life centers—to refer women to institutions that commit abortions. *United States v. O'Brien*, 391 U.S. 367, 384-85 (1968) ("[T]he inevitable effect of a statute on its face may render it unconstitutional.").

This Court's recent treatment of an analogous state statute in *Sorrell v. IMS Health Inc.*, confirms the FACT Act's viewpoint-based design. 564 U.S. 552 (2011). In *Sorrell*, this Court confronted a Vermont statute that forbade the sale of pharmacy records revealing individual doctors' prescribing practices. But the statute exempted from its prohibitions the dissemination of

prescriber-identifying information for certain purposes including healthcare research, the enforcement of health insurance policies, patient education, and law enforcement operations. *Id.* at 559-60. When read in light of these exemptions, this Court recognized that the Vermont law in its "practical operation" burdened only pharmaceutical manufacturers who used the information for marketing purposes. *Id.* at 565 (quotation omitted). The law thus went "beyond mere content discrimination, to actual viewpoint discrimination." *Id.* (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992)); *see also id.* (noting that an anti-bias ordinance in its "practical operation" imposed viewpoint-specific punishment).

Likewise, read in light of its exemptions, the FACT Act's practical operation burdens only pro-life pregnancy centers on the basis of their pro-life ideology. The Ninth Circuit refused to apply *Sorrell* in its decision below because it claimed the FACT Act "applies to almost all licensed and unlicensed speakers," characterizing the Act's exemptions as "narrow" and "unrelated to viewpoint." *Nat'l Inst. of Family & Life Advocates*, 839 F.3d at 836. But these assertions overlook Family PACT's position with regard to abortifacients. Just as the viewpoint-based exceptions in *Sorrell* demonstrated Vermont's disfavor of pharmaceutical manufacturers engaged in marketing speech, the FACT Act's viewpoint-based Family PACT exemption demonstrates California's disfavor of pregnancy centers engaged in pro-life speech. The FACT Act "on its face burdens disfavored speech by disfavored speakers." *Sorrell*, 564 U.S. at 564. Strict scrutiny therefore applies.

This Court has separately held that strict scrutiny applies even to those regulations that are facially

viewpoint-neutral but "were adopted by the government 'because of disagreement with the message convey[ed]" by the underlying speech. *Reed*, 135 S. Ct. at 2227 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). Thus, even if the FACT Act was not facially viewpoint-discriminatory (and it is), strict scrutiny still would apply because the California legislature intended to target pro-life pregnancy centers with this Act.

California's justifications and stated purpose for passing the FACT Act reveal the state's unabashed hostility toward the ideology of pro-life pregnancy centers. The State Assembly specifically drafted the Act in response to the pro-life centers' speech, condemning the centers' "aim to discourage and prevent women from seeking abortions." JA 84-85. To be sure, the legislature attempted to couch its findings in viewpoint-neutral language, alleging that the centers "confuse" and "misinform" women in their care. *Id.* But these conclusory allegations lack any evidentiary support whatsoever in either the legislative record or the record in this case. *See* Brief of Petitioners, at 51-52 & n.17; *see also Greater Baltimore Ctr. for Pregnancy Concerns, Inc. v. Mayor and City Council of Baltimore*, __ F.3d __, __, 2018 WL 298142, at *6 (4th Cir. Jan. 5, 2018) ("After seven years of litigation and a 1,295-page record before us, the City does not identify a single example of a woman who entered the [pro-life] Center's waiting room under the misimpression that she could obtain an abortion there."). The state's only basis for its belief that the centers engage in deception is its disagreement with their "unfortunate" pro-life message. JA84-85. And "whenever the government creates 'a regulation of speech because of disagreement with the message it conveys,'" the First Amendment demands the application of strict scrutiny. *Sorrell*, 564 U.S. at 566 (quoting *Ward*, 491 U.S. at 791).

In both its terms and stated purpose, the FACT Act is a viewpoint-based regulation of speech. It is therefore unconstitutional unless it can surpass strict scrutiny. Tellingly, no government has ever succeeded in an attempt to justify a speech regulation that discriminates based on viewpoint. *See* Brief of Petitioners, at 58-60.

C. The FACT Act fails under either level of scrutiny because its means are prohibitively restrictive.

Regardless of which level of scrutiny this Court applies, the FACT Act fails. To survive intermediate scrutiny, a statute must "directly advance[] a substantial governmental interest" and be "drawn to achieve that interest." *Sorrell*, 564 U.S. at 572. Under strict scrutiny, the regulation "must be narrowly tailored to promote a compelling Government interest." *United States v. Playboy Entm't*, 529 U.S. 803, 813 (2000). To be narrowly tailored, a regulation must use the "least restrictive means." *Id.*

Under either standard, the FACT Act fails because the requirements it imposes on pro-life centers (and only on pro-life centers) are far too restrictive, regardless of the alleged state interest.[2] When evaluating a mandatory

2. The state's alleged interest lies in remedying a problem that does not exist. The stated purpose of the law is grounded in its conclusory allegation that pro-life centers "confuse" and "misinform" women. JA 84-85. It is from this unsupported premise that the state claims an interest in mandating the various disclosures required by the FACT Act. As explained above, the state's claims lack any support in either the legislative record or the record of this case. *Supra* at 16. Thus, its alleged interest

speech requirement, this Court considers the "nature of the speech" and "the effect of the compelled statement thereon." *Riley v. Nat'l Fed. of the Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988). The speech implicated in this case concerns abortion—a hotly contested public issue of great importance. Such speech occupies "the highest rung of the hierarchy of First Amendment values." *Carey*, 447 U.S. at 466-67.

The effects of California's mandatory speech requirements on pro-life centers' protected speech are "impermissible." *Pac. Gas & Elec. Co.*, 475 U.S. at 9. Because the law targets only centers that oppose abortion, it "penalizes the expression of particular points of view and forces speakers to alter their speech to conform with an agenda they do not set," and one they specifically exist to oppose. *Id.* Although "[m]andating speech that a speaker would not otherwise make" always "alters the content of the speech," that is especially the case here. *Riley*, 487 U.S. at 795. Not only have these pro-life centers chosen "not [to] otherwise make" abortion referrals, *id.*, they exist to communicate precisely the *opposite* viewpoint and offer life-affirming options to women. To promote a mother's

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in imposing mandatory speech requirements on noncommercial (and in some cases, unlicensed) pregnancy centers falls far short of compelling. *See Brown v. Entmt. Merchants Ass'n*, 564 U.S. 786, 799 (2011) ("The state must specifically identify an 'actual problem' in need of solving, and the curtailment of free speech must be actually necessary to the solution." (citations omitted)); *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 822 (2000) (concluding the state interest was insufficient because "no support for the restriction [could] be found in the near barren legislative record relevant to [the] provision," explaining that "the Government must present more than anecdote and supposition").

option to get an abortion would defeat these centers' core message. Moreover, many pro-life centers' deeply held moral convictions and religious beliefs would be violated by forced involvement in abortion referrals.

"[L]ess instrusive and more effective measures" for informing women and preventing fraud are readily available. *Vill. of Schaumburg v. Citizens for a Better Env't*, 444 US. 620, 639 (1980). California can publish abortion-access information itself or rigorously enforce its fraud laws to deter any actual deception that occurs. Although censorship of pro-life pregnancy centers may be "the most efficient" way for California to achieve its goals, "the First Amendment does not permit the State to sacrifice speech for efficiency." *Riley*, 487 U.S. at 795.

The FACT Act's requirements do not merely restrict the pro-life centers' speech, they necessarily and fundamentally alter it—all the while violating the centers' conscience rights. As speakers in a noncommercial context, these centers have absolute "autonomy to choose the content of [their] own message." *Hurley*, 515 U.S. at 573. And they certainly cannot be compelled "to foster ... an idea they find morally objectionable." *Maynard*, 430 U.S. at 715. Congress's tradition of protecting the conscience rights of those who in good faith oppose abortion provides an example of alternative legislative approaches that accommodate, rather than suppress, pro-life views. The FACT Act, in contrast, seeks to enlist pro-life speakers to broadcast, and thus implicitly support, the availability of abortion. This state legislative requirement cannot be justified under strict or intermediate scrutiny and is therefore unconstitutional.

CONCLUSION

For the reasons stated, this Court should reverse the Ninth Circuit's decision.

Respectfully submitted,

PATRICK STRAWBRIDGE
Counsel of Record
JENNIFER L. MASCOTT
CAROLINE A. COOK
CONSOVOY MCCARTHY PARK PLLC
GEORGE MASON UNIVERSITY
ANTONIN SCALIA LAW SCHOOL
SUPREME COURT CLINIC
3033 Wilson Blvd., Suite 700
Arlington, VA 22201
(703) 243-9423
patrick@consovoymccarthy.com

Attorneys for Amici Curiae

January 16, 2018

APPENDIX — LIST OF *AMICUS CURIAE*

U.S. Senate

Steve Daines (MT)

Charles E. Grassley

Rand Paul (KY)

Tom Cotton (AR)

Joni Ernst (IA)

Jerry Moran (KS)

James Lankford (OK)

James E. Risch (ID)

Ted Cruz (TX)

Ben Sasse (NE)

Roy Blunt (MI)

Debra Fischer (NE)

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Tim Scott (SC)

Pat Roberts (KS)

James Inhofe (OK)

U.S. House of Representatives

Doug LaMalfa (CA-01)

House Majority Leader Kevin McCarthy (CA-23)

Bradley Byrne (AL-01)

Bruce Westerman (AR-04)

Andy Biggs (AZ-05)

Andy Harris, M.D. (MD-01)

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Paul A. Gosar, D.D.S. (AZ-04)

Paul Cook (CA-08)

Devin Nunes (CA-22)

Ken Calvert (CA-42)

Dana Rohrabacher (CA-48)

Doug Lamborn (CO-05)

Ted S. Yoho, D.V.M. (FL-03)

Daniel Webster (FL-11)

Dennis A. Ross (FL-15)

Earl L. "Buddy" Carter (GA-01)

Austin Scott (GA-08)

Barry Loudermilk (GA-11)

Steve King (IA-04)

Peter Roskam (IL-06)

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John Shimkus (IL-15)

Tom McClintock (CA-04)

David G. Valadao (CA-21)

Steve Knight (CA-25)

Mimi Walters (CA-45)

Duncan Hunter (CA-50)

Neal Dunn, M.D. (FL-02)

Ron DeSantis (FL-06)

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Francis Rooney (FL-19)

Drew Ferguson IV, D.M.D. (GA-03)

Jody Hice (GA-10)

Rick W. Allen (GA-12)

Daniel W. Lipinski (IL-03)

Darin LaHood (IL-08)

Randy Hultgren (IL-14)

Jackie Walorski (IN-02)

Appendix

Jim Banks (IN-03)

Luke Messer (IN-06)

Kevin Yoder (KS-03)

Thomas Massie (KY-04)

Clay Higgins (LA-03)

Ralph Abraham, M.D. (LA-05)

Jack Bergman (MI-01)

John Moolenaar (MI-04)

Mike Bishop (MI-08)

Ann Wagner (MO-02)

Sam Graves (MO-06)

Gregg Harper (MS-03)

Walter Jones (NC-03)

Mark Walker (NC-06)

Richard Hudson (NC-08)

Kevin Cramer (ND-At Large)

Todd Rokita (IN-04)

Roger Marshall, M.D. (KS-01)

Ron Estes (KS-04)

Hal Rogers (KY-05)

Mike Johnson (LA-04)

Garret Graves (LA-06)

Bill Huizenga (MI-02)

Tim Walberg (MI-07)

Paul Mitchell (MI-10)

Vicky Hartzler (MO-04)

Jason Smith (MO-08)

Steven Palazzo (MS-04)

Virginia Foxx (NC-05)

David Rouzer (NC-07)

Mark Meadows (NC-11)

Jeff Fortenberry (NE-01)

Appendix

Don Bacon (NE-02)

Christopher H. Smith (NJ-04)

Mark Amodei (NV-02)

Brad Wenstrup (OH-02)

Robert Latta (OH-05)

Bob Gibbs (OH-07)

Michael R. Turner (OH-10)

Tom Cole (OK-04)

Mike Kelly (PA-03)

Bill Shuster (PA-09)

Lou Barletta (PA-11)

Joe Wilson (SC-02)

Ralph Norman (SC-05)

David P. Roe, M.D. (TN-01)

Diane Black (TN-06)

Adrian Smith (NE-03)

Steve Pearce (NM-02)

Steve Chabot (OH-01)

Jim Jordan (OH-04)

Bill Johnson (OH-06)

Warren Davidson (OH-08)

Jim Renacci (OH-16)

Steve Russell (OK-05)

Scott Perry (PA-04)

Tom Marino (PA-10)

Keith Rothfus (PA-12)

Trey Gowdy (SC-04)

Jeff Duncan (SC-03)

Kristi Noem (SD-At Large)

Chuck Fleischmann (TN-03)

Marsha Blackburn (TN-07)

Appendix

Louie Gohmert (TX-01)

Sam Johnson (TX-03)

John Ratcliffe (TX-04)

Jeb Hensarling (TX-05)

John Culberson (TX-07)

K. Michael Conaway (TX-11)

Mac Thornberry (TX-13)

Randy Weber (TX-14)

Bill Flores (TX-17)

Jodey C. Arrington (TX-19)

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Pete Olson (TX-22)

Kenny Marchant (TX-24)

Roger Williams (TX-25)

Brian Babin (TX-36)

Mia Love (UT-04)

Rob Wittman (VA-01)

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Dave Brat (VA-07)

H. Morgan Griffith (VA-09)

Jaime Herrera Beutler (WA-03)

Dan Newhouse (WA-04)

Glenn Grothman (WI-06)

Alex Mooney (WV-02)

Evan Jenkins (WV-03)

No. 16-1140

In the
Supreme Court of the United States

NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES, D/B/A/ NIFLA, ET AL.,

Petitioners,

v.

XAVIER BECERRA, ATTORNEY GENERAL, ET AL.,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF OF AMICI CURIAE OPERATION OUTCRY, THE JUSTICE FOUNDATION, AND PRIESTS FOR LIFE IN SUPPORT OF PETITIONERS

CATHERINE W. SHORT
Counsel of Record
REBEKAH MILLARD
ALLISON K. ARANDA
Life Legal Defense Foundation
PO Box 2105
Napa, CA 92544
(707) 224-6675
LLDFOjai@cs.com
Counsel for Amici Curiae

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INTERESTS OF AMICI[1]

Amicus Operation Outcry is a project of Amicus The Justice Foundation. The Justice Foundation is a non-profit organization created to protect the fundamental freedoms and rights essential to preserve American society. The Justice Foundation advocates for the protection of women's health, represents clients on a pro bono basis, litigates cases, and provides education. The Justice Foundation serves at the forefront of protecting women from unsafe abortion practices and provides post-abortive women with a forum to share their abortion experiences.

Operation Outcry has collected over 4,500 legally admissible written testimonies of women hurt by abortion. These testimonies describe the devastating effects of abortion on the women, chronicling a startling array of adverse consequences, including depression, anxiety, suicidal attempts and thoughts, promiscuity, anxiety, drug and alcohol abuse, addiction, and inability to bond with subsequent children. These pathologies led to other adverse consequences, such as economic and social losses through inability to hold steady jobs.

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[1] No counsel for a party authored this brief in whole or in part. No party or counsel for a party made any financial contribution toward the preparation of submission of the brief. All parties consented in writing to the filing of this brief.

The Supreme Court has previously cited the Brief of Sandra Cano (the "Jane Doe" of *Doe v. Bolton*) and 180 Women (of Operation Outcry) for the proposition that "some women come to regret" their abortions. "Whether to have an abortion requires a difficult and painful moral decision" and is "fraught with emotional consequence." The Court also noted that "severe depression and loss of esteem can follow" an abortion. *Gonzalez v. Carhart*, 550 U.S. 124 (2007).

The Justice Foundation is currently assisting Melinda Thybault in circulating "The Moral Outcry Petition," which seeks to declare abortion a crime against humanity because of its injurious effect on women and their unborn children. The petition has garnered over 74,000 signatures in seven months, including some from individuals who are working with pregnancy resource centers. [2] These individuals believe abortion to be an egregious human rights violation, yet their ability to communicate this message to abortion-vulnerable women is threatened by the oppressive burdens imposed by the statute.

Amicus Priests for Life is a national, non-profit corporation and the largest pro-life ministry in the Catholic Church. Its mission is to unite, encourage, and train not only clergy, but also the pro-life movement and the general public in advancing a Culture of Life. An important part of

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[2] See "The Moral Outcry Petition" Names, available at https://www.dropbox.com/s/eqdrj9hn3nizyl7/TMO-1-10-18-FINAL.pdf?dl=0 (last visited January 10, 2018)

fulfilling this mission is Priests for Life's work with pregnancy resource centers.

Priests for Life's full-time priests and lay staff travel the country visiting and helping in the work of pregnancy resource centers. Its leaders are invited to address national conferences for associations of pregnancy centers and are speakers at fundraising dinners for local facilities that assist pregnant women. More importantly, two ministries of Priests for Life, the Silent No More Awareness Campaign and Rachel's Vineyard, involve many women who provide one-on-one peer counseling at pregnancy resource facilities.

For over 15 years, the Silent No More Awareness Campaign has been a hub for women and men who regret the abortion of their children. Over 6,000 Silent No More members in 48 states have appeared at high schools, college campuses, special events, and in the media sharing personal testimonies of the trauma they've endured because of abortion. They speak to others from their own abortion experiences. Another ministry of Priests for Life, Rachel's Vineyard, conducts over 1,000 retreats annually for women who seek healing from the pain of their abortions. These retreats are also attended by family members who have lost relatives to abortion and by former abortion clinic workers who seek spiritual and emotional recovery from their involvement in terminating life. Many participants in both of these Priests for Life ministries go on to become peer counselors at pregnancy resource centers.

Much like peer counselors at drug and alcohol rehabilitation centers, the women of

Operation Outcry, Silent No More, and Rachel's Vineyard are not licensed professionals; nevertheless, they have a story to tell and experiences to share. They have a valuable message for women facing an unplanned pregnancy—namely, that there are alternatives to abortion. The effect of the State's mandate is to stifle this message. The ability of amici to communicate their experience by working in association with pregnancy resource centers is compromised by the unnecessary, misleading, and onerous disclosure provisions of the law at issue. The State's notice requirement communicates that their advice and assistance to pregnant women is less valuable than that of licensed abortion providers.

SUMMARY OF THE ARGUMENT

Assembly Bill 775, the Reproductive FACT Act (the Act), contains two distinct mandates, applicable to two distinct types of entities. One mandate applies to facilities licensed to provide a certain level of medical care. The other mandate, the particular subject of this brief, applies to facilities that provide no medical services and are thus not required to be licensed. This second mandate is so burdensome as to effectively preclude these non-medical assistance centers from advertising their free services to women in need. Moreover, it misleadingly implies that the centers are not in compliance with state licensing laws and that its services are inferior to those of licensed

professionals who provide an entirely different type of service.

In seven paragraphs, the Ninth Circuit disposed of Petitioners' challenge to the portion of the Act requiring expensive, impracticable, and message-killing notices in all advertising by these non-professional, non-commercial speakers. Pet. App. 37a – 39a.

First, after toying with the idea that these volunteer non-professionals were in fact engaged in "professional speech," the Ninth Circuit stated that it need not decide that issue, because the mandate survived even strict scrutiny.

The lower court correctly set out the standard under strict scrutiny (the regulation must be narrowly tailored to serve a compelling interest), but then evaluated the mandate in a manner that was anything but strict, or even scrutiny. Relying on unproven legislative findings, the court invoked a compelling governmental interest that is, by definition, inapplicable to these non-medical centers. Its assessment of narrow tailoring consisted of noting that the mandated speech is "only one sentence long;" the court completely ignored both the length of that one sentence and the Act's crushing requirements of where, how, and in how many languages the centers must publish the state-mandated sentence. Nor did the court consider whether more narrowly tailored means would adequately serve the state's purported interests.

In sum, while the Ninth Circuit purported to review the mandate under the correct standard of

strict scrutiny, the review was cursory and, other than the invocation of an inapplicable "compelling" interest, indistinguishable from rational basis review. The court thus cleared a path for government to impose onerous burdens on the disfavored speech of non-professionals, leaving the speech of licensed professionals to be regulated and channeled by the government through other mandates.

ARGUMENT

I. NO COMPELLING GOVERNMENTAL INTEREST SUPPORTS MANDATING DISCLOSURES FROM NON-COMMERCIAL, NON-PROFESSIONAL SPEAKERS.

A. Non-Medical Centers Do Not Provide Medical Services

With virtually no preliminaries, the Ninth Circuit announced that "California has a compelling interest in informing pregnant women when they are *using the medical services* of a facility that has not satisfied licensing standards set by the state." Pet. App. 38a (emphasis added). However, the non-licensed centers do not provide "medical services" as that term is generally understood, i.e., services by a licensed medical professional. Precisely because of state licensing requirements, these centers provide only services that do not require any such licensing, such as the

provision of free or low-cost maternity and baby clothes, diapers, social support services, counseling, education, non-diagnostic ultrasound, and over-the-counter, self-administered pregnancy tests.

The court's feat of verbal legerdemain relies on the unspoken implication that there is a meaning of "medical services" that is broader and that includes non-professional peer counseling and other services ancillary to aiding pregnant women. In the Ninth Circuit's reasoning, pregnancy is a medical condition, and therefore any pregnancy-related service is a medical service.

However, by selectively expanding the meaning of "medical services" to include over-the-counter self-administered pregnancy test kits, information about pregnancy options, free diapers, and educational programs, the court undercut its own pronouncement that the state has a compelling interest in informing women when they are receiving these "medical services" in a facility "that has not satisfied licensing standards set by the state." Pet. App. 38a.

In fact, the state has no licensing requirements for these types of services. If what the Ninth Circuit deems "medical services" can lawfully be provided without a license, then the state has no *compelling* interest in requiring such a disclosure. A state might conceivably be able to articulate some *legitimate* interest in requiring such a disclosure, but a merely legitimate interest is not constitutionally sufficient to support a regulation compelling speech. *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 800 (1988) (government may not "dictate the content of speech absent

compelling necessity, and then, only by means precisely tailored").

B. The Asserted Governmental Interest Is Vague and Subjective

The court also formulated the interest at stake as "ensur[ing] that women, who may be particularly vulnerable when they are searching for and using family-planning clinical services, are fully informed that the clinic they are trusting with their well-being is not subject to the traditional regulations that oversee those professionals who are licensed by the state." Pet. App. 38a. This exposition contains several erroneous and problematic assumptions

First, as noted above, the unlicensed centers are not "clinics" and do not provide "clinical services," so no women will be using clinical family planning services at these centers. If searching for clinical services, they will not find them at these centers, so there is nothing for the women to be "fully informed" about in terms of who might be providing the services.

Consumers seek out organizations, facilities, businesses, or nonprofits for what they *provide*, not for what they *do not provide*. Women understand that in going to a facility offering free services, they may not be obtaining every service that is otherwise available. A woman may go to a non-medical center for a free pregnancy test and related information – this does not mean that she expects

to get any and every type of medical diagnosis or treatment.

Second, the Ninth Circuit's fuzzy reference to "clinics [women] are trusting with their well-being" (Pet. App. 38a) injects a significant amount of uncertainty and subjectivity into what should be a rigorous statement of the state's compelling interest. Every day, people "trust their well-being" to unlicensed individuals for various reasons. The assumption that the state has a compelling interest in imposing onerous disclosure requirements on individual or facilities who provide non-professional, non-licensed services to enhance the well-being of others is a recipe for state control over speech in many areas, controversial and otherwise.

For example, the state of California has statutorily prohibited mental health professionals from providing "sexual orientation change efforts" ("SOCE") to minors. Cal. Bus. & Prof. Code § 865 (Senate Bill 1172). In upholding this restriction, the Ninth Circuit noted, "Importantly, SB 1172 does not . . . prevent unlicensed providers, such as religious leaders, from administering SOCE to children or adults, . . ." *Pickup v. Brown*, 740 F.3d 1208, 1223 (9th Cir. 2014). However, under the Ninth Circuit's reasoning in the instant case, the state could successfully assert a compelling interest in requiring any church or individual offering SOCE from a faith-based or other non-medical perspective to submerge its advertising in disclosures that the counseling is not conducted by licensed professionals. The two modes of regulating the speech of licensed and unlicensed individuals would effectively inhibit the provision of any

counseling in this area, lay or professional, not approved by the state.

The Ninth Circuit's reasoning is not limited to physical or mental health interests. Parents entrust the "well-being" of their minor children to public and private schools. Under the Ninth Circuit's reasoning, the state could claim a compelling interest in requiring private schools that use non-credentialed teachers to include in all their advertising a "conspicuous" notice stating, e.g., "This school employs teachers who are not credentialed by the State of California and have not satisfied the credentialing standards set by the state." Or "This school has teachers on staff who have not been subject to the traditional regulations overseeing professional teachers who are credentialed by the state." Cf. Pet. App. 38a.

This last example highlights another deception in the Ninth Circuit's reasoning. The court claims that the mandated notice "says nothing about the quality of service women may receive at these clinics, and in no way implies or suggests California's preferences regarding unlicensed clinics." Pet. App. 39a. But if the state has no message about the relative quality of service between licensed and non-licensed facilities, and if it expresses no preference regarding which type of facility women choose, then how can it have a *compelling* interest in informing women that they are "trusting their well-being" to a non-licensed facility?

Put another way, if the state's interest in warning women that they are "trusting their well-being" to facilities that are not licensed by the

state of California is a *compelling* one, wouldn't that compelling interest in turn dictate that the mandated speech convey more than a non-committal choice between apples and oranges? But the Ninth Circuit claims that, while the state *urgently* needs to convey a warning to women receiving services in non-licensed pregnancy resource centers, the message itself is a neutral one, not expressing any judgment on the quality of the services.

The panel's protestations notwithstanding, the mandated notices do convey a message, a message of disapproval of non-licensed individuals providing counseling and assistance that could theoretically be provided by a state-licensed professional. The state of California wishes to direct the flow of information and assistance to pregnant women into channels it controls through licensing requirements. To that end, it forces those providing non-medical forms of assistance to proclaim their suspect status in a "conspicuous" manner that suggests the facility does not comply with state regulations and is inappropriately providing services that require licensing.

The mandated notice also implies that services provided in a licensed facility or by licensed providers are superior to those provided by those without such licensing. However, particularly in the context of pregnancy options counseling, this assumption lacks empirical support and is itself suspect. The state presented no evidence that pregnant women considering abortion will get more beneficial, helpful, and disinterested advice or assistance from a licensed

doctor running a for-profit abortion clinic than from a lay counselor who, like members of amici Operation Outcry, has had an abortion and lives with the consequences.

Far from furthering a state interest in truth-in-advertising, the Act's mandated notice provision for non-licensed pregnancy care centers is itself false and misleading by implying the necessity or superiority of a license for volunteer pregnancy peer counseling where none is required.

C. The Deference Given To The Legislative Record In Finding A Compelling Governmental Interest Was Erroneous And Inappropriate In The Context Of Strict Scrutiny.

When examining a law under strict scrutiny, the factual assumptions underlying the legislation must be evaluated. It would be an abdication of the judiciary's role to give unbridled deference to legislative findings either to show a compelling government interest or sufficient narrowly tailoring. *NAACP v. Button*, 371 U. S. 415, 83 S. Ct. 328, 9 L. Ed. 2d 405, 439 (1963)(regulatory measures, no matter how sophisticated, cannot be employed in purpose or in effect to stifle, penalize, or curb the exercise of First Amendment rights); *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 749 (2011)("We have repeatedly rejected the argument that the government has a compelling state interest in 'leveling the playing field'...").

In the case of AB 775, the legislative findings include generalizations about the State's desire to make sure that women facing unplanned pregnancies have access to a full range of medical care, presumably necessitating the mandated notices for licensed facilities. Pet. App. 76a-78a. The only legislative finding undergirding the speech mandate imposed on non-medical centers is the assertion that it is "critical that women know whether they are receiving care from licensed medical professionals." Pet. App. 79a. But as a factual basis for a compelling interest in imposing the notice requirement on non-licensed centers, this "finding" fails: not only is it unsupported by empirical evidence, but its basic assumptions are erroneous.

As discussed above, non-licensed pregnancy support centers do not provide medical care. They do not dispense drugs. They do not diagnose medical conditions (including pregnancy). They provide social and physical resources, including peer counseling such as that offered by *Amici Curiae*, referrals to available services, as well as maternity clothes, baby clothes and diapers. Some centers provide a self-administered pregnancy test, free of charge, to women who could also obtain the same test at a supermarket. Some centers provide a keepsake (nonmedical) ultrasound, not used for diagnostic purposes, but providing these ultrasounds is not medical care and is already subject to a written disclosure requirement. Cal. Health & Safety Code § 123620.

None of these services are regulated, nor need they be regulated for the health or safety of

women. Any unlicensed person attempting or purporting to practice healing arts at a pregnancy support center would be liable for the unauthorized practice of medicine. *See* Cal. Bus. & Prof. Code § 2052. Non-medical, non-licensed pregnancy support centers are not medical providers, and do not meet the definition of a "health facility" that is regulated by the Health and Safety Code. *See* Cal. Health & Safety Code § 1250 ("'health facility' means a facility, place, or building that is organized, maintained, and operated for the diagnosis, care, prevention, and treatment of human illness..."). In sum, if these centers or unlicensed individuals volunteering in them did in fact provide medical care, they could and would be prosecuted, no matter how many disclosures they made to women about their unlicensed status.

The legislative history (not findings) of AB 775, relied on by the Ninth Circuit in a single sentence, also contains unsupported, blanket statements about "crisis pregnancy centers." These generalizations include allegations from ideological foes that these centers provide inaccurate information regarding the risks of abortion, use manipulation and shame tactics, and use false and misleading advertising. Neither empirical data nor firsthand accounts supported any of these allegations. A single report issued by the University of California, Hastings College of Law, was cited several times by legislative committees,

but this report contained no empirical data.[3] Instead, it proposed legislative and enforcement actions that might be taken to regulate pregnancy resource centers

In sum, the state failed, both in this lawsuit and in the legislative history itself, to provide even a cursory evidentiary showing to support the asserted "compelling" governmental interest.[4]

II. THE MANDATED NOTICE IS NOT NARROWLY TAILORED

Even if the mandated notice served a compelling governmental interest, that does not end the inquiry under strict scrutiny: "to recite the Government's compelling interests is not to end the matter." *United States v. Alvarez*, 567 U.S. 709, 725 (2012). The First Amendment requires that the Government's chosen regulation of speech be

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[3] Casey Watters, et al., *Pregnancy Resource Centers: Ensuring Access and Accuracy of Information* (2011), available at https://www.heartbeatinternational.org/pdf/CrisisCenterRegulation_Final.pdf

[4] The lack of evidence of an actual problem is not unique to California. Ruling on a challenge to a similar disclosure law targeting pregnancy support centers in Baltimore, the Fourth Circuit recently noted, "After seven years of litigation and a 1,295-page record before us, [Baltimore] does not identify a single example of a woman who entered the Greater Baltimore Center's waiting room under the misimpression that she could obtain an abortion there." *Greater Baltimore Ctr. for Pregnancy Concerns v. Baltimore*, 2018 U.S. App. LEXIS 297 *19-20 (4th Cir. 2018).

narrowly tailored, or "actually necessary," to achieve its interest. *Brown v. Entm't Merchs. Ass'n.*, 564 U.S. 786, 799 (2011) Under strict scrutiny analysis, the state bears the burden on the issue of narrow tailoring. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015).

Other than noting that the mandated notice "is only one sentence long," the Ninth Circuit did not conduct even the most cursory examination of the particular provisions of the Act governing how the notice must be printed. The court did not consider the effect of the mandate on the advertising of non-licensed centers. It did not consider any less burdensome alternatives. Far from being strict, its scrutiny of the regulation was entirely deferential.

A. The Requirements of the Mandated Notice Are Broader and More Burdensome Than Necessary to Serve the Purported Governmental Interest.

The Act's detailed requirements for the mandated notice are more burdensome than necessary.

The Act mandates a bloated, redundant 29-word message, where four or five words would satisfy the purported interest, e.g., "Not a licensed clinic" or "No licensed professionals on staff."

Rather than requiring simply that the font for the notice be of a legible size, the Act mandates that, for both web and print advertising, the font be larger than the surrounding text or in some other manner made "conspicuous" by standing out from

the surrounding text. In other words, the Act mandates that the non-licensed centers design their advertisements to make the state-mandated speech *more* prominent than their own message.

The Act mandates that the state's message be printed in English and the "primary threshold languages for Medi-Cal beneficiaries . . . for the county in which the facility is located." Pet. App. 82a. For example, to comply with the Act, Petitioner Pregnancy Care Clinic must include, in ***all*** of their advertisements, the following:

This facility is not licensed as a medical facility by the State of California and has no licensed medical provider who provides or directly supervises the provision of services.

* Este establecimiento no tiene licencia como instalación médica por parte del Estado de California y no tiene un proveedor médico con licencia que proporcione o supervise directamente la prestación de servicios. *

* قبل من طبي كمرفق مرخص غير المرفق هذا
مرخص طبي مزود لديه وليس كاليفورنيا ولاية
الخدمات تقديم على مباشرة يشرف أو يقدم *

* Cơ sở này không được Nhà nước California cấp phép như một cơ sở y tế và không có nhà cung cấp dịch vụ y tế được cấp phép cung cấp hoặc trực tiếp giám sát việc cung cấp dịch vụ.*

* ای پزشک مرکز کی عنوان به نه مرکز نیا
دهنده ارائه بدون و مجوز ایفرنیکال التیا توسط
طور به ای و کند یم فراهم که است مجاز یپزشک
دارد نظارت خدمات ارائه میمستق. *

* ito ay hindi ng may pahintulot na gaya ng isang medikal sa pamamagitan ng estado ng california may pahintulot na nagkakaloob medikal at wala na siyang nagbibigay ng tuwiran o supervises ang pagkain ng mga paglilingkod. *

If a center's own advertising is not printed in these other languages, the mandate is hardly narrowly tailored in requiring a disclosure of the non-licensed status of the facility in those languages. A narrowly tailored requirement might require, at most, the mandated notice to appear only in the same language used in the advertisement itself.

The Act mandates that the state's message be included in all print and digital advertising material, regardless of the size or format of the advertisement or audience of the particular form of advertising. While the exact meaning of "advertising material" is uncertain, it doubtless includes most traditional advertising as well as many emerging forms of advertising. In fact, the mandate appears so broad as to include every outreach made by a non-medical center, creating problems ranging from significant to insurmountable.

For example, the dozen words printed in a small phone book ad or bus or subway sign ("Pregnant? Think You Might Be? We're Here to Help. Call 888-555-1212") is more than tripled by the addition of the mandated 29-word notice in only one language. Not only is the center's own message crowded out, but the cost of the advertisement also increases substantially. Pet. App. 32a – 33a. A simple organization name and logo on a T-shirt would be transformed into something ridiculous.

Under the Act, non-medical centers are completely foreclosed from advertising on the Internet, as these platforms have limitations on the number of characters in advertisements. Indeed, at 153 characters, the wordy and redundant state-

mandated notice alone, in just one language, is almost double the 80-character limit for a GoogleAd. Pet. App. 33a.[5]

The "one sentence long" mandated notice is burdensome and not narrowly tailored to serve the purported governmental interest.

B. The Ninth Circuit Failed to Consider Narrowly Tailored Alternatives

Assuming *arguendo* that there was some empirical evidence of pregnancy support centers misleading clients or potential clients (which there is not), a state-wide mandate applicable to every center nonetheless fails to meet the constitutional requirement of narrow tailoring. A regulation of speech is not narrowly tailored if less restrictive alternatives are "readily available." *Boos v. Barry*, 485 U.S. 312, 329 (1988).

The state has other tools in its toolbox to address the alleged problems of centers engaging in deceptive advertising or misleading of potential clients, none of which the Ninth Circuit considered. The state could, as recommended in the report commissioned from U.C. Hastings College of Law, have simply focused on enforcing existing laws against false advertising. *Riley, supra*, 487 U.S. at 800 (vigorous enforcement of antifraud laws is more narrowly tailored than "prophylactic,

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[5] See Google AdWords Help, available at https://support.google.com/adwords/answer/1704389?hl=en (last visited January 10, 2018).

imprecise, and unduly burdensome" disclosure requirements on solicitations). Legislatively, it could have created a private right of action for those actually harmed by alleged deceptive practices of pregnancy care centers.

The Legislature might also have adopted a law like an existing San Francisco ordinance, which authorizes courts to order remedial steps upon a finding that a particular center has engaged in deceptive advertising. *First Resort, Inc. v. Herrera*, 860 F.3d 1263, 1270 (9th Cir. 2017) (upholding S.F. Admin. Code, ch. 93 § 93.5, creating cause of action by city attorney for injunctive relief; court may order remedial disclosure requirements upon finding that center's advertising is false, misleading, or deceptive). While this approach may suffer from other constitutional infirmities, such as the singling out of pregnancy care centers, it also demonstrates the existence of more narrowly tailored alternatives than the broad prophylactic approach chosen by the Legislature.

While the state has considerable latitude in protecting public health and preventing deceptive advertising, the compelled speech of AB 775 is too loose a fit to those ends to survive strict scrutiny, and in fact creates its own deception by mandating a warning of "non-licensure" where no licensure is required or even obtainable.

CONCLUSION

Strict scrutiny is, as the name implies, a demanding standard; it is a "'rare case' in which a

State demonstrates that a speech restriction is narrowly tailored to serve a compelling interest." *Williams-Yulee v. Fla. Bar*, 135 S.Ct. 1656, 1665 (2015). Petitioners' challenge to AB 775 is not such a case.

The Act satisfies neither element of the strict scrutiny test. It does not serve even an intelligible, much less a compelling, governmental interest. Moreover, it is not narrowly tailored to further the purported interest identified by the court below. This Court should reverse the Ninth Circuit and find AB 775 unconstitutional.

Respectfully submitted,

CATHERINE W. SHORT
Counsel of Record
REBEKAH MILLARD
ALLISON K. ARANDA
Life Legal Defense Foundation
PO Box 2105
Napa, CA 92544
Tel.: (805) 640-1940
Fax: (707-224-6676
LLDFOjai@cs.com

Counsel for Amici Curiae

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IN THE

Supreme Court of the United States

NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES, D/B/A NIFLA, ET AL.,
Petitioners,

v.

XAVIER BECERRA, ATTORNEY GENERAL, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PLANNED PARENTHOOD FEDERATION OF AMERICA AND PHYSICIANS FOR REPRODUCTIVE HEALTH AS AMICI CURIAE SUPPORTING RESPONDENTS

KIMBERLY A. PARKER
LESLEY R. FREDIN
E. ROSS COHEN
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000

ALAN E. SCHOENFELD
Counsel of Record
CHARLES C. BRIDGE
WILMER CUTLER PICKERING HALE AND DORR LLP
7 World Trade Center
New York, NY 10007
(212) 937-7518
alan.schoenfeld@wilmerhale.com

CORPORATE DISCLOSURE STATEMENT

Planned Parenthood Federation of America and Physicians for Reproductive Health state that they have no parent corporation and that no publicly held corporation owns 10 percent or more of their stock.

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STATEMENT OF INTEREST OF AMICI CURIAE[1]

Planned Parenthood Federation of America (PPFA) is the oldest and largest provider of reproductive health care in the United States, delivering medical services through over 600 health centers operated by 56 affiliates. Its mission is to provide comprehensive reproductive health care services and education, to provide educational programs relating to reproductive and sexual health, and to advocate for public policies to ensure access to health services. PPFA affiliates provide care to approximately 2.5 million women and men each year. One out of every five women in the United States has received care from PPFA. In particular, PPFA is at the forefront of providing high-quality reproductive health care to individuals and communities facing serious barriers to obtaining such care—especially individuals with low income, individuals in rural and other medically underserved areas, and communities of color.

Physicians for Reproductive Health (PRH) is a doctor-led nonprofit that seeks to assure meaningful access to comprehensive reproductive health services, including contraception and abortion, as part of mainstream medical care. Founded in 1992, the organization currently has over 6,000 members across the country, including over 3,000 physicians who practice in a range of fields: obstetrics and gynecology, pediatrics, family medicine, emergency medicine, cardiology, public health, neurology, radiology, osteopathic medicine, and

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[1] No counsel for a party authored this brief in whole or in part, and no entity or person, other than amici curiae and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties consent to the filing of this brief.

more. These members, many of whom provide abortion care, include faculty and department heads at academic medical centers and top hospitals.

PPFA and PRH (collectively, Amici) are dedicated to ensuring meaningful access to reproductive health care services, and believe that it is vitally important for women to be able to make fully informed decisions about their reproductive health care. Amici have an interest in ensuring women, including women with low income, are knowledgeable about the full range of options and care available to them. Amici's affiliates, providers, and members have seen firsthand pregnant women who have been misled and misinformed, and thus had their health care delayed, by health centers that deceptively posed as offering a full range of women's health services, although, in fact, they did not. Amici's affiliates, providers, and members have also been subject to laws that force physicians, other medical personnel, and health centers to communicate state-mandated messages to patients—messages that are often inconsistent with medical science and prevailing professional standards and that are harmful both to patients and to the medical profession.

As detailed below, several States have passed laws requiring providers of abortion services to give prospective and current patients scientifically baseless warnings about the supposed harmful effects abortions can have on women, or recommend procedures that, according to the established consensus among medical professionals, are not in patients' best interest. *See* Part II, *infra*. Amici thus have been profoundly affected by laws regulating the speech of medical professionals and have an abiding interest in ensuring that those laws are subject to appropriate judicial scrutiny.

SUMMARY OF ARGUMENT

As licensed health professionals who both provide care to patients and are often subject to government speech regulations, Amici here address the proper degree of constitutional scrutiny to be applied to the Reproductive FACT Act's disclosure requirement for licensed medical facilities and the reasons the requirement survives the applicable heightened scrutiny. *See* Cal. Health & Safety Code § 123472(a) (the "Licensed Notice" provision).

As this Court has long recognized, regulation of speech by professionals, in a professional context, about matters of professional concern implicates a conflict between professionals' substantial First Amendment interest in practicing their profession unencumbered by speech regulations that either compel them to make, or restrict them from making, certain statements to clients and patients, and the State's recognized interest in the protection of public health and patient welfare when patients receive care by licensed purveyors of professional services, who have superior knowledge and clout with respect to the services they provide. California's Licensed Notice provision falls squarely within this constitutional tradition: It regulates speech by licensed medical providers, as they provide reproductive health care to patients in licensed facilities, regarding the particular health care the patient is seeking. And it does so to further the State's recognized interest in ensuring that women seeking reproductive health care services have necessary and accurate information about, and access to, medically accepted options.

Regulation of professional speech like the Licensed Notice is subject to heightened scrutiny under the

First Amendment. Given the acute risk that States will exercise their police powers to suppress disfavored speech by professionals, only heightened scrutiny suffices to smoke out impermissible state justifications for speech regulation and thereby protect professionals' right to be free from government-compelled speech or restraints on the free expression of their professional judgment. While not all regulation of professional speech will satisfy this heightened scrutiny, the Licensed Notice does: It advances an important governmental interest in a narrow and targeted way, requiring licensed health care providers, which have as their "primary purpose" the provision of women's reproductive health care services or counseling about such services, to provide a limited written disclosure entailing indisputably accurate information to their patients who seek their advice on matters of reproductive health about their options, without indicating any preference for one health care service over another.

ARGUMENT

I. THE LICENSED NOTICE PROVISION OF THE FACT ACT MUST BE ANALYZED AS A PROFESSIONAL SPEECH REGULATION

As the Ninth Circuit correctly observed, the Licensed Notice provision regulates speech that occurs "within the confines of a professional's practice," *NIFLA* v. *Harris*, 839 F.3d 823, 839 (9th Cir. 2016), and therefore implicates the particular First Amendment concerns that attach to professional speech.

A. Professional Speech Is A Matter of Special First Amendment Concern

Professional speech creates a First Amendment dilemma. On the one hand, professional speech "occurs in

an area traditionally subject to government regulation." *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm. of N.Y.*, 447 U.S. 557, 562 (1980) (discussing the special First Amendment treatment required in another such area, commercial speech). The government has a long-settled interest in "the regulation of certain trades and callings." *Watson* v. *Maryland*, 218 U.S. 173, 176 (1910) (explaining that "the police power of the states" encompasses professional regulation and highlighting in particular professions that "closely concern the public health"). This Court has accordingly recognized that a State may take steps to maintain high standards of professional conduct, through licensing and other means, including speech regulations, to support and justify the trust that consumers repose in professionals when relying on their services. *See, e.g.*, *Edenfield* v. *Fane*, 507 U.S. 761, 770 (1993) ("We have given consistent recognition to the State's important interests in maintaining standards of ethical conduct in the licensed professions."); *Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. 447, 460 (1978) ("[T]he State bears a special responsibility for maintaining standards among members of the licensed professions."); *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748, 768 (1976) (noting the importance of Virginia's "close regulation" of the pharmacist profession as a means of maintaining "high professional standards"); *Thomas* v. *Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring) (identifying the government's need to protect consumers of professional services from "the untrustworthy, the incompetent, or the irresponsible").

On the other hand, individuals do not forfeit their First Amendment right to free speech when speaking in their professional capacity, even when their profes-

sion is subject to the State's superintendence. Like any other participant in the marketplace of ideas, professionals have a protected First Amendment interest in speaking—and in not speaking. *See Hurley* v. *Irish-American Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 573 (1995) ("[O]ne important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say.'"); *Riley* v. *National Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988) ("Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech."); *see also Planned Parenthood of Se. Pa.* v. *Casey*, 505 U.S. 833, 884 (1992) (plurality opinion) (recognizing that physicians' "First Amendment rights not to speak are implicated" when a State regulates speech by medical professionals).

When professionals, particularly those in state-regulated professions, speak, these interests often come into conflict with each other. *See Lowe* v. *SEC*, 472 U.S. 181, 228 (1985) (White, J., concurring) (describing the "collision between the power of government to license and regulate those who would pursue a profession or vocation and the rights of freedom of speech and of the press guaranteed by the First Amendment"). And because "[s]peech by professionals ... has many dimensions," *Florida Bar* v. *Went For It, Inc.*, 515 U.S. 618, 634 (1995), context matters enormously where regulation of professional speech is concerned—as it often does in the First Amendment context. *See, e.g., Snyder* v. *Phelps*, 562 U.S. 443, 453-454 (2011) (explaining that, when evaluating the nature of speech for First Amendment purposes, "it is necessary to evaluate all the circumstances of the speech, including what was said, where it was said, and how it was said"); *Riley*, 487 U.S. at 796 (explaining that courts must look at "the nature of

the speech taken as a whole and the effect of the compelled statement thereon").

For example, a professional's public speech (*i.e.*, outside the context of a client or patient relationship) on a matter of public concern would receive full First Amendment protection. *See Lowe*, 472 U.S. at 232 (White, J., concurring) (explaining that regulations of a professional's public speech, "[w]here [a] personal nexus between professional and client does not exist, ... becomes regulation of speaking or publishing as such [and is] subject to the First Amendment's" full protection). But not every case is so straightforward. This Court has repeatedly recognized that speech occurring "as part of the practice of [a profession], subject to reasonable licensing and regulation by the State," is a matter of special First Amendment concern and has distinctive qualities. *Casey*, 505 U.S. at 884 (plurality op.); *see also, e.g.*, *Legal Servs. Corp.* v. *Velazquez*, 531 U.S. 533, 542 (2001) (observing that a professional does not become "the government's speaker" when speaking in the course of practicing a regulated profession, but rather retains First Amendment interests of his or her own); *Riley*, 487 U.S. at 801 n.13 (explaining that the government's interest in professional licensure was not "devoid of all First Amendment implication"); *Thomas*, 323 U.S. at 531 ("[T]he rights of free speech and a free press are not confined to any field of human interest.").

Professional speech is typically characterized by a knowledge imbalance between professional and client: most clients seek out professional services because they want to capitalize on an enshrined profession's specialized knowledge or expertise. As a result, clients must place their trust in professionals' speech, and States have some power to ensure that trust is appropriately reposed, including by regulating professionals' speech.

See Thomas, 323 U.S. at 545 (Jackson, J., concurring); Halberstam, *Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions*, 147 U. Pa. L. Rev. 771, 844-845 (1999) (discussing this "imbalance of authority" and knowledge). At the same time, when professionals speak in the course of practicing their profession, their First Amendment interests extend to conveying information based on their own professional expertise and an interest in delivering messages consistent with their professional judgment. *See* Haupt, *Professional Speech*, 125 Yale L.J. 1238, 1272-1273 (2016) ("The professional not only speaks for herself, but also as a member of a learned profession—that is, the knowledge community. And that community has an interest of its own. Only if the community remains autonomous can it develop and refine the specialized knowledge that is its essence and the source of its social value."); *see also* Part II, *infra* (citing cases to illustrate the risks of permitting excessive government interference with accepted professional consensus).

Drawing on this Court's precedent,[2] several courts of appeals have recognized that government regulation of "professional speech," defined as speech relating to the practice of the profession, presents a special First Amendment dilemma and warrants special First Amendment treatment. *See Harris*, 839 F.3d at 838-841; *Wollschlaeger* v. *Governor of Fla.*, 814 F.3d 1159, 1186 (11th Cir. 2015) (*Wollschlaeger I*), *opinion vacated by reh'g en banc*, 848 F.3d 1293 (11th Cir. 2017) (*Wollschlaeger II*); *King* v. *Governor of N.J.*, 767 F.3d 216,

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[2] The principles justifying special First Amendment treatment for professional speech are "implicit in a number of [this Court's] decisions involving government-funded speech, commercial speech, and other areas." Haupt, 125 Yale L.J. at 1241 & nn.6-8, 1258-1264 (collecting and discussing cases).

229-233 (3d Cir. 2014), *cert. denied*, 135 S. Ct. 2048 (2015); *Stuart* v. *Camnitz*, 774 F.3d 238, 247-248 (4th Cir. 2014), *cert. denied sub nom. Walker-McGill* v. *Stuart*, 135 S. Ct. 2838 (2015). These decisions commonly recognize that, although the government has a role to play in regulating the professions, professionals do not abandon their free speech rights simply by virtue of their membership in a regulated occupation. *See Stuart*, 774 F.3d at 247 ("[S]peech is speech, and it must be analyzed as such for purposes of the First Amendment." (quoting *King*, 767 F.3d at 229)).

Rather, professional speech is worthy of the Constitution's protection: it is valuable to listeners and, by extension, to society as a whole because of its function as a source of valuable information. *See Sorrell* v. *IMS Health Inc.*, 564 U.S. 552, 566 (2011) (noting that "information can save lives" in the context of medicine and public health); *Central Hudson*, 447 U.S. at 561-562; *Virginia State Bd. of Pharmacy*, 425 U.S. at 762 ("Purely factual matter of public interest may claim [First Amendment] protection."); *cf. Snyder*, 562 U.S. at 453 (explaining that matters of public concern—"'any matter of political, social, or other concern to the community'" or "'of general interest and of value and concern to the public'"—receive heightened First Amendment protection).

B. The Licensed Notice Provision of the FACT Act Regulates Professional Speech

Applying the common-sense definition drawn from this Court's precedents—professional speech is speech to clients, relating to the practice of the profession—the Ninth Circuit correctly categorized the Licensed Notice provision as a professional speech regulation. *Harris*, 839 F.3d at 839-840. In attempting to redefine

or restrict professional speech so as to exclude the Licensed Notice, petitioners and their amici lose sight of the doctrine's justifications and the interests it serves.

Under the FACT Act, all "licensed covered facilities" must distribute the "Licensed Notice" to their patients. *See* Cal. Health & Safety Code § 123472(a). To qualify as a "licensed covered facility" for purposes of the Licensed Notice provision, a clinic must have a "primary purpose [of] providing family planning or pregnancy-related services" and must also satisfy two or more of the following criteria:

(1) The facility offers obstetric ultrasounds, obstetric sonograms, or prenatal care to pregnant women.

(2) The facility provides, or offers counseling about, contraception or contraceptive methods.

(3) The facility offers pregnancy testing or pregnancy diagnosis.

(4) The facility advertises or solicits patrons with offers to provide prenatal sonography, pregnancy tests, or pregnancy options counseling.

(5) The facility offers abortion services.

(6) The facility has staff or volunteers who collect health information from clients.

Cal. Health & Safety Code § 123471(a). As a result, by definition, any patient who visits a licensed covered facility has chosen to seek out a facility—endorsed by the State with a medical license—with a "primary purpose" of offering a particular set of professional medical services. She has also chosen to seek out a facility that publicly offers at least some of the specific family-planning or pregnancy-related procedures and services

enumerated by the FACT Act. *See Harris*, 839 F.3d at 840 ("Clients go to a [licensed covered facility] precisely because of the professional services it offers, and ... they reasonably rely upon the clinic for its knowledge and skill.").[3]

Given the constraints of the statute, speech by employees of a licensed covered facility that takes place within the facility and relates to the professional services on offer should be considered professional speech. From the moment a patient walks in the door of a licensed covered facility until the moment she walks out, she has placed her trust in the medical expertise that the facility is licensed to provide and has publicly held itself out as possessing. Speech related to that medical expertise implicates the knowledge imbalance that is at the core of professional speech. *See Lowe*, 472 U.S. at 232 (White, J., concurring) (recognizing the special role played by those who "take[] the affairs of a client personally in hand").

The substance of the Licensed Notice provision clearly relates to the particular medical services sought by women who visit these licensed covered facilities. The Notice provides information about "free or low-cost access to comprehensive family planning services," which is precisely the medical specialty as to which li-

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[3] Even if the facility does not offer the complete range of family-planning or pregnancy-related procedures and services, many facilities use deceptive tactics to attract women seeking those services. *See* Part III, *infra*. Indeed, in adopting the FACT Act, the California Legislature aimed to address the fact that some of the facilities (which do not offer a full range of medical services) intentionally "pose as full-service women's health clinics" in an effort to exploit the trust that laypeople—especially laypeople in acute need of medical care—place in medical professionals. *See* Assem. Comm. on Health, Analysis of Assembly Bill No. 775, at 3.

censed covered facilities, by definition, publicly profess to have professional expertise. And when a client receives that medical information from a facility defined by its expertise in that area of medicine, the client reasonably expects that the information can be trusted, given California's licensing and regulation of the facility and the medical profession. *Cf. Ohralik*, 436 U.S. at 460, 464-465 (identifying the State's "general interest in protecting consumers" and observing that an individual "may place his trust in a lawyer," whether or not that trust is not warranted, on account of the lawyer's apparent expertise); *Virginia State Bd. of Pharmacy*, 425 U.S. at 766-769 (discussing the State's "indisputabl[e]" interest in maintaining and monitoring high professional standards of competence and trustworthiness via "close regulation"). In short, because the Licensed Notice relates to the professional services on offer in licensed covered facilities, it is professional speech.

Petitioners and their amici attempt to avoid this conclusion by proposing restrictive conditions that would exclude speech like the Licensed Notice from the reach of professional speech doctrine.

One of petitioners' amici argues that the Licensed Notice provision does not regulate professional speech because the Notice is a "rote advertisement" for public services and does not require specialized medical knowledge to deliver or explain. *See* Cato Br. 3-6 (arguing that the Licensed Notice "can be understood fully by reading a website or brochure" and is therefore not "unique to the doctor-patient relationship"); *cf.* Cal. Health & Safety Code § 123472(a)(1). But context matters. *See, e.g.*, *Snyder*, 562 U.S. at 453-454 (explaining that, when evaluating the nature of speech for First Amendment purposes, "it is necessary to evaluate all the circumstances of the speech, including what was

said, where it was said, and how it was said"); *see also Stuart*, 774 F.3d at 246 (explaining that, when evaluating required disclosures, "[c]ontext matters" (quoting *Greater Balt. Ctr. for Pregnancy Concerns, Inc.* v. *Mayor of Balt.*, 721 F.3d 264, 286 (4th Cir. 2013) (en banc))). Patients receiving the Licensed Notice have, by definition, come to a facility presenting itself to the public as a licensed provider of specialized medical services; they reasonably expect that any information substantively related to those medical services is being delivered within the context of a professional-client relationship.[4] Clients are hardly equipped to assess whether substantive medical speech like the Licensed Notice—or any other medical message delivered during their time at a licensed covered facility—is "unique to the doctor-patient relationship." Indeed, it is not clear how courts could fairly and consistently engage in that line-drawing exercise. The more workable standard—and the standard most responsive to the doctrine's justifications—is to analyze as "professional speech" any

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[4] For this reason, the Licensed Notice is professional speech regardless of whether a medical professional, a nonprofessional staff member, or the facility itself is viewed as the speaker. Because the information relates to the medical services that the facility publicly purports to offer, it is information that clients reasonably view as within the context of the professional-client relationship. *See Harris*, 839 F.3d at 840 ("All the speech related to the clinics' professional services that occurs within the clinics' walls ... is part of the clinics' professional practice."). By contrast, a staff member's speech to a client in the waiting room about a clearly nonmedical or political topic—for example, the merits of a candidate for elected office or political threats to birth control access—would not be analyzed as professional speech. *See King*, 767 F.3d at 235.

speech that, like the Licensed Notice, relates to the professional services being rendered.[5]

The same amicus also argues that the Licensed Notice provision does not regulate professional speech because its required disclosure is not "tailored to a particular client's circumstances." *See* Cato Br. 6-9. This limiting condition likewise reflects too narrow a view of professional speech. Patients trust and rely upon doctors' or other professionals' speech, even when the speech is not tailored to their particular circumstances. Patients are therefore subject to a knowledge imbalance with respect to speech relating to professional medical services, regardless of whether the speech is individualized. *See Ohralik*, 436 U.S. at 464-465 (explaining that "harmful solicitation" by attorneys, even before the establishment of any individualized attorney-client relationship, presents dangers because of a power and knowledge imbalance that may be especially strong in "circumstances conducive to uninformed acquiescence").

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[5] Petitioners' amicus raises the specter of a hypothetical California statute that would compel California doctors to inform patients where they can buy the cheapest nearby broccoli—evidently to illustrate the purported dangers of ignoring amicus's preferred "limiting principle centered on expert knowledge." Cato Br. 6. As an initial matter, this hypothetical statute compels speech relating more to commerce than to medical services. More to the point, amicus's implication—that the Ninth Circuit's definition of professional speech will lead to a deluge of silly or onerous disclosure laws—is unfounded. If a court were to find that California has only a weak interest in having licensed doctors promote broccoli's nutritional virtues, then the fact that the statute is a professional speech regulation would not preclude the court from striking down the statute under heightened scrutiny. *See* Part II, *infra*.

Casey did not hold to the contrary. In fact, *Casey* upheld a provision requiring a "physician or qualified nonphysician" to inform the patient of the availability of certain printed materials not tailored to the individual client's circumstances, but providing general information. 505 U.S. at 881. To the extent that *Casey* says anything at all about the First Amendment, it simply outlined an approach consistent with the conception of professional speech laid out here. *See id.* at 884 (recognizing that a workable balance must be found between a "physician's First Amendment right[] not to speak" and the State's power to impose "reasonable licensing and regulation" on professionals). Prudently, lower courts have declined to draw precedential First Amendment guidance from a single paragraph in *Casey* that did not clearly articulate a standard of review. *See, e.g.*, *Harris*, 839 F.3d at 837-838; *Wollschlaeger II*, 848 F.3d at 1311; *Stuart*, 774 F.3d at 239, 249 ("[T]he plurality did not hold sweepingly that all regulation of speech in the medical context merely receives rational basis review."); *see also* Haupt, 125 Yale L.J. at 1259-1260 & nn.89-91 (observing that scholars, like the courts of appeals, "have been struggling" to draw explicit guidance from *Casey*'s "cryptic" paragraph).[6]

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[6] The Fifth and Eighth Circuits have misinterpreted *Casey*'s holding and conflated *Casey*'s treatment of the Fourteenth and First Amendment claims at issue in that case. *See Texas Med. Providers Performing Abortion Servs.* v. *Lakey*, 667 F.3d 570, 574-576 (5th Cir. 2012); *Planned Parenthood Minn., N.D., S.D.* v. *Rounds*, 530 F.3d 724, 733-735 (8th Cir. 2008). Those courts incorrectly concluded that if a speech regulation passes muster under *Casey*'s Fourteenth Amendment undue burden analysis—that is, if it compels speech that is truthful and not misleading—then any First Amendment challenge to the regulation necessarily fails. That analysis misreads *Casey*, which treated the undue burden and First Amendment questions as separate inquiries. Simply

Finally, contrary to petitioners' suggestion, it is irrelevant whether a licensed covered facility charges for its services. *Compare* Pet. Br. 21-22, 40-46, *with* U.S. Br. 20-24. To be sure, many professional-client relationships are transactional: a professional provides services, and the client pays for them. But many professionals, particularly doctors and lawyers, regularly offer their services pro bono—either on a full-time basis or as a part-time complement to their ordinary practice.[7] The knowledge imbalance between doctor and patient does not disappear in the pro bono context—nor does a patient's expectation of competent medical care. Professional speech and commercial speech share certain qualities, and there are some shared justifications for giving those two speech categories special First Amendment treatment. But it does not follow that professional speech must be related to a commercial transaction (*i.e.*, money exchanged for professional services) in order to be categorized as professional speech. Moreover, even in the commercial speech context, speech may be commercial (and regulated as such) even if the speech is not a "proposal[] to engage in commercial transactions." *See* U.S. Br. 21-22 (quoting *Bolger* v. *Youngs Drug Prods. Corp.*, 463 U.S. 60, 66 (1983)).

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put, "[t]he fact that a regulation does not impose an undue burden on a woman under the due process clause does not answer the question of whether it imposes an impermissible burden on the physician under the First Amendment." *Stuart*, 774 F.3d at 249.

[7] In fact, in the legal profession, most lawyers view themselves as bound by an ethical obligation to perform at least some pro bono work. *See* ABA Model Rule 6.1 ("Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least (50) hours of pro bono publico legal services per year.").

II. Professional Speech Is Subject To Heightened Scrutiny

This Court's precedent makes clear that heightened scrutiny strikes the proper balance between the free speech rights of professionals and the power of the government to regulate the professions.

As a general rule, when a "law on its face burdens disfavored speech by disfavored speakers, ... [i]t follows that heightened judicial scrutiny is warranted." *Sorrell*, 564 U.S. at 564. Professional speech regulations fit comfortably within this framework; they burden "disfavored speech" within the professional-client relationship (either by proscribing or compelling speech with "particular content") by "disfavored speakers," namely, professionals. *Id.* at 565.

The justification for this general rule is particularly salient in the professional speech context. Professionals have access to a body of specialized knowledge to which laypersons have little or no exposure. *See* Part I.A, *supra*. Clients seek out professionals precisely because clients lack this knowledge. Heightened scrutiny is necessary to ensure that government regulations of professional speech are properly directed to maintaining the integrity of this information flow, not to inhibiting politically-disfavored messages. *See Central Hudson*, 447 U.S. at 561-562 (describing "the societal interest in the fullest possible dissemination of information"); *see also Sorrell*, 564 U.S. at 566 (recognizing the public's interest in the "free flow" of information, especially "in the fields of medicine and public health, where information can save lives").

Moreover, regardless of the government's own interest in regulating professions, this Court's precedents establish that rational basis review cannot adequately

safeguard the important First Amendment concerns implicated with professional speech. *See NAACP* v. *Button*, 371 U.S. 415, 438-439 (1963) ("[A] State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights."); *District of Columbia* v. *Heller*, 554 U.S. 570, 628 n.27 (2008) ("Obviously, the [rational basis] test could not be used to evaluate the extent to which a legislature may regulate a specific, enumerated right, be it the freedom of speech, the guarantee against double jeopardy, the right to counsel, or the right to keep and bear arms."). This Court has implicitly acknowledged as much and, on several occasions, has applied heightened scrutiny to regulations restricting the speech of professionals. *See, e.g.*, *Legal Servs. Corp.*, 531 U.S. at 542-548 (holding that a federal law prohibiting attorneys from advising their clients about challenging welfare laws violated the First Amendment because it limited "constitutionally protected expression" and "alter[ed] the traditional role of the attorneys"); *Button*, 371 U.S. at 438 ("[O]nly a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms. Thus it is no answer ... to say that the purpose of [a law] was merely to ensure high professional standards[.]"); *cf. Ohralik*, 436 U.S. at 464 (upholding ban on lawyers' in-person solicitation in light of the state's "strong interest" in protecting the public from overreaching and harmful solicitation).

Indeed, in certain circumstances, intermediate scrutiny would be too lenient a standard to apply to professional speech regulations. *See King*, 767 F.3d at 235. For example, a law that compelled a professional to utter ideological speech should be subjected to strict, not intermediate, scrutiny. *See Stuart*, 774 F.3d at 246

(finding that a mandatory ultrasound statute compelled ideological speech); *see also id.* at 255 ("Regulations which compel ideological speech 'pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion.'" (quoting *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 641 (1994)).

Consistent with these principles, several lower courts have expressed "serious doubts that anything less than intermediate scrutiny would adequately protect the First Amendment interests inherent in professional speech," explaining that, without heightened scrutiny, "legislatures could too easily suppress disfavored ideas under the guise of professional regulation." *See King*, 767 F.3d at 236; *see also Wollschlaeger II*, 848 F.3d at 1311 ("If rationality were the standard, the government could—based on its disagreement with the message being conveyed—easily tell architects that they cannot propose buildings in the style of I.M. Pei, or general contractors that they cannot suggest the use of cheaper foreign steel in construction projects, or accountants that they cannot discuss legal tax avoidance techniques, and so on and so on."); *Stuart*, 774 F.3d at 249 ("A heightened intermediate level of scrutiny is thus consistent with Supreme Court precedent and appropriately recognizes the intersection here of regulation of speech and regulation of the medical profession in the context of an abortion procedure.").

The need for heightened scrutiny of professional speech regulations is evidenced by the spectrum of state laws enacted to compel reproductive health providers to make certain disclosures. The Arizona legislature, for example, enacted a law in 2015 mandating that abortion providers tell anyone seeking an abortion

that "it may be possible to reverse the effects of a medication abortion if the woman changes her mind but that time is of the essence," Ariz. Rev. Stat. § 36-2153(2)(h) (2015), in addition to several other required disclosures. *See Planned Parenthood Ariz., Inc.* v. *Brnovich*, 172 F. Supp. 3d 1075 (D. Ariz. 2016). The law required that this statement be made even if the patient was not seeking a medication abortion, thus adding confusion and unnecessary noise to the patient's decision-making process. Moreover, the statement itself lacks scientific support and is opposed by major medical organizations like the American College of Obstetricians and Gynecologists.[8] Other states have similarly sought to compel abortion providers to convey statements without any scientific support or medical justification. *See, e.g.*, Tex. Health & Safety Code § 171.012(a)(1)(B)(iii) (requiring abortion providers to tell patients that abortion increases the risk of developing breast cancer)[9]; *Stuart*, 774 F.3d at 254 (discussing North Carolina law requiring abortion providers to display a sonogram and provide an accurate description of the fetus, "regardless of the psychological or emotional well-being of the patient," even when doing so "could prove psychologically devastating").

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[8] Am. Coll. Obstetricians & Gynecologists, *Facts Are Important: Medication Abortion "Reversal" Is Not Supported by Science* (Aug. 2017) ("Claims regarding abortion 'reversal' treatment are not based on science and do not meet clinical standards. The American College of Obstetricians and Gynecologists (ACOG) ranks its recommendations on the strength of the evidence, and does not support prescribing progesterone to stop a medical abortion." (endnote omitted))

[9] Melbye et al., *Induced Abortion and the Risk of Breast Cancer*, 336 N. Eng. J. Med. 81, 83 (1997) (study of 1.5 million women "uncover[ing] no overall increased risk of breast cancer among women with a history of induced abortion").

Not only do these laws compel abortion providers to alter the content of their professional messages, thereby restricting free speech and damaging the "free flow" of information; but they also affirmatively disrupt the valuable informational function of professional speech by mandating misleading and deceptive statements and/or statements that depart from standard medical practice. Rational review leaves this harmful government interference essentially unchecked. *See, e.g.*, Haupt, 125 Yale L.J. at 1288 (explaining the importance of keeping medical providers' speech "free from outside interference" and that mandated disclosures may not run afoul of the First Amendment only if they are "considered a part of medically necessary information flow within the doctor-patient relationship").

The government may very well have a role to play in regulating professional speech in some circumstances. But, particularly in the patient-provider context, "professionals do not leave their speech rights at the office door." *Stuart*, 774 F.3d at 251. Laws aiming to limit the free speech rights of professionals must face heightened scrutiny to protect the vital First Amendment concerns presented.

III. The Licensed Notice Survives Heightened Scrutiny

As this Court has explained, under heightened scrutiny, a government regulation must (1) "directly advance[] a substantial governmental interest," and (2) be "drawn to achieve that interest." *Sorrell*, 564 U.S. at 572.[10] The Licensed Notice amply satisfies that test.

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[10] Unlike the Vermont statute at issue in *Sorrell*, the Licensed Notice provision was not enacted with the intention of

The Licensed Notice directly advances a substantial government interest. The State has a substantial interest in ensuring that women receive accurate information in their pursuit of reproductive health care. *Harris*, 839 F.3d at 841; *see also Roe* v. *Wade*, 410 U.S. 113, 149-150 (1973). That interest includes ensuring that women receive accurate information on services available to them in a timely fashion. *See* Am. Coll. of Obstetricians & Gynecologists, Comm. on Ethics, *The Limits of Conscientious Refusal in Reproductive Medicine* 5 (2007; reaffirmed 2013) ("Health care providers must impart accurate and unbiased information so that patients can make informed decisions about their health care."). The earlier in pregnancy that women obtain the health care services they desire, the better and safer it is for them. Women must make decisions about their pregnancies in a timely fashion, or the available safe and legal options will be restricted. Assem. Comm. on Health, Analysis of Assembly Bill No. 775, at 3 ("[B]ecause pregnancy decisions are time sensitive, California Women should receive information about their rights and available services at the sites where they obtain care.").

As the legislative history indicates, there is a demonstrated problem with certain health centers who purport to provide a full range of services to pregnant women but instead use deceptive tactics to mislead women about their options. These centers exist to promote their own views against abortion and other legal pregnancy services. *See* Am. Coll. of Obstetricians & Gynecologists, Comm. on Health Care for Underserved Women, *Increasing Access to Abortion* 5

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demonstrating legislative antipathy toward a particular viewpoint. *See Sorrell*, 564 U.S. at 576-577.

(2014; reaffirmed 2017) (noting these centers "operate to dissuade women from seeking abortion care"). The American College of Obstetricians and Gynecologists has stated that centers of this type "often provide inaccurate medical information" to women, which "can divert women from accessing comprehensive and timely care from appropriately trained and licensed providers." *Id.* These deceptive tactics have been well documented in numerous studies from around the country. *See, e.g., False and Misleading Health Information Provided by Federally Funded Pregnancy Resource Centers* 7, Prepared for Rep. Henry A. Waxman, U.S. House of Representatives, Committee on Government Reform – Minority Staff, Special Investigations Division (July 2006) (finding 87% of centers in the study provided false or misleading information about the effects of abortion on a woman's health); NARAL Pro-Choice America, *The Truth about Crisis Pregnancy Centers* 2-3 (Jan. 1, 2017) (listing deceptive tactics used by these centers to mislead women seeking reproductive health care services). Given this background, and the weight of significant medical authority on its side, California has a particularly substantial interest in ensuring that women are not misled about the services available to them in the course of their pregnancy.

Further, the statute is properly drawn to achieve the State's substantial interest. The Licensed Notice conveys only accurate information, in a written format, about the services available to low-income women seeking reproductive health care services. The Notice is a clear recitation of information effectively targeted to the population at the center of the State's substantial interest: women seeking information regarding reproductive health care services who are not aware of the services available to them. Assem. Bill No. 775 § 1(b)

("[A]t the moment they learn that they are pregnant, thousands of women remain unaware of the public programs available to provide them with contraception, health education and counseling, family planning, prenatal care, abortion, or delivery."). Moreover, the Notice does not require petitioners to express any view about those services, nor does it require petitioners to suggest that women should take advantage of those services, or any particular service over another. *See Harris*, 839 F.3d at 842 (distinguishing *Evergreen Ass'n* v. *City of N.Y.*, 740 F.3d 233 (2d Cir. 2014), and noting that "the Licensed Notice does not use the word 'encourage,' or other language that suggests the California Legislature's preferences regarding prenatal care"). In fact, the statute leaves petitioners free to express disagreement with the services listed on the Licensed Notice.

For all these reasons, the Ninth Circuit properly found that the Licensed Notice directly advances—and is drawn to achieve—a substantial government interest.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted.

KIMBERLY A. PARKER
LESLEY R. FREDIN
E. ROSS COHEN
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000

ALAN E. SCHOENFELD
Counsel of Record
CHARLES C. BRIDGE
WILMER CUTLER PICKERING
HALE AND DORR LLP
7 World Trade Center
New York, NY 10007
(212) 937-7518
alan.schoenfeld@wilmerhale.com

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No. 16-1140

In The
Supreme Court of the United States

NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES d/b/a NIFLA, et al.,

Petitioners,

v.

XAVIER BECERRA, ATTORNEY GENERAL, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

AMICUS CURIAE BRIEF OF PREGNANCY CARE CENTERS IN TEXAS IN SUPPORT OF PETITIONERS

LINDA BOSTON SCHLUETER
Counsel of Record
TRINITY LEGAL CENTER
11120 Wurzbach, Suite 206
San Antonio, Texas 78230
210-697-8202
TLC4Linda@aol.com

Counsel for Amici Curiae

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

CORPORATE DISCLOSURE STATEMENT

Amici pregnancy care centers are nongovernmental corporate entities, and they have no parent corporations and no publicly held corporations hold 10 percent or more of their stock.

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STATEMENT OF INTEREST OF AMICI CURIAE

Both parties have given consent to file this amicus curiae brief. Counsel for Amici has prepared this brief supporting Petitioners.[1]

Pregnancy care centers in Texas and across the nation will be affected by this Court's decision. Their message will be hindered, stifled, and drowned out by being forced to speak a government-crafted message that is contrary to their strongly held beliefs, core values, and mission. The Amici Texas pregnancy care centers are: First Choice Pregnancy Resource Center (Texarkana); Pregnancy Resources and Medical Clinic of North Texas (Burleson); Agape Pregnancy Resource Center (Round Rock); Southwest Pregnancy Services (Duncanville); Cleburne Pregnancy Center (Cleburne); Any Woman Can (San Antonio); El Pasoans for Life (El Paso); Pregnancy Assistance Center North (Spring); Anderson House (Carrizo Springs); The Source for Women (3 centers in Houston); Hope Pregnancy Centers of Brazos Valley (College Station).

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[1] The parties were notified ten days prior to the due date of this brief of the intention to file. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Trinity Legal Center is a nonprofit corporation and is supported through private contributions of donors who have made the preparation and submission of this brief possible. No person other than amici curiae, their counsel, or donors to Trinity Legal Center made a monetary contribution to its preparation or submission. The parties have consented to this brief.

SUMMARY OF THE ARGUMENT

I.

The marketplace of ideas should be marked by robust debate that is free from government interference. This is particularly important regarding controversial and divisive issues such as abortion. The Act in this case is content-based and constitutes viewpoint discrimination that is entitled to strict scrutiny review. Although the Court of Appeals for the Ninth Circuit concluded that the Act is content-based, it erred in failing to apply strict scrutiny. In reaching a wrong result, the court also erred in misapplying this Court's precedents in *Casey* and *Reed*, and therefore, the decision should be reversed.

II.

The Court of Appeals also erred in finding the Act regulated professional speech. Pregnancy care centers are not professional individuals like doctors or lawyers who belong to a learned profession in occupations that require a high level of training and proficiency. The Act is aimed at the centers as the term "facility" was used thirty-one times, but the term "doctor" or "physician" is not used even once. In carving out a new category of speech for abortion, the Court of Appeals erred in applying intermediate scrutiny. The Act is a content-based regulation and the court should have applied strict scrutiny. Even assuming the Court of Appeals applied the correct standard, the regulation could not

pass strict scrutiny muster and was therefore unconstitutional.

ARGUMENT

I. THE ACT IS A CONTENT-BASED REGULATION WHICH REQUIRES STRICT SCRUTINY ANALYSIS, AND THEREFORE, THE COURT OF APPEALS FOR THE NINTH CIRCUIT ERRED IN FAILING TO APPLY THE CORRECT STANDARD.

A. In the Marketplace of Ideas, the Government Cannot Constitutionally Compel Speakers to Deliver a Message That Is Contrary to Their Beliefs and Mission, and Therefore, the Court of Appeals Erred.

The marketplace of ideas envisions competing ideas and robust debate. It is a long-standing doctrine dating back to 1919 when Justice Holmes first introduced the concept into American jurisprudence.[2] He stated that "the best test of truth is the power of thought to get itself accepted in the competition of the market."[3] Justice Holmes warned that "we should be eternally vigilant against attempts to check the expression of opinions that we loathe. . . ."[4] Robust

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[2] Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

[3] *Id.*

[4] *Id.*

debate that is uninhibited by governmental interference will lead to truth and the proper evolution of society.

The marketplace of ideas is particularly important regarding controversial or divisive issues such as abortion. As Justices on this Court have recognized, abortion has been one of the most controversial and divisive issues of our time.[5]

Abortion has not only been controversial, it has had a negative impact on women. Women should therefore be able to hear various speakers without the interference and hinderance of government so that they can make an informed decision to either abort their babies or exercise a pro-life option. The courts have

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[5] Justice O'Connor wrote: "Where, in the performance of its judicial duties, the Court decides a case in such a way as to resolve the sort of intensely divisive controversy reflected in *Roe* and those rare, comparable cases, its decision has a dimension that the resolution of the normal case does not carry. It is the dimension present whenever the Court's interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution." Planned Parenthood v. Casey, 505 U.S. 833, 866-67 (1992); Justice Scalia referred to the abortion decisions as "a troublesome era in the history of our Nation and of our Court." Planned Parenthood v. Casey, 505 U.S. 833, 1001 (1992) (Scalia J., concurring in the judgment in part and dissenting in part); Justice Kennedy wrote: "To say that one citizen can approach another to ask the time or the weather forecast or the directions to Main Street but not to initiate discussion on one of the most basic moral and political issues in all of contemporary discourse, a question touching profound ideas in philosophy and theology, is an astonishing view of the First Amendment." Hill v. Colorado, 530 U.S. 703, 768 (2000) (Kennedy, J., dissenting).

recognized the negative psychological impact that abortion has on women. For example, the Court of Appeals for the Fifth Circuit cited testimony that abortion as practiced is "almost always a negative experience for the patient. . . ."[6] This Court has recognized that abortion:

> Is an act fraught with consequences for others; for the woman who must live with the implications of her decision; for the persons who perform and assist in the procedure; for the spouse, family, and society which must confront the knowledge that these procedures exist, procedures some deem nothing short of an act of violence against innocent human life; and depending on one's beliefs, for the life or potential life that is aborted.[7]

More recently, this Court recognized, "whether to have an abortion requires a difficult and painful moral decision" and is "fraught with emotional consequences."[8] In addition, women can suffer from depression, regret, guilt, and a loss of self-esteem following an abortion.[9] As Justice Ginsburg wrote, "The Court is surely correct that, for most women, abortion is a painfully difficult decision."[10]

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[6] Women's Medical Center v. Bell, 248 F.3d 411, 418 (5th Cir. 2001).

[7] Planned Parenthood v. Casey, 505 U.S. 833, 852 (1991).

[8] Gonzales v. Carhart, 550 U.S. 124, 159 (2007).

[9] *Id.*

[10] *Id.* at 184 n.7 (Ginsburg, J., dissenting).

Indeed, this Court has recognized the impact that abortion can have on women and that is why women need to hear various speakers to fully understand their choice. Pregnancy care centers are in the unique position to help women through a pregnancy when they are deciding to keep their babies and women should know that help is available for women who choose a pro-life option.

In the marketplace of ideas, particularly on controversial issues that have a negative impact on women, the government should not stifle or drown out a contrary message because it wants to mandate a certain viewpoint. Women deserve better.

B. The Court of Appeals Recognized That the Act Is a Content-Based Regulation, But Erred in Failing to Apply Strict Scrutiny.

1. The Act is content-based and constitutes viewpoint discrimination.

As a general rule, the First Amendment,[11] prevents the government from proscribing or mandating

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[11] The First Amendment states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." The First Amendment is applied to the states by the Fourteenth Amendment. *See* O'Brien v. Mayor and City Council of Baltimore, 768 F. Supp. 2d 804 (D. Md. 2011), *aff'd sub nom.* Greater Baltimore Center for

speech.[12] Specifically, "content-based regulations are presumptively invalid."[13] This Court has also been clear that viewpoint discrimination violates the First Amendment: "It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys."[14] Furthermore, "[t]he government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction."[15] The "government regulation may not favor one speaker over another."[16] The Court of Appeals erred when it allowed the State to favor an abortion speaker over a pro-life speaker.

This Court has also held that a speaker has the right not to speak.[17] Justice Jackson, writing for the Court in *Barnette*, stated: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith

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Pregnancy Concerns, Inc. v. Mayor and City Council of Baltimore, 683 F.3d 539 (4th Cir. 2012).

[12] R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992).

[13] *Id.*

[14] Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 828 (1995).

[15] *Id.* at 829.

[16] *Id.* at 828.

[17] West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943).

therein."[18] In this case, the Court of Appeals erred because the Act forces pregnancy care centers to speak a message that is directly contrary to their beliefs even though they have a right not to speak the government-scripted abortion message.

Compelled speech is very dangerous in a free society, and consequently, courts must be vigilant.[19] Judge Wilkinson warned in *Centro Tepeyac*: "Because the dangers of compelled speech are real and grave, courts must be on guard whenever the state seeks to force an individual or private organization to utter a statement at odds with its most fundamental beliefs."[20] The Act is unconstitutional because it forces pregnancy care centers to utter a statement that is at odds with their fundamental pro-life beliefs.

Content-based regulations must not discriminate against speakers based on their viewpoint.[21] Being viewpoint neutral means that "the government cannot regulate speech based on the ideology of the message."[22] In the present case, the Court of Appeals correctly concluded that the Act is a content-based regulation,[23] but erroneously concluded that it does not

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[18] *Id.* at 642.

[19] Centro Tepeyac v. Montgomery County, 722 F.3d 184, 193 (4th Cir. 2013).

[20] *Id.*

[21] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 978 (5th ed. 2015).

[22] *Id.*

[23] National Institute of Family and Life Advocates v. Harris, 838 F.3d 823, 834 (9th Cir. 2016).

discriminate based on viewpoint.[24] The Act targets the content and the viewpoint of pregnancy care centers as they are coerced with the threat of penalties[25] to state a message which is directly contrary to their mission, core values, and beliefs. At the heart of the pregnancy care centers' beliefs is to support a healthy pregnancy and to oppose abortion. Compelled speech " . . . involves the state imprinting its ideology on an unwilling speaker."[26] This is what is at stake in this case because the State is imprinting its abortion ideology on the unwilling pregnancy care centers' speech, and therefore, the Act is unconstitutional.

The Act also constitutes viewpoint discrimination because it regulates the speech of pregnancy care centers based on the ideology of their message. Although the purpose of the Act might sound reasonable, it is, in fact, discriminatory. Section 2 of the Act states: "The purpose of this act is to ensure that California residents make their personal reproductive health care decisions knowing their rights and the health care services available to them." If this were truly the intended purpose of the Act, a pro-life message would be mandated for abortion facilities so that California women would know that there are pro-life options for

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[24] *Id.* The court stated it was not viewpoint discrimination because "It does not discriminate based on the particular opinion, point of view, or ideology of a certain speaker." *Id.* at 835.

[25] CAL. HEALTH & SAFETY CODE § 123473 provides for a civil penalty of $500 for the first offense and $1,000 for each subsequent offense.

[26] Centro Tepeyac v. Montgomery County, 722 F.3d 184, 194 (4th Cir. 2013) (Wilkinson, J., concurring)

women who do not want to abort their babies. The Act, however, does not impose any such mandates on abortion facilities. Instead the regulation requires pregnancy care centers to advertise abortion services which is directly contrary to the mission of the pregnancy care centers. In contrast, nothing in the Act mandates – under civil penalties – that abortion facilities speak a pro-life message and advertise the services of the pregnancy care centers. This is blatant viewpoint discrimination and is unconstitutional.

In summary, the Court of Appeals correctly concluded that the regulation was content based, but it incorrectly concluded that it was not viewpoint discrimination. It allowed the State to coerce pregnancy care centers to speak a message that was directly contrary to their mission, core values, and beliefs but no such mandate was placed on abortion facilities to speak a pro-life message. Because this constitutes viewpoint discrimination, the Act is unconstitutional.

2. Because the Act is content-based and constitutes viewpoint discrimination, strict scrutiny is required.

The Court of Appeals also erred in failing to apply the strict scrutiny standard. "The levels of scrutiny are firmly established in constitutional law. . . ."[27] This Court has consistently held that where the regulation is content-based and constitutes viewpoint discrimination,

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[27] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 700 (5th ed. 2015).

strict scrutiny is applied.[28] In fact, the Court of Appeals even recognized that content-based laws are presumptively unconstitutional,[29] but then stated that it did not apply strict scrutiny because it categorized the speech being regulated as professional speech, which was error.

Furthermore, the strict scrutiny standard is necessary because the Act is not a content-neutral restriction. Content-neutral restrictions are subject only to intermediate scrutiny whereby the government may impose reasonable restrictions on the time, place, or manner of the speech if they are narrowly tailored to serve a significant governmental interest.[30] The Act is not content-neutral because it mandated, under civil penalty, that pregnancy care centers speak a government-crafted abortion statement. On the other hand,

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[28] *See, e.g.*, Reed v. Town of Gilbert, ___ U.S. ___, 135 S. Ct. 2218 (2015); Sorrell v. IMS Health Inc., 564 U.S. 552 (2011); Riley v. Nat'l Fed'n of the Blind, 487 U.S. 781 (1988). *See generally* Annotation, *Construction and Application of Reed v. Town of Gilbert, Ariz., Providing That Speech Regulation Targeted at Specific Subject Matter Is Content-Based Even If It Does Not Discriminate Among Viewpoints Within That Subject Matter*, 24 A.L.R.7th Art. 6 (2017).

[29] National Institute of Family and Life Advocates v. Harris, 838 F.3d 823, 836-37 (9th Cir. 2016) (*citing* Reed v. Town of Gilbert, ___ U.S. ___, 135 S. Ct. 2218, 2226 (2015)).

[30] *See generally* Annotation, *Construction and Application of Reed v. Town of Gilbert, Ariz., Providing that Speech Regulation Targeted at Specific Subject Matter Is Content-Based Even if It Does Not Discriminate Among Viewpoints Within that Subject Matter*, 24 A.L.R.7th Art. 6 (2017).

abortion facilities were not mandated, under civil penalty, to speak a pro-life message.

To pass strict scrutiny muster, the government must prove that it had a compelling governmental interest that is narrowly tailored to achieve that interest.[31] The Act fails the first prong of the strict scrutiny test because the State has failed to meet its heavy burden demonstrating a compelling governmental interest. Providing information about health care services available to women as stated in the Act's purpose does not trump the pregnancy care centers' fundamental First Amendment rights. Furthermore, the Court of Appeals based its compelling interest conclusions on the basis that the State has a "compelling interest in the practice of professions within their boundaries. . . ."[32] This rationale is unpersuasive because the Act regulates a facility and not a profession. Even assuming arguendo that there was a compelling interest, the State failed to meet the second prong of the test, that the speech restrictions must be narrowly tailored.

The Act was not narrowly tailored to specifically fulfill its intended goals. The stated purpose of the Act was to ensure women could make their reproductive decisions "knowing their rights and health care

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[31] Reed v. Town of Gilbert, ___ U.S. ___, 135 S. Ct. 2218, 2226 (2015).

[32] National Institute of Family and Life Advocates v. Harris, 839 F.3d 823, 841 (9th Cir. 2016).

services available to them."[33] The Act, however, takes one side of the abortion debate and drowns out the pro-life alternatives by requiring pregnancy care centers to speak a government-crafted abortion message and requiring the message to be in a large font and in multiple languages.

The State has a myriad of other less-restrictive means of informing women of their rights without burdening or infringing upon pregnancy care centers' First Amendment rights. For example, the State could issue pamphlets advising women of both their pro-life and abortion options and risks; it could place ads in newspapers and magazines; it could provide public service announcements on radio and television or other media outlets; or, it could raise awareness in various locations and forums of its safe haven laws.[34] The power of the State has many ways to spread its message without burdening and mandating pregnancy care centers to speak a message which is contrary to their core values and beliefs.

Government laws and regulations which treat speakers differently based on ideas, messages, or subject matter require strict scrutiny because they lend

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[33] Assembly Bill No. 775 at § 2.

[34] California like other states has a safe haven law whereby a child who is seventy hours old or younger may be relinquished at a fire station or hospital without fear of abandoning the child. CAL. PENAL CODE § 271.5.

themselves to invidious uses.[35] Justice Scalia warned that laws that treat speakers differently because of the ideas, messages, or subject matter of their speech "lend themselves" to invidious uses.[36] Content distinctions "give the government the power to target *only* those specific ideas or messages or topics it dislikes" which makes "it possible for the government to repress only the speech of its enemies and not the speech of its friends."[37] In other words, they provide "an attractive vehicle for advancing constitutionally prohibited purposes."[38]

The pregnancy care centers should not become the courier of the State's message. As this Court stated in *Wooley v. Maynard*, " . . . where the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's

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[35] Lakier, *Reed v. Town of Gilbert, Arizona, and the Rise of the Anticlassificatory First Amendment*, 2016 SUP. CT. REV. 233, 252 (stating the *Reed* test was appropriate).

[36] Madsen v. Women's Health Center, Inc., 512 U.S. 753, 794 (1994) (Scalia, J., concurring in part and dissenting in part) (stating "The vice of content-based legislation – what renders it *deserving* of the high standard of strict scrutiny – is not that it is *always* used for invidious, thought-control purposes, but that it *lends itself* to use for those purposes. A restriction that operates only on speech that communicates a message of protest, education, or counseling presents exactly this risk") (emphasis in original).

[37] Lakier, *Reed v. Town of Gilbert, Arizona, and the Rise of the Anticlassificatory First Amendment*, 2016 SUP. CT. REV. 233, 252.

[38] *Id.*

First Amendment right to avoid becoming the courier for such message."[39]

In the present case, speakers are treated differently under the Act because of their ideology and message. To coerce pregnancy care centers to be the courier of the State's message is a violation of their fundamental First Amendment rights. The State has also failed to meet its heavy burden of a compelling governmental interest that is narrowly tailored to serve that interest. The Court of Appeals erred in not applying strict scrutiny; but, even if it had, the Act would not pass strict scrutiny muster.

C. To Justify a Lesser Standard Than Strict Scrutiny, the Court of Appeals Misapplied This Court's Precedents in *Casey* and *Reed*, and Therefore, the Decision Should Be Reversed.

The Court of Appeals erred in misapplying the context of this Court's ruling in *Casey*,[40] and thus reached a wrong result. In *Casey*, this Court was addressing the doctor-patient relationship and what was needed for informed consent for the abortion procedure in that case.[41] This Court stated that " . . . a requirement that a doctor give a woman certain information as part of obtaining her consent to an abortion is, for constitutional purposes, no different from a

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[39] Wooley v. Maynard, 430 U.S. 705, 717 (1977).

[40] *See* Planned Parenthood v. Casey, 505 U.S. 833 (1992).

[41] *Id.* at 884.

requirement that a doctor give certain specific information about any medical procedure."[42]

The Court of Appeals in this case misinterpreted the context of the *Casey* opinion by applying a doctor-patient relationship requiring informed consent for the abortion procedure to a regulation that pertains to "facilities." The Act mentions facilities thirty-one times and never mentions doctors even once. This is not an informed consent case applicable to doctors performing an abortion procedure where the doctor must provide information regarding the risks and consequences of the medical procedure, and therefore, the Court of Appeals erred.

In addition, the Court of Appeals misapplied *Casey* in treating it as a First Amendment case applicable to the present case. The Court of Appeals correctly stated that this Court only had a "short discussion" in *Casey* concerning the doctor's First Amendment rights.[43]

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[42] *Id.*

[43] National Institute of Family and Life Advocates v. Harris, 838 F.3d 823, 838 (9th Cir. 2016). Indeed, the majority opinion in *Casey* had one short paragraph stating:

> All that is left of petitioners' argument is an asserted First Amendment right of a physician not to provide information about the risks of abortion, and childbirth, in a manner mandated by the State. To be sure, the physician's First Amendment rights not to speak are implicated, but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State. We see no constitutional infirmity in the requirement that the physician provide the information mandated by the State here. Planned Parenthood v. Casey, 505 U.S. 833, 884 (1992) (citations omitted).

Indeed, three sentences do not build a theory of First Amendment law[44] and this supports the fact that *Casey* was not a First Amendment case.

The Court of Appeals also quoted this Court's statement that the First Amendment only applied to the particular facts in *Casey*;[45] but, it did not heed this Court's caveat because it expanded the statement to a completely different set of facts and circumstances. The regulation in this case applies solely to "facilities" and not the doctor-patient relationship requiring informed consent for the abortion procedure. The plain language of the regulation was aimed at "facilities." The Court of Appeals' decision should be reversed because it misapplied this Court's decision in *Casey*.

The Court of Appeals' decision should also be reversed because it misinterpreted this Court's decision in *Reed*.[46] In attempting to state that this Court's decision in *Reed* did not apply, the Court of Appeals cited one of its own opinions in *Swisher* concerning unauthorized military medals.[47] But, that case is factually inapposite to the present case.

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[44] Smolla, *Professional Speech and the First Amendment*, 119 W. VA. L. REV. 67, 81 (2016) (stating "*Casey*'s three obscure sentences are hardly enough to build a coherent body of First Amendment law").

[45] National Institute of Family and Life Advocates v. Harris, 838 F.3d 823, 838 (9th Cir. 2016).

[46] Reed v. Town of Gilbert, ___ U.S. ___, 135 S. Ct. 2218 (2015).

[47] National Institute of Family and Life Advocates v. Harris, 838 F.3d 823, 837 (9th Cir. 2016) (*citing* United States v. Swisher, 811 F.3d 299 (9th Cir. 2016) (en banc)).

Furthermore, the Court of Appeals' application was misplaced. Quoting this Court's decision in *Alvarez*,[48] the Court of Appeals stated in *Swisher* that the

> . . . content-based restrictions on speech have been permitted only for a 'few historic and traditional categories' of speech, including incitement, obscenity, defamation, speech integral to criminal conduct, so-called "fighting words," child pornography, fraud, true threats, and "speech presenting some grave and imminent threat the government has the power to prevent."[49]

None of these "few historic and traditional categories of speech" exist in the present case, and therefore, the Court of Appeals erred. Contrary to this Court's long-standing view of not creating new categories of speech which would receive less scrutiny, the Court of Appeals attempted to carve out a new category for speech concerning abortion. In the marketplace of ideas concerning a controversial topic such as abortion, this is not in the public's best interest. Any attempt to carve out a new category should be rejected.

This Court's decision in *Reed* provides the proper guidance for deciding content-based speech. As explained in *Reed*: "[g]overnment regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message

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[48] United States v. Alvarez, 567 U.S. 709 (2012).

[49] United States v. Swisher, 811 F.3d 299, 313 (9th Cir. 2016) (en banc).

expressed."[50] If "a regulation of speech 'on its face' draws distinctions based on the message a speaker conveys," it is a content-based regulation.[51] Therefore, this Court stated that strict scrutiny applied to content-based regulations.[52] The regulation in this case is content-based speech as it pertains to the message and topic of abortion and on its face draws a different message that pregnancy care centers are coerced to speak.

In addition, this Court concluded in *Reed* that strict scrutiny applies regardless of the "government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech."[53] "Ideological messages are given more favorable treatment . . . ,"[54] and that is particularly important concerning controversial messages such as abortion.

As Justice Alito reiterated in *Reed*, content-based laws must satisfy strict scrutiny.[55] This protection is merited for content-based laws because "they present, albeit sometimes in a subtler form, the same dangers as laws that regulate speech based on viewpoint."[56] The Act is a content-based regulation that discriminates

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[50] Reed v. Town of Gilbert, ___ U.S. ___, 135 S. Ct. 2218, 2227 (2015) (*citing* cases).

[51] *Id.*

[52] *Id.*

[53] *Id.* at 2228.

[54] *Id.* at 2230.

[55] *Id.* at 2233 (Alito, J., concurring).

[56] *Id.*

against pregnancy care centers' pro-life viewpoint. Thus, these dangers exist in this case.

Dean Smolla surmised that *Reed* "is a powerful reminder that strict scrutiny is triggered by laws that either facially discriminate on the basis of content or are motived by a governmental purpose to penalize disfavored views."[87]

Pregnancy care centers are targeted because of their pro-life mission, core values, and beliefs. The Act demonstrates an animus toward those ideas because there was no similar requirement that abortion facilities provide a pro-life alternative message. If the State was concerned that women had all the information to decide whether to have an abortion or a pro-life alternative, abortion facilities should be compelled to speak a pro-life message. But the Act does not mandate such a message by abortion facilities.

This case involves the free speech rights of pregnancy care centers, but the Court of Appeals for the Ninth Circuit set a dangerous and erroneous precedent in applying intermediate scrutiny to a content-based regulation that discriminates against the centers' pro-life viewpoint and forcing them to speak a government-crafted abortion message. In reaching its erroneous decision, the Court of Appeals misinterpreted and misapplied this Court's precedents, and therefore, the decision should be reversed.

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[87] Smolla, *Professional Speech and the First Amendment*, 119 W. VA. L. REV. 67, 87 (2016).

II. THE COURT OF APPEALS ERRED IN DEFINING THE REGULATION AS PROFESSIONAL SPEECH, AND THEREFORE, THE DECISION SHOULD BE REVERSED.

A. The Court of Appeals Erred in Concluding That the Act Regulated Professional Speech Which Resulted in a Wrong Result.

This Court has recognized that certain types of speech are not protected by the First Amendment.[58] For example, unprotected speech would include the incitement of illegal activities, fighting words, and obscenity.[59] None of these are present in this case.

There are also categories of less-protected speech[60] such as professional speech and commercial speech. Neither professional speech nor commercial speech[61]

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[58] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1036 (5th ed. 2015).

[59] *Id.*

[60] *Id.* at 1037.

[61] The Court of Appeals correctly stated in a footnote that the Act did not regulate commercial speech. National Institute of Family and Life Advocates v. Harris, 838 F.3d 823, 835, n.5 (9th Cir. 2016). This case does not involve commercial speech as defined by this Court in Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 64, 66 (1983) (defining as speech that proposes a commercial transaction) or Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 561 (1980) (defining it as related solely to the economic interests of the speaker and its audience). Pregnancy care centers' purpose is neither to propose a commercial transaction nor related to an economic interest. *See* O'Brien v. Mayor and City Council of Baltimore, 768 F. Supp. 2d 804, 813-14 (D. Md. 2011) (stating reasons why it is not commercial speech),

are applicable in this case.[62] The Court of Appeals correctly concluded that the Act was content-based, but then redefined it as professional speech that only required intermediate scrutiny. There are "perils" to recognizing new categories of speech that would "enjoy diminished First Amendment protection."[63] But the speech involved in this case, in fact, is content-based viewpoint discrimination and is entitled to the highest protection of the strict scrutiny standard.

The Court of Appeals erred when it found that the Act regulated professional speech and applied intermediate scrutiny.[64] First, the court erred in defining the speech regulated by the Act as professional speech. The court defined professional speech as "speech that occurs between professionals and their clients in the context of their professional relationships."[65] Even under this loose definition, pregnancy care centers do not

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aff'd sub nom. Greater Baltimore Center for Pregnancy Concerns, Inc. v. Mayor and City Council of Baltimore, 683 F.3d 539 (4th Cir. 2012).

[62] *See* Greater Baltimore Center for Pregnancy Concerns, Inc. v. Mayor and City Council of Baltimore, 2018 WL 298142 at 5, ___ F.3d ___ (4th Cir. 2018) (concluding in a unanimous decision that commercial and professional speech were not applicable in that case, and therefore, heightened scrutiny was required).

[63] Smolla, *Professional Speech and the First Amendment*, 119 W. VA. L. REV. 67, 84 (2016).

[64] *See* National Institute of Family and Life Advocates v. Harris, 838 F.3d 823, 838 (9th Cir. 2016) (finding it was professional speech which was subject to intermediate scrutiny).

[65] *Id.* at 839.

meet the definition because a center is not a "professional" in a "professional relationship."

Justice White phrased it differently in an often-cited definition in *Lowe*: "One who takes the affairs of a client personally in hand and purports to exercise judgment on behalf of the client in the light of the client's individual needs and circumstances is properly viewed as engaging in the practice of a profession."[66] Under this definition, pregnancy care centers do not exercise judgments on behalf of the women. They provide alternatives to abortion and help to mothers who want to keep their babies by providing various items such as diapers and baby clothes.

In addition, pregnancy care centers do not meet the commonly used legal definition of professional. Black's Law Dictionary defines professional as "Someone who belongs to a learned profession or whose occupation requires a high level of training and proficiency."[67] It also defines a professional relationship as "An association that involves one person's reliance on the other person's specialized training" and provides

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[66] Lowe v. SEC, 472 U.S. 181, 232 (1985) (White, J., concurring).

[67] BLACK'S LAW DICTIONARY, *Professional* (10th ed. 2014). The second edition had a more expansive definition: "1. A person, who is a member of a professional body due to the education qualification and follows the prescribed moral and professional code of conduct. 2. A person who has mastered a high level of expertise in a subject, notion or field."

examples including one's relationship with a lawyer, doctor, insurer, banker, and the like.[68]

Pregnancy care centers do not meet this commonly used legal definition for numerous reasons. A center is not a person. A center is not a "learned profession." A center is not a person who has an "occupation that requires a high level of training and proficiency." And, a center is not an association where women are relying on a person's specialized training as they would if they had consulted a lawyer, doctor, or other professional. What the centers do is very different from the specialized training that lawyers, accountants, and other professionals have. Clearly, the Act places the burden on the center and not on a professional such as a doctor, and therefore, the Court of Appeals' analysis was error in deciding that this was professional speech and a lower standard could be applied.

The Act's specific language negates the Court of Appeals' opinion that this was professional speech. The Act mentions the word "facility" thirty-one times and

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[68] *Id.* at *professional relationship*. *See generally*, Haupt, *Professional Speech*, 125 YALE L.J. 1238, 1247 (2016) (stating profession involves three core elements: (1) a knowledge community's insights, (2) communicated by a professional within the professional-client relationship, (3) for the purpose of providing professional advice); Halberstam, *Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions*, 47 U. PA. L. REV. 771, 772 (1999) (stating professional speech "fulfills a more defined social role by offering specific knowledge and expertise to an audience that deliberately seeks access to such information and often to the professional's judgment about a particular issue").

never mentions the word "doctor" or "physician." Furthermore, the Act imposes a penalty on the facility[69] and not on a doctor who is the professional.

In addition, the Court of Appeals for the Ninth Circuit erroneously based its professional speech argument on the fact that because the state issues a license that there is a professional relationship which advances the welfare of clients rather than to contribute to the public debate.[70] Under this reasoning, anyone who receives a license from the state would become a professional. Taking this reasoning to its logical conclusion, it would be absurd to believe that anyone who receives a driver's license from the state suddenly becomes a professional or one who gets a fishing license is a professional. The state issues many types of licenses but that does not by definition make the individual a professional.

In reaching its conclusion, the court relied on its own decision in *Pickup*,[71] but this reliance was misplaced as *Pickup* concerned a licensed professional mental health therapist who specialized in sexual orientation cases. Judge O'Scannlain noted in his dissent in *Pickup* that the Supreme Court had never recognized professional speech as a distinct category of

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[69] CAL. HEALTH & SAFETY CODE § 123473.

[70] National Institute of Family and Life Advocates v. Harris, 838 F.3d 823, 838 (9th Cir. 2016).

[71] Pickup v. Brown, 740 F.3d 1208 (9th Cir.), *cert. denied*, ___ U.S. ___, 134 S. Ct. 2871 (2014).

speech.[72] He stated that the panel was playing a "labeling game."[73] He was also critical of the fact that the panel had failed to cite any authority for the proposition that speech uttered by professionals does not receive any First Amendment scrutiny.[74]

Pregnancy care centers are local, nonprofit organizations that provide compassionate support to women and men who are faced with difficult pregnancy decisions. Even assuming arguendo that the center refers a woman for consultation with a doctor or is supervised by medical personnel, this does not make the center a "professional." The Act places the burden on the center and not the doctor as was the case in *Pickup*, and therefore, the Court of Appeals erred.

B. The Court of Appeals Erred in Applying an Intermediate Scrutiny Analysis to the Act, and Therefore, the Decision Should Be Reversed.

Because the speech being regulated by the Act is not professional speech, the Court of Appeals for the Ninth Circuit erred in applying intermediate scrutiny. When the government attempts to coerce speech, it must pass strict scrutiny. The Court of Appeals' decision authorizes the government to target pregnancy care centers by forcing them to state and publish a

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[73] *Id.* at 1221 (O'Scannlain, J., dissenting from order denying rehearing en banc).

[73] *Id.* at 1218.

[74] *Id.*

government-crafted message which is contrary to their mission, core values, and beliefs. "It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys."[75] This is particularly abhorrent where the speech concerns the most controversial issue of our time.

In *Riley*,[76] this Court rejected compelled speech requirements for noncommercial speakers. It stated that " . . . the government, even with the purest of motives, may not substitute its judgment as to how best to speak for that of speakers and listeners; free and robust debate cannot thrive if directed by the government."[77]

Furthermore, this Court in *Riley* stated: "Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech. We therefore consider the Act as a content based regulation of speech."[78] There is no question that the speech in this case would alter the content of the speech and coerce the pregnancy care centers to speak a government message that is contrary to their core values and beliefs.

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[75] Alliance for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev., 651 F.3d 218, 235 (2d Cir. 2011) (*quoting* Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 828 (1995)), *aff'd*, ___ U.S. ___, 133 S. Ct. 2321 (2013).

[76] Riley v. Nat'l Fed'n of the Blind, 487 U.S. 781 (1988).

[77] *Id.* at 791.

[78] *Id.* at 795.

In *Riley*, this Court also recognized that the compelled disclosure would "almost certainly hamper" legitimate fundraising efforts.[79] This is certainly true for pregnancy care centers who rely on pro-life donors to fund their efforts. Pro-life donors would be offended that a pregnancy care center had to use its funds to promote an abortion message. Thus, this compelled speech would have a negative financial impact on pregnancy care centers.

This Court held in *Riley* that the statute was unconstitutional because it failed the strict scrutiny test and the regulation was not narrowly tailored. The Court of Appeals erred because it failed to apply strict scrutiny and the regulation was not narrowly tailored. Pregnancy care centers are content-based speakers concerning a controversial issue and should be afforded the full protection of a strict scrutiny analysis. The Act in the present case is subject to strict scrutiny because it compels a government mandated and scripted speech on noncommercial speakers and discriminates against the centers based on their pro-life viewpoint. Strict scrutiny is triggered in viewpoint discrimination cases and particularly in the controversial context.[80]

Assuming arguendo that this Court finds the regulation was professional speech, full First Amendment protection of professional speech should still be given

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[79] *Id.* at 799.

[80] *See* Alliance for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev., 651 F.3d 218, 239 (2d Cir. 2011), *aff'd*, ___ U.S. ___, 133 S. Ct. 2321 (2013).

by requiring strict scrutiny.[81] This Court, however, does not need to create a category for professional speech or the standard to apply in such a case because this is a content-based Act that constitutes viewpoint discrimination, and therefore, strict scrutiny should have been applied.

The speech in the present case is not professional speech. Therefore, the Court of Appeals miscategorized the type of speech and applied the wrong level of scrutiny. The regulation is content-based and constitutes viewpoint discrimination, and therefore, is entitled to strict scrutiny review. Had that standard been applied, the regulation could not pass strict scrutiny muster and should have been held unconstitutional.

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[81] Commentators have suggested that strict scrutiny should be applied to professional speech. *See, e.g.*, Sherman, Commentary, *Occupational Speech and the First Amendment*, 128 HARV. L. REV. F. 183, 192-93 (2015) (stating occupational speech should be treated like any other content-based speech and subject to strict scrutiny); Smolla, *Professional Speech and the First Amendment*, 119 W. VA. L. REV. 67, 84 (2016) (stating professional speech should be subjected to strict scrutiny which is the norm for content-based regulations); Zick, *Professional Rights Speech*, 47 ARIZ. ST. L.J. 1289, 1310 (2015) (stating professional speech merits strict scrutiny).

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals for the Ninth Circuit should be reversed and A.B. 775 held unconstitutional.

Respectfully submitted,

LINDA BOSTON SCHLUETER
Counsel for Amici Curiae

No. 16-1140

IN THE

Supreme Court of the United States

NATIONAL INSTITUTE OF FAMILY & LIFE ADVOCATES, D/B/A NIFLA, *ET AL.*,

Petitioners,

v.

XAVIER BECERRA, ATTORNEY GENERAL OF CALIFORNIA, *ET AL.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN, INC., IN SUPPORT OF RESPONDENTS

SCOTT L. NELSON
Counsel of Record
ALLISON M. ZIEVE
JULIE A. MURRAY
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
snelson@citizen.org
Attorneys for Amicus Curiae

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INTEREST OF AMICUS CURIAE[1]

Amicus curiae Public Citizen, Inc., is a nonprofit consumer advocacy organization that appears on behalf of its nationwide members and supporters before Congress, administrative agencies, and courts on a wide range of issues. Public Citizen and its attorneys have long been involved in First Amendment cases, particularly those involving the development of commercial-speech doctrine.

Among Public Citizen's interests is preservation of reasonable requirements that providers of goods and services, including practitioners of regulated professions, disclose information relevant to consumers. Increasingly, however, marketplace participants—even those who engage solely in commercial speech—are challenging such requirements on the ground that they are "content-based" and assertedly subject to strict First Amendment scrutiny. Public Citizen believes that the assertion, implicated in this case, that all speech regulations that can be characterized as content-based are subject to strict scrutiny is directly contrary to this Court's precedents.

At the same time, as an advocacy organization itself, Public Citizen is very sensitive to the need to avoid restraints on fully protected advocacy of viewpoints on political and social issues—including advocacy by persons and organizations that may simulta-

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[1] This brief was not authored in whole or part by counsel for a party. No one other than amicus curiae made a monetary contribution to preparation or submission of this brief. Counsel for all parties have consented in writing to the filing of this brief.

neously be engaged in providing professional services to members of the public.

Public Citizen submits this brief to assist the Court in assessing the significance of these considerations to the proper outcome of the challenge in this case, which seeks to invalidate factual disclosure requirements applicable to entities that hold themselves out as providing medical services to pregnant women.

SUMMARY OF ARGUMENT

Petitioners' challenge to the California law requiring them to disclose facts about limitations of the medical care provided by their facilities rests heavily on the proposition that the disclosure requirement is a "content-based" regulation of speech, and that content-based regulations are subject to strict First Amendment scrutiny. Pet. Br. 28. That broadly stated proposition is incorrect, and this Court should not endorse it.

In the commercial-speech arena, both longstanding precedents and the Court's most recent pronouncements make clear that content-based restrictions on speech are subject to intermediate rather than strict scrutiny. Moreover, requirements that commercial speakers disclose factual information pertinent to consumers, investors, and regulators are subject to an even more relaxed form of scrutiny and are permissible if they are reasonably related to a government interest and are not unduly burdensome, *see Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985)—even though such requirements are inherently "content-based" in the sense that they prescribe the content of the required disclosures.

The commercial-speech setting offers instructive parallels to the regulation of professional service providers at issue here. The considerations that justify relaxed scrutiny of disclosure requirements under *Zauderer* are not solely limited to commercial speakers. Governments have substantial authority to regulate the provision of professional services even by nonprofit or ideologically motivated entities. That authority justifies standards of review similar to those applicable to commercial speech, at least with respect to some aspects of professionals' communications with clients or prospective clients. *See Lowe v. SEC*, 472 U.S. 181, 228–33 (1985) (White, J., concurring in the result); *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 884 (1992) (lead opinion).

The provision of professional services by ideologically motivated advocacy organizations may involve a mix of fully protected speech, unprotected conduct, and speech that is incidentally affected by the government's exercise of legitimate authority to regulate professional practice. Speech that concerns the nature of the services to be provided and that is material to the client's choice whether to avail herself of those services falls into the latter category. Reasonable disclosure requirements related to those subjects, like disclosure requirements related to purely commercial transactions, should not be subject to a level of scrutiny designed to protect wholly different expressive interests.

Here, the state's disclosure requirements are reasonably related to legitimate interests in ensuring that women seeking pregnancy-related care receive factual information that is highly material to the decision whether to seek care at specific facilities. Under

this Court's precedents, the First Amendment poses no obstacle to such requirements.

ARGUMENT

I. Not all content-based speech regulations are subject to strict scrutiny.

Petitioners' suggestion that this Court's decisions establish that content-based speech regulations—including factual disclosure requirements—are subject to strict scrutiny regardless of the nature of the speech involved is not correct. *See* Pet. Br. 28–31. The Court should, at a minimum, steer clear of repeating petitioners' mantra to avoid upsetting established First Amendment doctrine. More than that, however, the setting in which the Court has clearly and repeatedly called for relaxed scrutiny of content-based regulations—commercial-speech disclosure—has important parallels to this case that call for a similar level of scrutiny here.

A. This Court has rejected strict scrutiny for content-based restrictions in the related context of commercial speech.

This Court has long recognized that restrictions of commercial speech, even if content-based, are subject to intermediate scrutiny, not to the strict scrutiny ordinarily applied to content-based restrictions on fully protected speech. *See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 564 (1980). Disclosure requirements applicable to commercial messages are subject to an even more lenient standard of review, akin to the rational-basis test applicable to commercial regulation generally. *See Zauderer*, 471 U.S. at 651. The Court's most recent decisions bearing on the subject reinforce these longstanding prin-

ciples. *See Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144, 1151 (2017) (citing *Central Hudson* and *Zauderer*); *Matal v. Tam*, 137 S. Ct. 1744, 1767 (2017) (Kennedy, J., concurring in part and concurring in the judgment) (recognizing that "content based discrimination" is not of "serious concern in the commercial context").

1. The Court has applied intermediate scrutiny to content-based commercial speech restrictions.

For nearly four decades, the First Amendment standard that applies to content-based restrictions on commercial speech has been clear: The government may regulate such speech where it has "substantial" interests in the regulation, the regulation "advances these interests in a direct and material way," and "the extent of the restriction on protected speech is in reasonable proportion to the interests served." *Edenfield v. Fane*, 507 U.S. 761, 767 (1993) (citing *Cent. Hudson*, 447 U.S. at 564). This standard—termed intermediate scrutiny or *Central Hudson* review—affords less protection for commercial speech than the strict scrutiny ordinarily applicable to fully protected speech, such as political, literary, artistic, or religious expression.

The "common-sense distinction" between commercial and noncommercial speech stems from commercial speech's "subordinate position in the scale of First Amendment values." *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455–56 (1978) (internal quotation marks omitted). Accordingly, the Court's decisions recognize that "regulation of commercial speech based on content is less problematic" than regulation of content-based noncommercial speech. *Bolger v.*

Youngs Drug Prods. Corp., 463 U.S. 60, 65 (1983); *accord Matal*, 137 S. Ct. at 1767 (Kennedy, J., concurring) (citing *Bolger*).

The argument for strict scrutiny of every content-based speech regulation runs counter to a long line of cases in which this Court has applied intermediate scrutiny to content-based restrictions on lawful, non-misleading commercial speech. *See, e.g.*, *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 176, 183–84 (1999) (striking down a statute that forbade broadcast advertising of casino gambling as applied to advertisements in jurisdictions where such gambling was legal); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 478, 482, 488 (1995) (invalidating federal law that prohibited labels for beer, but not wine or distilled spirits, from displaying alcohol content); *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 620, 635 (1995) (upholding rule prohibiting attorneys from sending certain written solicitations to prospective clients that "relate[d] to an accident or disaster involving the person to whom the communication [was] addressed or a relative of that person"); *Bolger*, 463 U.S. at 61, 68–69 (holding unconstitutional as applied a statute that prohibited unsolicited advertisements for contraceptives); *In re R.M.J.*, 455 U.S. 191, 194, 205–07 (1982) (holding unconstitutional a rule that barred attorney advertisements from identifying jurisdictions in which attorneys were licensed).

In each case, the restrictions turned on the "subject matter" of the speech and the identity of the speaker. Yet in each case, the Court held that the restrictions were subject to intermediate scrutiny. Indeed, *Central Hudson* itself addressed a regulation that banned all "advertising intended to stimulate the

purchase of utility services"—an explicitly content-based restriction. *Cent. Hudson*, 447 U.S. at 559 (internal quotation marks omitted).

2. Content-based commercial disclosure requirements are subject to relaxed scrutiny.

In *Zauderer*, this Court held that content-based commercial disclosure requirements are subject to an even less stringent standard of review than laws that prohibit commercial speech based on content. *Zauderer* rests on a fundamental principle governing First Amendment review of commercial-speech regulations: The constitutionally protected interests implicated by commercial-speech regulations that involve disclosure are much less substantial than those implicated by prohibitions on commercial speech. Thus, while prohibitions on commercial speech are subject to a form of "heightened scrutiny"—under the intermediate scrutiny framework articulated in *Central Hudson*—commercial disclosure requirements are sustained if they are "reasonably related" to a legitimate government interest. *Zauderer*, 471 U.S. at 651. The *Zauderer* disclosure standard and the rational-basis standard applicable to "'regulatory legislation affecting ordinary commercial transactions'" are "similarly permissive." *Expressions*, 137 S. Ct. at 1152 (Breyer, J., concurring in the judgment) (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938)).

This Court explained in *Zauderer* that the difference in the standards of review rests on "material differences between disclosure requirements and outright prohibitions on speech." 471 U.S. at 650. *Zauderer* recognized that laws compelling individuals to

profess views on "'politics, nationalism, religion, or other matters of opinion'" raise the most fundamental First Amendment concerns. *Id.* at 651 (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)). But when commercial speakers are required to disclose information about their products or businesses, "the interests at stake ... are not of the same order." *Id.* "Because the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides, [a commercial speaker's] constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal." *Id.*

Disclosure requirements are a preferred form of regulating commercial speech precisely because they "trench much more narrowly on an advertiser's interests than do flat prohibitions on speech." *Id.* These considerations led the Court in *Zauderer* to hold heightened scrutiny in any form (including *Central Hudson*'s intermediate scrutiny) inapplicable to requirements of factual disclosures in commercial advertising, and to limit its review to the most deferential level of constitutional scrutiny. *Id.*

In *Zauderer* and the Court's later decision in *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229 (2010), the legitimate interest that justified disclosure was the "interest in preventing deception of consumers." *Id.* at 253; *Zauderer*, 471 U.S. at 651. But those decisions do not limit application of the *Zauderer* standard to cases where the government interest is related to protecting consumers against deception. The Court in *Zauderer* applied "reasonable relationship" review because commercial speakers'

interest in not disclosing factual information about their products, services, or businesses is only minimally protected by the Constitution. That reasoning compels the conclusion that whenever a law "requires the disclosure of beneficial consumer information, the purpose of its regulation is consistent with the reasons for according constitutional protection to commercial speech[.]" *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 501 (1996) (plurality).

Disclosure requirements subject to the *Zauderer* standard are necessarily content- and speaker-based: They are triggered by advertisements or other commercial speech with specific content, made by particular types of speakers, and they specify the content of the required disclosures. In *Zauderer*, for example, the disclosure requirement applied only to particular speakers (attorneys) and only to speech with particular content (advertisements mentioning contingent-fee representation), and it told attorneys running such ads exactly what they had to say about a client's potential liability for costs. *See* 471 U.S. at 650.

Such content- and speaker-specificity is an inherent feature of disclosure requirements. It would make no sense, for example, to require companies advertising shoes to warn that smoking cigarettes causes cancer. Likewise, cigarette companies are not required to include warnings about the dangers of sugary drinks in their advertisements, and soft-drink advertisements need not disclose EPA-estimated miles-per-gallon figures for cars. Thus, if content- and speaker-based disclosure requirements were necessarily subject to heightened scrutiny, all disclosure requirements would have to face such scrutiny, and *Zauderer* would be a dead letter.

B. *Reed* and *Sorrell* do not mandate strict scrutiny for all content-based speech regulation.

The argument for strict scrutiny of all content-based restrictions hinges on this Court's decisions in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), and *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011). Those decisions, however, do not step back from the Court's well-established acceptance of lesser scrutiny for content-based commercial-speech regulations.

In *Sorrell*, the Court struck down on First Amendment grounds a Vermont law that prohibited, with limited exceptions, "pharmacies, health insurers, and similar entities from disclosing or otherwise allowing prescriber-identifying information to be used for marketing" and "pharmaceutical manufacturers and detailers from using the information for marketing." 564 U.S. at 563. The Court held that the law imposed a "speaker- and content-based burden on protected expression," *id.* at 571, by allowing the use of information by other entities, such as "private or academic researchers," *id.* at 563, and for non-marketing purposes, such as "educational communications," *id.* at 564. The Court therefore concluded that "heightened judicial scrutiny [was] warranted." *Id.* at 565.

The Court went on, however, to explain that two types of "heightened" scrutiny could potentially apply to the speech at issue: "a special commercial speech inquiry or a stricter form of judicial scrutiny." *Id.* at 571. The Court concluded that it was unnecessary to decide whether the speech at issue was commercial because, even under the less stringent "commercial speech inquiry," the law was unconstitutional. *See id.*

at 571–72 (citing *Cent. Hudson*, 447 U.S. at 566). Far from announcing a new rule, *Sorrell*'s repeated distinction between intermediate scrutiny and the "stricter" standard the Court did not apply supports the continued application of intermediate scrutiny to commercial speech.

Thus, as *Sorrell* makes clear, the phrase "heightened scrutiny" does not necessarily refer to strict scrutiny. *Sorrell*'s application of intermediate scrutiny contradicts any such reading, and many of the Court's other opinions demonstrate that "heightened scrutiny" is a *generic* term indicating a level of scrutiny higher than rational-basis scrutiny, including both intermediate scrutiny and strict scrutiny. For example, the Court's equal protection precedents frequently use the term "heightened scrutiny" to describe the intermediate scrutiny applicable to gender classifications. *See, e.g.*, *United States v. Virginia*, 518 U.S. 515, 533, 555 (1996); *Clark v. Jeter*, 486 U.S. 456, 463, 465 (1988). In the First Amendment area, the Court has similarly referred to the intermediate scrutiny applied to limits on political contributions as a form of "heightened judicial scrutiny." *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 391 (2000).

The Court's opinion in *Sorrell* uses the term "heightened scrutiny" in the same way as these precedents—as a general description of scrutiny above a rational-basis test, not as a synonym for strict scrutiny. *Sorrell* is thus fully consistent with the continued application of intermediate scrutiny to content-based restrictions of commercial speech. Moreover, nothing in *Sorrell* remotely suggests application of heightened scrutiny of any kind, let alone strict scrutiny, to content-based commercial *disclosure* requirements.

Likewise, *Reed* offers no support for universal application of strict scrutiny to content-based regulations. *Reed* struck down a local law that prohibited outdoor signs without a permit but exempted twenty-three categories of signs, including political and ideological signs and temporary directional signs of short duration. *See* 135 S. Ct. at 2224–25. The law did not, however, exempt signs that the plaintiffs—a church and its pastor—sought to display for extended periods to publicize the time and location of upcoming church services. *Id.* at 2225. The Court cited noncommercial-speech cases for the proposition that "[c]ontent-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Id.* at 2226.

The Court cited *Sorrell*, a commercial-speech case, only in defining the "commonsense meaning of the phrase 'content based.'" *Id.* at 2227. The Court explained that "[g]overnment regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Id.* (citing *Sorrell*, 564 U.S. at 565). The Court thus found that the town ordinance in *Reed* was content-based because it "single[d] out specific subject matter for differential treatment." *Id.* at 2230. The Court then applied strict scrutiny to the ordinance as a content-based regulation of fully protected, noncommercial speech. *Id.* at 2231.

Critically, *Reed* did not hold—or even discuss the possibility—that strict scrutiny would apply to content-based commercial-speech restrictions. Had the Court intended to overrule its many decisions apply-

ing intermediate scrutiny to content-based commercial speech restrictions, its opinion would undoubtedly acknowledge such an important aspect of the decision. This Court, like Congress, "does not ... hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). *Reed* provides no hint that it is concealing such an elephant. Indeed, the Court's opinion does not use the term "commercial speech" even once. Similarly, any suggestion that *Reed* alters the standard for *disclosure* requirements is untenable, as such requirements were not at issue in the case, and the Court's opinion does not discuss them.

That *Reed* and *Sorrell* do not sweep so broadly as to require strict scrutiny of any content-based speech restriction is confirmed by this Court's subsequent decisions in *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144, and *Matal v. Tam*, 137 S. Ct. 1744. *Expressions* concerned a challenge to a New York statute prohibiting merchants from imposing surcharges on consumers who paid with credit cards. The Court determined that the law regulated speech rather than conduct, but did not determine whether it was properly viewed as a speech *prohibition* or a requirement that prices be *disclosed* in a particular way. *See* 137 S. Ct. at 1151 & n.3. Under either view, the law was "content-based" in the sense that its application either prohibited or required speech with particular content. Nonetheless, the Court's opinion does not suggest that the law might be subject to strict scrutiny. Rather, the Court remanded the case for consideration of the law either under *Central Hudson* intermediate scrutiny (if it was ultimately determined to be a speech restriction) or *Zauderer* (if it was determined to be a disclosure requirement). *See id.* at 1151.

Matal concerned a federal statute prohibiting registration of offensive trademarks. Viewed as a speech restriction (as the Court determined it to be), it, too, was undoubtedly content-based. But neither the Court's lead opinion, joined in relevant part by four Justices, nor the opinion of Justice Kennedy (also representing the views of four Justices) held that the law was subject to strict scrutiny solely because it was content-based. The lead opinion applied the *Central Hudson* standard to the law and held it unconstitutional because the interest in suppressing socially offensive speech is not legitimate. 137 S. Ct. at 1764. The opinion of Justice Kennedy (*Sorrell*'s author) applied strict scrutiny because the law was *viewpoint-based*—that is, because it regulated speech because of disagreement with its message. At the same time, that opinion reiterated the point that, by contrast, "content based discrimination" is not "of serious concern in the commercial context." *Id.* at 1767 (citing *Bolger*, 463 U.S. at 65, 71–72).

C. Strict scrutiny for every content-based regulation would have significant adverse consequences.

Applying strict scrutiny to content-based commercial-speech restrictions would risk devastating consequences for the government's ability to adopt commonsense marketplace regulations. Regulations of commercial speech typically apply to specific market participants, such as food manufacturers, debt collectors, and drug companies, and they deal with problems unique to industries in which those participants operate. For example, federal law limits the circumstances in which food manufacturers can make claims about health benefits of their products, 21 C.F.R.

§ 101.14, or advertise the addition of vitamins to infant formula, *id.* § 107.10(b). It forbids debt collectors from advertising the sale of a debt to coerce a debtor to pay it, and from publishing lists of consumers who refuse to pay debts. 15 U.S.C. § 1692d(3)–(4). If content-based commercial-speech restrictions are subject to strict scrutiny, all these restrictions and numerous other useful, longstanding provisions might have to satisfy such scrutiny, on the theory that they apply "to particular speech because of the topic discussed or the idea or message expressed." *Reed*, 135 S. Ct. at 2227.

In the disclosure context, too, the government frequently mandates speech on a particular subject and requires that commercial actors use specific language. For example, vehicle manufacturers must label, in accordance with Environmental Protection Agency rules, each vehicle with its average miles per gallon of fuel. 49 U.S.C. § 32908(b). Drug manufacturers must include "black box" warnings on labels of certain drugs to emphasize particular hazards. 21 C.F.R. § 201.57. And food manufacturers must disclose nutritional information about their products. *Id.* § 101.9.

The government would have a much higher burden to justify basic rules like these if they were subjected to strict scrutiny. It "is the rare case" in which the government "demonstrates that a speech restriction is narrowly tailored to serve a compelling interest," as required to satisfy strict scrutiny. *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1665–66 (2015) (citation omitted). Indeed, the very point of strict scrutiny is to render laws subject to it "presumptively invalid." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992). Applying strict scrutiny to con-

tent-based commercial-speech restrictions could obliterate many longstanding laws and regulations that are critical to the protection of consumers and the marketplace.

II. Strict scrutiny should not apply to disclosure requirements for providers of professional services.

Considerations similar to those in the commercial-speech realm also justify the application of less stringent scrutiny to certain types of regulation directed at persons or entities that offer to provide professional services to members of the public—even if the regulation can be described as content-based and the services are provided on a nonprofit basis and are related to the provider's ideological or advocacy mission. In particular, factual disclosure requirements that relate to the nature of the services to be provided and are material to the client's decision whether to enter into a relationship should not be subject to strict First Amendment scrutiny.

Providers of professional services, no less than commercial speakers, are subject to the government's regulatory authority—authority that is "not lost whenever the practice of a profession entails speech." *Lowe v. SEC*, 472 U.S. at 228 (White, J., concurring in the result). The "personal nexus between professional and client" that exists when a provider of professional services "takes the affairs of a client personally in hand and purports to exercise judgment on behalf of the client in light of the client's individual needs and circumstances" is one marker that helps define when government regulation is legitimately aimed at the professional relationship rather than at fully protected speech as such. *Id.* at 232. Where such a relation-

ship is present, the government may exercise its authority in ways that have the effect of regulating speech with particular content (for example, speech constituting medical, legal, or investment advice).

Indeed, the government may require a license to engage in professional activities involving speech without implicating strict First Amendment scrutiny, even where the licensing of speech itself, or of the press, would otherwise be subject to the most stringent First Amendment scrutiny. *See id.* at 229–30; *see, e.g.*, *Nat'l Ass'n for Advancement of Multijurisdiction Practice v. Howell*, 851 F.3d 12, 19–20 (D.C. Cir. 2017); *Nat'l Ass'n for Advancement of Multijurisdiction Practice v. Lynch*, 826 F.3d 191, 195–96 (4th Cir. 2016); *Nat'l Ass'n for Advancement of Multijurisdiction Practice v. Castille*, 799 F.3d 216, 220–21 (3d Cir. 2015). Thus, although regulations of "professional speech" are inherently applicable to speech defined by its subject matter, the appellate courts generally agree that such regulations, like commercial-speech regulations, are not necessarily subject to strict scrutiny.[2]

As in the realm of commercial speech, disclosure requirements applicable to providers of professional services are properly subject to a level of scrutiny *less* stringent than that applicable to requirements that directly restrain speech. Thus, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, this Court in-

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[2] *See, e.g.*, *Howell*, 851 F.3d 12, 19–20; *Serafine v. Branaman*, 810 F.3d 354, 359–60 (5th Cir. 2016); *Castille*, 799 F.3d at 220–21; *Stuart v. Camnitz*, 774 F.3d 238, 247–48 (4th Cir. 2014); *King v. Governor of N.J.*, 767 F.3d 216, 229–32 (3d Cir. 2014); *Locke v. Shore*, 634 F.3d 1185, 1191 (11th Cir. 2011).

voked the government's authority to subject "the practice of medicine ... to reasonable licensing and regulation," 505 U.S. at 884 (lead opinion), when it upheld the requirement that physicians providing abortions give patients information about the risks of abortion and childbirth, the effects of abortion on the fetus, and the availability of financial support for alternatives to abortion. *See also id.* at 966–67 (opinion of Rehnquist, C.J.). The Court did not subject those requirements to heightened scrutiny, but required that they be "reasonable," *id.* at 885–85 (lead opinion), or "rationally related" to a state interest, *id.* at 967 (opinion of Rehnquist, C.J.)—a standard similar to that applied to commercial speech under *Zauderer*.

Where an organization is engaged both in providing professional services and in ideologically based advocacy—and where it views offering its professional services as a means of advancing its advocacy interests—determining where legitimate regulation of a profession stops and presumptively unconstitutional regulation of fully protected speech begins requires care. The activities of professionals may be viewed as falling "along a continuum" between fully protected speech and unprotected conduct. *Pickup v. Brown*, 740 F.3d 1208, 1227 (9th Cir. 2014). "At one end of the continuum, where a professional is engaged in a public dialogue, First Amendment protection is at its greatest." *Id.*

By contrast, speech "within the confines of the professional relationship" falls at "the midpoint of the continuum." *Id.* at 1228. Some such speech may have very substantial First Amendment protection—for example, a lawyer's advocacy of a nonfrivolous legal position—but the government may nonetheless regu-

late the competence of the professional's advice and require that it be in the best interests of the client. *See id.* And the government has considerable leeway to require the professional to disclose information about the nature and terms of the relationship and the existence and implications of alternative courses of action. *See id.*

At the end of the continuum furthest from speech regulation are limits on professional conduct that prohibit professionals from acting without a license or from engaging in particular prohibited conduct (such as ordering administration of an illegal drug), although such regulations necessarily have an impact on speech. *See id.* at 1229; *cf. Expressions*, 137 S. Ct. at 1152 (Breyer, J., concurring in the judgment) ("[V]irtually all government regulation affects speech. Human relations take place through speech.").

Regulation of professional services offered by advocacy organizations thus may run afoul of the First Amendment when it aims directly at advocacy itself. For example, in *NAACP v. Button*, 371 U.S. 415 (1963), the Court held that the First Amendment does not permit application of legal ethics rules that prohibit in-person solicitation of clients to an organization that seeks to engage in advocacy through litigation for noncommercial purposes. And in *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001), the Court held that attempts to prevent lawyers from engaging in particular forms of advocacy on behalf of clients (specifically, offering legal representation to challenge welfare laws) violated the First Amendment. *See also Wollschlaeger v. Governor of Fla.*, 848 F.3d 1293, 1309 (11th Cir. 2017) (applying intermediate scrutiny to strike down a statute limiting "what

[a] practitioner could say or recommend to a patient or client").

These principles, however, do not excuse professionals engaged in nonprofit advocacy from all forms of regulation that may affect the content of their speech. In particular, nothing in *NAACP v. Button* or *Velazquez* exempts such professionals from obligations to disclose material information concerning the nature and terms of their representation. Nor do those decisions subject such disclosure obligations to any form of heightened First Amendment scrutiny. Nonprofit lawyers, for example, like for-profit lawyers, are required to disclose conflicts of interest and inform clients of the terms under which their services are being provided. *See, e.g.*, D.C. R. Prof. Conduct 1.5(b), 1.7(c)(1).

Similar disclosure requirements are, under this Court's decision in *Riley v. National Federation of the Blind*, 487 U.S. 781 (1988), subject to stringent First Amendment scrutiny as compelled speech if applied to speakers when they are engaged *solely* in fully protected speech, such as charitable solicitation. *See id.* at 796–97. But the same result does not follow when disclosures are mandated as part of the formation of a professional relationship or the provision of services within it. As the lead opinion in *Casey* explains, such disclosure requirements in the context of the "reasonable licensing and regulation" of a profession do not share the "constitutional infirmity" that attaches to compelled speech under such decisions as *Wooley v. Maynard*, 430 U.S. 705 (1977). *Casey*, 505 U.S. at 884. Like the regulation at issue in *Zauderer*, such requirements do "not attempt[] to 'prescribe what shall be orthodox in politics, nationalism, religion, or other

matters of opinion or force citizens to confess by word or act their faith therein.'" 471 U.S. at 651.

The imposition of reasonable disclosure requirements on organizations that offer medical or medically related services is no more problematic than the legal-services disclosure requirements discussed above, even if the organizations subject to the requirements offer their services to advance their advocacy of an ideological position on the subject of abortion or any other matter of controversy. Surely, for example, strict scrutiny would not be required if petitioners were to challenge the requirement that providers of medical care provide patients with factual information about their privacy rights under the Health Insurance Portability and Accountability Act (HIPAA)—even if, as part of their ideological mission, petitioners objected to HIPAA privacy rights and advocated their elimination.

The same result should obtain here. The challenged law does not prevent petitioners from offering services that are shaped and limited by their advocacy of a position on abortion. It does not prevent them from presenting their views on abortion to the public or to clients of their facilities. It does not require them to say anything that amounts to advocacy of abortion or that contradicts their positions with respect to abortion. Rather, the law requires only the provision of factual information relevant to their potential clients.

First, as to an unlicensed facility, the disclosure is no more than that the facility does not have a license—a statement of fact that, by definition, cannot be subject to debate because the disclosure requirement would not apply if the statement were not true.

Such information bears a reasonable relationship to the state's interest in fostering the ability of its residents to make informed choices among healthcare providers. Whether a facility that appears to offer health services is in fact a licensed clinic where care is provided by or under the supervision of a doctor or other licensed professional is of obvious relevance to individuals who seek care. Indeed, petitioners do not really argue otherwise, but only assert that the interest is not compelling, Pet. Br. 51–53, or could be pursued through other, less effective means, Pet. Br. 57—points relevant only if strict scrutiny applied.

Second, as to a licensed facility, the disclosure is that the full range of services not provided by the facility (including abortion) are available elsewhere, that public financial support may be available for them, and that more information is available from the county social services offices. Much as petitioners might wish to avoid providing this information, it is indisputably factual. And a person considering whether to seek care at a facility that has chosen, for whatever reason, to limit the services it offers would reasonably want to know whether more comprehensive services are available, and affordable, elsewhere. The required disclosure of availability of "state-funded alternatives," in particular, is "relevant, accurate, and non-inflammatory" and thus "rationally related to the State's legitimate interest" in ensuring that health care choices are "truly informed." *Casey*, 505 U.S. at 968 (opinion of Rehnquist, C.J.).

Petitioners' suggestion that the government's legitimate interest is limited to ensuring informed consent to *surgical procedures*, Pet. Br. 46–49, is unsupported by reason or precedent. The government's in-

terest in fostering informed choice is not confined to any particular type of medical services (or, indeed, to medical services as opposed to other types of services or products). *See Friedman v. Rogers*, 440 U.S. 1, 8 (1979). In addition, as in *Casey*, that petitioners object to providing the information because it might make a difference to some women "only demonstrates that this information ... [is] relevant to a woman's informed choice." *Casey*, 505 U.S. at 968–69 (opinion of Rehnquist, C.J.). Finally, the disclosure does not require petitioners to contradict their advocacy positions, which do not involve attempts to mislead the public into falsely believing that abortion and other reproductive health services are unavailable or that they are not publicly funded in California.[3]

In sum, this is not a case where the government has attempted "to control public discourse through the regulation of a profession." *Lynch*, 826 F.3d at 196. The state has not limited or attached disclosure requirements to the mere dissemination of "information from pro bono advocacy groups." Pet. Br. 47–48. Rather, it has required organizations offering medical services to make factual disclosures of information relevant to the choice whether to seek such services from them or from another provider. The disclosures fall well within the range of the kinds of legitimate regulations of professional service providers that do not trigger strict First Amendment scrutiny.

---

[3] If petitioners' advocacy attempted to attract clients by denying that public programs providing reproductive health services were available in California, the First Amendment clearly would not prevent correction of such misrepresentations. *See Ill. ex rel. Madigan v. Telemarketing Assocs.*, 538 U.S. 600 (2003).

The Court in this case need not attempt to provide a comprehensive set of answers to the many First Amendment issues that may arise when governmental attempts to regulate the provision of professional services have some impact on the content of speech. Still less should it make sweeping generalizations about strict scrutiny of content-based regulations that could extend beyond the context of this case into the area of commercial speech. In the narrow circumstances here, where a state has imposed a factual disclosure requirement applicable to organizations that operate facilities held out as providing medical services, the Court should decline the invitation to apply strict scrutiny and uphold the challenged law as a reasonable measure rationally related to the interest in informing potential clients of facts relevant to their choices of care providers.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

SCOTT L. NELSON
Counsel of Record
ALLISON M. ZIEVE
JULIE A. MURRAY
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
snelson@citizen.org
Attorneys for Amicus Curiae

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No. 16-1140

In The Supreme Court of the United States

NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES, D/B/A NIFLA, ET AL.,

Petitioners,

v.

XAVIER BECERRA, ATTORNEY GENERAL OF CALIFORNIA, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE CITY AND COUNTY OF SAN FRANCISCO; THE CITIES OF OAKLAND, BALTIMORE, LOS ANGELES, AND NEW YORK; AND THE COUNTY OF SANTA CLARA AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

DENNIS J. HERRERA
City Attorney
CHRISTINE VAN AKEN
YVONNE R. MERÉ
MATTHEW GOLDBERG
MOLLIE M. LEE
Counsel of Record
CITY ATTORNEY'S OFFICE
City Hall Room 234
One Dr. Carlton B. Goodlett Pl.
San Francisco, CA 94102
Telephone: (415) 554-4290
mollie.lee@sfcityatty.org
Attorneys for the City and County of San Francisco

BARBARA J. PARKER
City Attorney
MARIA BEE
ERIN BERNSTEIN
MALIA MCPHERSON
OFFICE OF THE OAKLAND CITY ATTORNEY
1 Frank H. Ogawa Plaza
Oakland, CA 94612
Attorneys for the City of Oakland

Solicitor ANDRE M. DAVIS
SUZANNE SANGREE
BALTIMORE CITY LAW DEPARTMENT
100 North Holliday Street
Room 109
Baltimore, MD 21202
(443) 388-2190
Attorneys for the City of Baltimore

[Additional Counsel Listed On Signature Page]

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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INTEREST OF *AMICI CURIAE*[1]

Amici are cities and counties that regulate pregnancy centers. Through legislation, litigation, investigations, and enforcement efforts, *amici* have developed substantial records about the harms caused by many pregnancy centers. These harms often arise when pregnancy centers mislead women about the services they provide, leading women to delay accessing abortion services or comprehensive prenatal care. Some *amici* have enacted legislation to address deceptive practices by pregnancy centers. For instance, Baltimore and New York City have enacted ordinances requiring pregnancy centers to disclose certain information about their services. *See* Balt., Md., City Health Code §§ 3-501 to 3-506; N.Y.C., N.Y., Admin. Code § 20-816(a)-(e). San Francisco and Oakland prohibit pregnancy centers that provide limited medical services from falsely advertising services they do not offer. *See* S.F., Cal., Admin. Code § 93.4; Oakland, Cal., Mun. Code § 5.06.110. Other *amici*, like the City of Los Angeles and the County of Santa Clara have encountered pregnancy centers' deceptive practices in the course of investigation or enforcement efforts.

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[1] Pursuant to Supreme Court Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. Counsel for Petitioners' letter consenting to the submission of *amicus* briefs has been filed with the Clerk's Office. Counsel for Respondents have consented to the filing of this *amicus* brief.

Collectively, *amici* are leaders among local governments in advocating and acting to protect consumers.

Amici submit this brief to provide the Court with factual information from municipal records, as well as to urge the Court to adopt a consistent standard for reviewing reproductive health disclosure laws. This evidence demonstrates that there is ample reason to regulate pregnancy centers – not to discriminate against their viewpoints, but because pregnant women have a critical need for accurate and timely information. That would be reason enough for *amici* to require pregnancy centers to disclose truthful information to the pregnant women they serve. The need for disclosure mandates is only strengthened by overwhelming evidence that the deceptive conduct of some pregnancy centers hinders the ability of pregnant women to obtain accurate information and appropriate services, causing significant harms. Recognizing that there is not a one-size-fits-all approach, *amici* have selected different policy tools to respond to this problem. Some *amici* have enacted compelled disclosure laws similar to California's Reproductive FACT Act,[2] while others have taken different approaches tailored to specific problems in their jurisdictions. All *amici* share an interest in maintaining a broad range of policy tools so that jurisdictions around the country can select an approach that best fits the problems they have identified. *Amici* urge the Court to uphold the FACT Act.

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[2] Cal. Health & Safety Code §§ 123470-123473 (FACT Act).

SUMMARY OF ARGUMENT

California is not alone in regulating pregnancy centers.[3] At least ten other jurisdictions, including four *amici*, have enacted regulations that impose disclosure requirements or advertising restrictions on pregnancy centers.[4] These regulations respond to the particular harms that result when pregnancy centers use false information and deceptive practices to prevent pregnant women from accessing desired health care, including abortion, in a timely fashion. While some pregnancy centers are honest brokers that provide valuable services to pregnant women, *amici*'s legislative records – as well as records developed through their

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[3] State and local laws define pregnancy centers differently, with some focused on limited-service pregnancy centers and others including pregnancy centers that provide comprehensive reproductive health care. As used in this brief, the term "pregnancy centers" refers to facilities that offer pregnant women limited services such as pregnancy tests or ultrasounds, but do not offer or provide referrals for abortion.

[4] *See* Austin, Tex., City Code §§ 10-10-1 to 10-10-3; Balt., Md., City Health Code §§ 3-501 to 3-506; Court of Common Council of the City of Hartford, Ct., Ordinance Amending Chapter 17 of the Hartford Municipal Code To Add Article VI-Pregnancy Information Disclosure and Protection (Dec. 11, 2017) (enacted); S.B. No. 501, S.D. 1, 29th Leg., Reg. Sess. (Haw. 2017); 745 Ill. Comp. Stat. §§ 70/2, 70/3, 70/6, 70/9; King County, Wa., Board of Health, Rule & Reg. No. BOH17-04 (July 20, 2017); Montgomery County, Md., Board of Health, Res. No. 16-1252 (Feb. 2, 2010); N.Y.C., N.Y., Admin. Code § 20-816(a)-(e); Oakland, Cal., Mun. Code § 5.06.110; S.F., Cal., Admin. Code §§ 93.1-93.5.

litigation and enforcement actions – show recurring patterns of deception at many pregnancy centers.[5]

This deception frequently begins when pregnancy centers use intentionally misleading advertising to attract women seeking abortions, even though the centers do not provide or refer for abortions. Sometimes, pregnancy center staff members pretend that they work for clinics that provide abortions, and dupe pregnant women into going to the pregnancy center instead of their intended destination. At unlicensed pregnancy centers, the deception often continues when staff request medical histories, wear scrubs, and purport to give clients "full examinations," falsely leading them to believe they have been treated by a medical professional. Pregnancy centers also frequently give clients medically or legally inaccurate information about abortion, and fail to provide them with information about the availability of medical assistance for family planning and abortion services. The trickery culminates with lies and delay tactics designed to prevent a pregnant woman from seeing an abortion provider until it is too late for her lawfully to choose an abortion – with the consequence that comprehensive prenatal care is also delayed.

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[5] Many of *amici*'s legislative records have been included in court records in cases challenging *amici*'s laws. For the convenience of the Court, references are provided to court filings where possible. Where evidence has not been included in court filings, citations are provided to legislative records. All cited records are on file with counsel.

California's FACT Act responds to these harms by ensuring that pregnant women at unlicensed facilities are notified that the person treating them is not a licensed medical provider, and that pregnant women at licensed facilities are informed about the option to access comprehensive reproductive health care at little or no cost. In requiring pregnancy centers to provide factual information about care and services, the FACT Act is similar to dozens of laws that compel disclosures by physicians before providing abortions. Like these other disclosure laws, the FACT Act regulates some speakers treating pregnant women but not others, responding to the particular harms the legislature was trying to solve. This does not constitute viewpoint discrimination. "States adopt laws to address the problems that confront them. The First Amendment does not require States to regulate for problems that do not exist" by enacting an overly broad statute to counter a particular issue. *McCullen v. Coakley*, 134 S. Ct. 2518, 2532 (2014) (quoting *Burson v. Freeman*, 504 U.S. 191, 207 (1992) (plurality opinion)). So long as disclosure laws simply require a commercial speaker to provide "purely factual and uncontroversial information," they need only be "reasonably related to the State's interest." *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985). The FACT Act easily satisfies this standard.

Amici urge the Court to maintain a consistent standard for evaluating reproductive health disclosure laws. If the Constitution allows a state to require abortion providers to give a pregnant woman factual

information about available resources, it must also allow similar disclosures to be imposed on providers who do not offer abortions.

ARGUMENT

I. Many Pregnancy Centers Deceive Women About The Services They Offer And The Qualifications Of Their Personnel, And Also Provide Inaccurate Information About Pregnancy And Abortion.

Some pregnancy centers are straightforward about their objectives, honestly advertising the services they offer, and supporting women who choose to carry their pregnancies to term. But other pregnancy centers take a different approach, as demonstrated in *amici*'s legislative records.

A. Deceptive Advertising

Many pregnancy centers use advertising campaigns that lead pregnant women to believe that they offer abortions, and intentionally dupe women seeking abortions into making appointments at the centers. For instance, a San Francisco pregnancy center that does not perform abortions or refer women to abortion providers pays to advertise on Google searches for "abortion San Francisco" and on yellowpages.com

under "abortion services."[6] These advertisements include links to a website that features a testimonial from a "client who chose to terminate her pregnancy," without disclosing that the pregnancy center did not help that client obtain an abortion. *Id.* at 39. Other pregnancy centers advertise that they provide "Abortion and Morning After Pill information, including procedures and risks," omitting that the advertised "procedures" do not include abortion and contraceptive care.[7]

One pregnancy center's executive director admitted that its "ads are purposely vague, of course." *Id.* at 708. After running these "purposely vague" ads, this pregnancy center reported an increase in the number of calls from women who "wanted to schedule an abortion" and who "were under the [false] impression from the bus advertisements that [the center] assisted in paying for abortions." *Id.* at 705.

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[6] Appellees' Supplemental Excerpts of Record at 151, 153-54, 157-58, *First Resort, Inc. v. Herrera et al.*, 860 F.3d 1263 (9th Cir. 2017) (No. 15-15434), ECF No. 12; *see also* Amy Everitt, Remarks at the Oakland City Council Life Enrichment Committee Meeting (June 28, 2016), http://oakland.granicus.com/MediaPlayer.php?view_id=2&clip_id=2026&meta_id=139607, at 8:35 [hereinafter Oakland City Council LEC] (noting that a Google search for "abortion Oakland" listed crisis pregnancy centers as two of the top three results).

[7] Joint Appendix to Appellants' Brief at 702-03, *Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Balt.*, No. 16-2325 (4th Cir. Jan. 30, 2017), ECF No. 26 [hereinafter Balt. J.A.].

Phone calls to pregnancy centers are unlikely to yield further clarity. A nationwide pregnancy center hotline trains staff to be intentionally "vague" when fielding calls about abortion services. Oakland City Council LEC at 10:10. And in a survey of pregnancy centers, "not one of the [pregnancy centers] admitted that they don't offer complete pregnancy counseling including abortion and contraception options, unless explicitly asked."[8]

Some pregnancy centers adopt a different strategy to attract clients – namely, diverting pregnant women who are going to other clinics and tricking them about where they are and what services are offered there. Pregnancy centers "often have misleading names and signage and set up shop near legitimate reproductive health care providers." *Id.* at 311. They use "large and vague signs and advertis[e]ments" to divert patients from their intended destinations. *Id.* at 951. Many women "accidentally enter[] into a 'limited service' pregnancy center," "thinking it is a medical facility that offers a full range of reproductive health services." *Id.*

Other pregnancy centers go further, actively deceiving women who intend to go to clinics that provide more comprehensive care, including contraception and abortion services. In Brooklyn, for example, a pregnancy center operates in the same building as a clinic

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[8] Joint Appendix to Appellants' Brief at 308, *Evergreen Ass'n, Inc. v. City of New York*, 740 F.3d 233 (2d Cir. 2014) (No. 11-2735-cv), ECF Nos. 78-81 [hereinafter N.Y.C. J.A.].

that provides contraceptive and abortion care, but on a different floor. Someone posing as a clinic employee intercepted a patient outside of the clinic and took her to the pregnancy center instead. *Id.* at 315. Another pregnancy center parks a bus advertising free ultrasounds outside of a clinic that provides abortions. *Id.* at 442-43. Workers on the bus have falsely stated that "the counselors work for [the] clinic, [and] that the clinic is closed," in an apparent effort to lure women to the pregnancy center instead of the clinic. *Id.* at 443.

B. Unlicensed Facilities Purporting To Be Licensed

Some pregnancy centers falsely claim that they are licensed medical facilities. For instance, a California pregnancy center advertises that its unlicensed mobile unit provides "the same services" as its licensed facility, even though the mobile unit cannot legally provide medical services that are provided by the licensed facility.[9]

Other pregnancy centers "go to great lengths to foster an impression of medical authority, even though most are not licensed medical facilities, and the women coming in are unlikely to see a licensed medical provider." N.Y.C. J.A. at 308. These pregnancy centers "look like a doctor's office," *id.* at 312, or "like a medical

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[9] *See* Informed Choices, *Location & Hours*, http://www.informed-choices.org/map-office-hours (last visited Feb. 15, 2018); Cal. Bus. & Prof. Code § 2052 (prohibiting the unlicensed practice of medicine).

facility," *id.* at 321. Clients are often asked for a full medical history, and then given a "full examination" by staff in scrubs. *Id.* at 400.[10] As one woman testified:

> On October 18th at 23 weeks pregnant, I went to EMC Pregnancy Center in downtown Brooklyn. Though this crisis pregnancy center did not appear to have any licensed medical personnel on staff, it looked and felt like a doctor's office. I was given paperwork to fill out that asked for a medical history as well as all of my contact information and all of my partner's contact information. A woman in scrubs was seeing patients in an exam room that looked just like every OB/GYN office I've ever been in.
>
> I took a pregnancy test . . . and sat waiting for the results with scared 16, 17 and 18-year-old women. Women half my age who had come seeking help at a desperate moment. Though I knew I was pregnant and had been testing positive on pregnancy tests since I was four weeks along, I was told my pregnancy test was inconclusive. The only way to know for sure was a sonogram.

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[10] *See also* King County Board of Health Staff Report, Briefing No. 17-B14, at 5 (June 15, 2017), https://kingcounty.legistar.com/View.ashx?M=F&ID=5269982&GUID=C4A67A50-9E92-4A42-BA4F-2217DFE71C1C [hereinafter King Cnty. Staff Report] (describing a pregnancy center waiting room that "looked like a professional office" and had a framed "test site provider" certificate from the Washington State Department of Public Health, even though it was not a licensed medical facility).

> I was taken into the examination room where the woman in scrubs pulled a wand over my belly and played the sound of the heartbeat for me. She oohed and aahed and with a few more quick swipes, she gave the baby a full examination. She pronounced my baby healthy and perfect. The whole procedure took less than five minutes. I was never seen by a doctor or nurse and my fetus had not received a full medical examination. Though if I didn't know it beforehand, I would have assumed, as many women do, that they had had a full checkup."

Id. at 399-401.

C. Breaches Of Patient Confidentiality

Pregnancy centers often ask clients "to fill out forms soliciting personal information, including health history, relationship status and work information with no assurance of confidentiality," N.Y.C. J.A. at 308, or with assurances of confidentiality that the centers later violate.[11] This raises particular concerns in unlicensed facilities. "[I]n a room set up to look like a doctor's office, many women do not know that there isn't a licensed medical professional giving them this information or that private health and contact information may not be treated confidentially." *Id.* at 312.

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[11] *See, e.g.*, Complaint Ex. D-2 at 8, *Tepeyac v. Montgomery Cnty.*, 5 F. Supp. 3d 745 (D. Md. 2014) (No. 8:10-cv-01259-DKC), ECF No. 1-5 [hereinafter Complaint Ex. D-2] (testimony of Laura Berger).

Pregnancy centers have used women's personal information to show up at their workplaces, *id.* at 337-39, send them harassing texts, *id.* at 338, and sign them up for pregnancy tracking and notifications without their consent.[12] They have shared a woman's personal information with other pregnancy centers, *see* Complaint Ex. D-2, at 8; and even attempted to read the medical records of a former patient into the record at a public hearing.[13]

D. Medically And Legally Inaccurate Information

While some pregnancy centers seek to enhance decision-making by providing information about abortion alternatives, others undermine informed decision-making by giving women inaccurate information about abortion and contraception.

Some pregnancy centers provide women with medical information about the risks of abortion and contraceptives that is inconsistent with the medical standard of care. For example, pregnancy centers often tell clients that abortion causes breast cancer, *see*

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[12] *Relating to Health: Hearing on S.B. 501 Before the S. Comm. on Ways & Means*, 29th Leg. at 117 (Haw. 2017), https://www.capitol.hawaii.gov/Session2017/Testimony/SB501_SD1_TESTIMONY_WAM_02-23-17_.PDF [hereinafter S. Comm. WAM Hearing on S.B. 501] (testimony of Morgen Trube).

[13] *Relating to Health: Hearing on H. Comm. on Health*, 29th Leg. at 253-54 (Haw. 2017), https://www.capitol.hawaii.gov/Session2017/Testimony/SB501_SD1_TESTIMONY_HLT_03-16-17_.PDF (testimony of Ghazaleh Moayedi, DO).

N.Y.C. J.A. at 946, 950; King Cnty. Staff Report at 5, even though the American Cancer Society has concluded that "the scientific evidence does not support the notion that abortion of any kind raises the risk of breast cancer or any other type of cancer."[14] In another common example, pregnancy centers often greatly exaggerate the risks of abortion, telling women that it "is a dangerous procedure" and that they "will become sterilized from the abortion and never able to have children again." N.Y.C. J.A. at 950; *see also id.* at 650 ("[C]ountless women" report "that they were told specifically from the staff at Crisis Pregnancy Centers that they will never have another child again."). Some pregnancy centers also discourage contraceptive use by telling clients that contraceptives cause sterility or sexually transmitted diseases. Complaint Ex. D-2 at 6 (testimony of Eleanor Dayhoff-Brannigan) (describing a pregnancy center giving misinformation about contraception, including that "birth control pills would lead to sterility"); N.Y.C. J.A. at 315-16 ("According to this [pregnancy center], Depo-Prevara [sic], a form of contraception, causes HPV, a sexually transmitted infection.").

The provision of medically inaccurate information by pregnancy centers – many of which present themselves to the public as medical facilities – is widespread. In a 2010 investigation of pregnancy centers throughout California, 40 percent advised that

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[14] Am. Cancer Soc'y, *Abortion and Breast Cancer Risk* (last revised June 19, 2014), https://www.cancer.org/cancer/cancer-causes/medical-treatments/abortion-and-breast-cancer-risk.html.

hormonal birth control increases the risk of infertility, 60 percent advised that condoms were ineffective in reducing pregnancy and sexually transmitted diseases, 70 percent advised that abortion increases the risk of breast cancer, and 85 percent advised that abortion increases the risk of infertility. Oakland City Council LEC at 22:45.

Additionally, pregnancy centers sometimes lie to women about whether and when abortion is legal. Some pregnancy centers falsely "tell the Hispanic women that abortion is illegal" and "[t]hat if they do have abortions that they will be deported back to their country." N.Y.C. J.A. at 450. Others encourage women to wait to decide about abortion by claiming that "[a]bortion is legal through all nine months of pregnancy," even when the procedure is not legal or not available at later gestational ages. Balt. J.A. at 179. A pregnancy center patient in New York was "shocked" to learn that she had delayed her abortion decision until it was too late for the procedure, because the pregnancy center "had assured her she could have an abortion in the third trimester." N.Y.C. J.A. at 941. And a California pregnancy center falsely advises that a woman must undergo multiple steps – including an ultrasound – before obtaining an abortion, even though California law does not require this.[15]

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[15] The center's website tells women that they must first "Verify" a pregnancy via a "laboratory quality pregnancy test," second "Confirm" via a "limited obstetric ultrasound," and third "Decide" by speaking "with a trained pregnancy options consultant." Informed Choices, *Home*, http://www.informed-choices.org/ (last

E. False Information About Pregnancies And Other Delay Tactics

At pregnancy centers that trade in deception, the duplicity often culminates in delay tactics designed to prevent women considering abortions from seeing a provider until it is too late to terminate the pregnancy. "When a woman is misled into believing that a clinic offers services that it does not in fact offer, she loses time crucial to the decision whether to terminate a pregnancy. Under these circumstances a client may also lose the option to choose a particular procedure, or to terminate the pregnancy at all." S.F., Cal., Admin. Code § 93.2(9). Such delays may also lead to increased safety risks and medical costs. Although abortion is a safe medical procedure, the risks of abortion – and its costs – increase as a woman advances through her pregnancy. Balt. J.A. at 712. As a result, the longer a woman is delayed in having an abortion, the riskier and costlier the procedure becomes. *Id.*[16] Similarly,

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visited Feb. 22, 2018). It specifically states that "No matter what you decide to do if your pregnancy test is positive, you will need an ultrasound to confirm if you have a viable pregnancy and to accurately date your pregnancy." Informed Choices, *About our Services*, http://www.informed-choices.org/our-services (last visited Feb. 22, 2018). However, California does not require that a woman undergo an ultrasound before an abortion. *See* Kaiser Family Foundation, *State Ultrasound Requirements in Abortion Procedure: As of April 1, 2017*, https://www.kff.org/womens-health-policy/state-indicator/ultrasound-requirements/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D (last visited Feb. 22, 2018).

[16] *See also* Appellant's Excerpts of Record at 65, ¶ 29, *First Resort, Inc. v. Herrera*, 860 F.3d 1263 (9th Cir. 2017) (No. 15-15434), ECF 7-3.

delays in access to the birth control method of a woman's choice can leave the woman and her partner vulnerable to unintended pregnancy and sexually transmitted disease. *Id.*; *see also* N.Y.C. J.A. at 640.

Care providers across the country testified about encountering patients who sought abortions but could not obtain them because of pregnancy center delay tactics. In one example, a woman went to a pregnancy center in the mistaken belief that they offered abortions. N.Y.C. J.A. at 941. The center told her "she needed an ultrasound before the procedure." *Id.* "Then another ultrasound." *Id.* The center strung her along by telling her they were "uncertain[] about how advanced her pregnancy was." *Id.* The woman's pregnancy advanced to the third trimester. When she finally sought an abortion at a hospital-based clinic, her doctor "had to tell her it was no longer possible: she was well beyond the legal limit for abortion in New York." *Id.* The woman was "shocked"; her pregnancy center counselor had assured her that she could have an abortion in her third trimester of pregnancy. *Id.* After examining the woman, her doctor found that there was no medical reason why she should have had to wait for an abortion; her case was straightforward and her pregnancy could have been dated with a single ultrasound. *Id.* The doctor reported that this pattern of deception was "not uncommon" in her experience. *Id.* at 942.

In another example, a pregnant 16-year-old girl sought care at a pregnancy center, and they "delayed doing an ultrasound several times," and then told the girl and her parents that "the pregnancy was not as far

along as it actually was." *S. Comm. WAM Hearing on S.B. 501* at 107. When the girl and her parents finally sought care at a full-service practice, her pregnancy was too advanced for her to obtain an abortion. *Id.* Her doctor reported that upon hearing the news, "this 16 year-old girl was beyond grief and her parents were understandably very upset. For two months this center had deceived this family, and essentially forced this girl into continuing her pregnancy." *Id.*

These delay tactics are often deliberate. "[S]ome girls are set up for procedures with appointments, only to have these appointments canceled and rescheduled time and time again, in an attempt to prolong the process past a point when a woman can have access to a real and safe abortion procedure by a licensed provider." N.Y.C. J.A. at 649; *see also* Balt. J.A. at 180 (describing similar practices). Some pregnancy centers wait to transfer patients out of their care until the pregnancy is at "20-24 weeks, because the center knows that the patient can no longer terminate the pregnancy."[17] A pregnancy center told a 15-year-old who was 21 weeks pregnant that "she was too far along" for an abortion, a false statement. N.Y.C. J.A. at 656, 660. A different pregnancy center told a patient that she had "weeks" to make her decision, even

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[17] Letter from Muntu Davis, Cnty. Health Officer, and Kiko Malin, Dir., Family Health Servs. Div., Alameda Cnty., Cal., to Oakland City Council Members (June 26, 2016), https://oakland.legistar.com/View.ashx?M=F&ID=4568298&GUID=949F4B1B-3B0E-46B9-9451-77E4D44ADD98 [heareinafter Alameda Cnty. Health Services Letter] (describing pregnancy center advertising in low-income neighborhoods).

though she "only had 10 days in which she was legally able to seek termination."[18]

These deceits also delay access to prenatal care. In one instance, a pregnancy center delayed a patient's care, "asking her to return for subsequent visits until she was well into her second trimester." *S. Comm. WAM Hearing on S.B. 501* at 46-47. "Unfortunately the patient had a serious medical condition and this delay of care resulted in additional risks to her and the pregnancy. These risks could have been decreased had she actually received prenatal care in the first trimester." *Id.*[19]

F. Pregnancy Center Clients Are Often Vulnerable To Deception

Women who go to pregnancy centers are sometimes experiencing emotional and physical stress that makes them especially susceptible to deception. S.F., Cal., Admin. Code § 93.2(8). Domestic violence

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[18] *Relating to Health: Hearing on H.B. 663 Before the H. Comm. on Health*, 29th Leg. 55-56 (Haw. 2017), https://www.capitol.hawaii.gov/Session2017/Testimony/HB663_TESTIMONY_HLT_02-02-17_.PDF (Testimony of Katelyn Stevens, PA-C).

[19] *See also Comments and Documents Relating to Disclosure of Information by Limited Service Pregnancy Centers: Hearing on BOH-17-04 Before the Bd. of Health*, King Cnty. Bd. of Health at 81 (King Cnty., Wa. 2017), https://mkcclegisearch.kingcounty.gov/View.ashx?M=F&ID=5452607&GUID=F536D4AF-3F70-468D-B9CB-39FBE35565D2 (noting that inaccurate dating led a patient to "delay[] her prenatal care for months because she was devastated because she thought the father of her baby was her ex.").

increases in frequency and severity when women are pregnant, and between four and nine percent of pregnant women are abused by their spouses or partners. N.Y.C. J.A. at 320. Many pregnancy center clients are vulnerable for additional reasons, including their age, economic status, and lack of literacy. Balt. J.A. at 712. These women "have even less general knowledge and access to accurate reproductive health information than other consumers." *Id.* One New York City care provider testified:

> I work in the south Bronx and many of the patients that we serve are low income. Some of them may have Medicaid, but in general I would say it's a population that experiences a lot of barriers to accessing medical care. So in that way, I think that these centers are particularly coercive because they prey on someone's lack of health literacy, lack of access to care. So these people are very desperate, especially if it's a young woman experiencing an unwanted pregnancy. Maybe she's in an abusive relationship. These women are in crisis and they're desperate for help.

N.Y.C. J.A. at 342-43.[20]

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[20] *See also* Alameda Cnty. Health Services Letter; *Relating to Health: Hearing on S.B. 501 Before the S. Comms. on Commerce*, Consumer Protection & Health and on Judiciary and Labor, 29th Leg. 1-2 (Haw. 2017), https://www.capitol.hawaii.gov/Session2017/Testimony/SB501_TESTIMONY_CPH-JDL_02-03-17_LATE.PDF (stating that pregnancy centers "disproportionately target teenagers, young women and women without easy access to actual medical services").

II. Pregnancy Center Disclosure Laws Should Be Evaluated Under The Same Standard As Other Reproductive Health Disclosure Laws

With the FACT Act, California has made the legislative judgment that the need for accurate information about care and services during pregnancy is particularly acute, and has tailored disclosure requirements to address that need. Its legislative response is analogous to the judgments that many other states have made that women should be advised of the risks of abortion, and this Court should apply the same standard to the FACT Act as it has applied to other reproductive health disclosure laws.

In *Planned Parenthood v. Casey*, this Court upheld a Pennsylvania statute requiring abortion providers to give verbal disclosures about the risks of abortion and the gestational age of the fetus, as well to offer state handouts listing agencies that offer pregnancy assistance and abortion alternatives. 505 U.S. 833 (1992). In the 25 years since *Casey*, over 30 states have enacted laws requiring doctors or medical facilities to make pre-abortion disclosures to patients.[21] Many of these

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[21] *See* Ala. Code § 26-23A-4; Alaska Stat. §§ 18.16.060, 18.05.032; Ariz. Rev. Stat. Ann. § 36-2153; Ark. Code Ann. §§ 20-16-1703 to 20-16-1705; Conn. Gen. Stat. § 19a-601; Fla. Stat. §§ 390.0111(3), 390.025; Ga. Code Ann. §§ 31-9A-3 to 31-9A-4; Idaho Code Ann. § 18-609; Ind. Code § 16-34-2-1.1 (§ 16-34-2-1.1(a)(1)(K), *invalidated by Planned Parenthood of Ind. & Ky., Inc. v. Comm'r, Ind. State Dep't of Health*, 265 F. Supp. 3d 859 (S.D. Ind. 2017), *appeal filed*, No. 17-3163 (7th Cir. Oct. 19, 2017)); Kan. Stat. Ann. §§ 65-6709 to 65-6710; Ky. Rev. Stat. Ann. §§ 311.725, 311.727, *invalidated by EMW Women's Surgical Ctr., P.S.C. v. Beshar*, ___ F. Supp. 3d ___, 2017 WL 4288906 (W.D. Ky. Sept. 27,

laws neatly mirror the FACT Act, requiring abortion-performing physicians to disclose state resources for maternity care and social services.[22] Arkansas, for example, requires distributing handouts that include "[g]eographically indexed materials that inform a pregnant woman seeking an abortion of public and

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2017), *appeal filed EMW Women's Surgical Ctr., P.S.C. v. Beshar*, No. 17-6183 (6th Cir. Oct. 12, 2017); La. Rev. Stat. Ann. §§ 40:1061.15 to 40:1061.17; Me. Rev. Stat. tit. 22, §§ 1597-A, 1599-A; Mich. Comp. Laws § 333.17015; Minn. Stat. §§ 145.4242-145.4243; Miss. Code Ann. §§ 41-41-33, 41-41-35; Mo. Rev. Stat. §§ 188.027, 188.039; Neb. Rev. Stat. §§ 28-327 to 28-327.01 (provisions requiring disclosure of risk factors of abortion procedures held likely to violate First Amendment and enjoined in *Planned Parenthood of Heartland v. Heineman*, 724 F. Supp. 2d 1025 (D. Neb. 2010)); Nev. Rev. Stat. § 442.253; N.C. Gen. Stat. §§ 90-21.82, 90-21.83, 90-21.85; N.D. Cent. Code §§ 14-02.1-02 to 14-02.1-02.1; Ohio Rev. Code Ann. §§ 2317.56, 2919.192; Okla. Stat. tit. 63, §§ 1-738.2, 1-738.3, 1-746.2, 1-746.3; R.I. Gen. Laws § 23-4.7-3; S.C. Code Ann. §§ 44-41-330, 44-41-340; S.D. Codified Laws §§ 34-23A-10.1, 34-23A-10.3 (upheld on First Amendment challenge in *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 686 F.3d 889 (8th Cir. 2012) (*en banc*); *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724 (8th Cir. 2008) (*en banc*)); Tex. Health & Safety Code Ann. §§ 171.012, 171.0123, 171.013, 171.015 (upheld on First Amendment challenge in *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570 (5th Cir. 2012)); Utah Code Ann. §§ 76-7-305, 76-7-305.5, 76-7-305.6; Va. Code Ann. § 18.2-76; W. Va. Code §§ 16-2I-2–16-2I-3; Wis. Stat. § 253.10.

[22] The State of Texas unsuccessfully tries to distinguish these as informed consent laws "giving a patient information to assess the risks and consequences of a procedure a doctor in a certain medical facility is about to perform." *See* Br. of Amicus Curiae State of Texas, *et al.* Supporting Petitioner, at 3. But at least eighteen of these laws have provisions that mirror the FACT Act by providing women with information about state-funded abortion alternatives, not medical information about abortion procedures. *See infra* n.25.

private agencies and services available to assist her through pregnancy, upon childbirth, and while her child is dependent, including without limitation adoption agencies."[23] Ark. Code Ann. § 20-16-1704. Alaska requires abortion providers to give patients "information concerning the eligibility for medical assistance benefits for prenatal care, childbirth, neonatal care, abortion services, women's health care, and contraception" and "geographically indexed material designed to inform a person of public and private agencies, services, clinics, and facilities that are available to assist a woman with the woman's reproductive choices," including entities providing or assisting with adoption services, counseling, and contraceptive options. Alaska Stat. §§ 18.05.032(a)(1)-(3), 18.16.060(b). In South Dakota, at least 24 hours prior to the abortion procedure, doctors must verbally inform patients "that medical assistance benefits may be available for prenatal care, childbirth, and neonatal care" and "the name, address, and telephone number of a pregnancy help center in reasonable proximity of the abortion

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[23] The Arkansas disclosure also mandates the following statement: "There are many public and private agencies willing and able to help you to carry your child to term and to assist you and your child after your child is born, whether you choose to keep your child or to place her or him for adoption. The State of Arkansas strongly urges you to contact one or more of these agencies before making a final decision about abortion. The law requires that your physician or his or her agent give you the opportunity to call agencies like these before you undergo an abortion." *See also* Ohio Rev. Code Ann. §§ 2317.56(B)(2)(b), 2317.56(C)(1) (similar).

facility where the abortion will be performed."[24] S.D. Codified Laws § 34-23A-10.1(2)(a), (c). In total, at least 18 states require abortion providers to give patients seeking abortions information or written materials about agencies that are available to assist women during pregnancy, childbirth, and beyond.[25] Depending on the state, these materials may include contact information for agencies that offer ultrasounds, adoption services, family planning and natural family planning, and limited-service pregnancy centers.

Some states require disclosures about other reproductive health matters. California and Arizona, for example, require factual disclosures before egg donation. *See* Cal. Health & Safety Code § 125335; Ariz. Rev. Stat. Ann. § 36-1702. At least seven states require doctors to provide specific disclosures to mammogram

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[24] Texas's requirements are quite similar. *See* Tex. Health & Safety Code Ann. §§ 171.012(a)(2)-(3), 171.014(a)(2), 171.015(1)(a); *see also* 18 Pa. Cons. Stat. §§ 3205(2)-(3), 3208(a)(1).

[25] *See* Alaska Stat. §§ 18.05.032(a)(1)-(3), 18.16.060(b); Ark. Code Ann. § 20-16-1704; Ga. Code Ann. §§ 31-9A-3(2)(C)-(D), 31-9A-4(a)(1)-(1.1); Idaho Code Ann. § 18-609(2), (4); Kan. Stat. Ann. §§ 65-6709(b)(2), 65-6710(a)(1); Ky. Rev. Stat. Ann. § 311.725(1)(b)(1), (2)(a); Minn. Stat. §§ 145.4242(a)(2)(iii), 145.4243(a)(1); Miss. Code Ann. §§ 41-41-33(1)(b)(iv), 41-43-35(1)(a); Neb. Rev. Stat. § 28-327(1)(a), (2)(d); N.D. Cent. Code §§ 14-02.1-02(11)(b)(1)-(2), 14-02.1-02.1(1)(a); Okla. Stat. tit. 63, §§ 1.738.2(B)(1)(a)(5), 1.738.3(A)(1)(a); 18 Pa. Cons. Stat. §§ 3205(2)-(3), 3208(a)(1); S.C. Code Ann. §§ 44-41-330(A)(2), 44-41-340(A)(1); S.D. Codified Laws § 34-23A-10.1(2)(a), (c); Utah Code Ann. §§ 76-7-305(2)(a), 76-7-305.5(2)(g)-(k); Va. Code Ann. § 18.2-76(D)(5), (F)(1); W. Va. Code §§ 16-2I-2(b)(3)-(4), 16-2I-3(a)(1); Wis. Stat. § 253.10(c)(1)(L)(d), (d)(1).

patients about breast tissue density,[26] at least five states require that patients be informed about alternative treatments for breast cancer,[27] and Texas requires midwives to provide written disclosures in Spanish and English related to the limitations of midwifery practice. *See* Tex. Occ. Code § 203.351. While many of these disclosures are linked to specific medical procedures, some are not. Missouri, for example, requires health facilities to disclose in the event of a miscarriage that the patient has a right to determine the disposition of the fetus. *See* Mo. Rev. Stat. § 194.387.

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[26] California, Connecticut, Illinois, New York, Texas, Utah, and Virginia require specific notice be given post-mammogram regarding breast density; each state specifies in a script the particular language to be given. *See* American College of Obstetricians and Gynecologists (ACOG), *State Legislative Mandates: Mammography & Breast Density* (2012), http://www.leg.state.nv.us/Session/77th2013/Exhibits/Senate/HHS/SHHS1054W.pdf (detailing state legislative efforts to require disclosure to women with dense breast tissue).

[27] *See, e.g.*, Cal. Health & Safety Code § 109275(b), (c)(1) (failure to inform patients in writing of alternative treatments for breast cancer is unprofessional conduct; state officials must develop standard disclosure form); Cal. Health & Safety Code § 109280 (requiring state officials to develop written disclosure form for alternative treatments for prostate cancer and urging physicians to disclose that information to patients); Fla. Stat. Ann. § 458.324; La. Rev. Stat. Ann. § 40:1103.4 (requiring discussion of alternative methods of treating breast cancer); Me. Rev. Stat. tit. 24, § 2905-A (requiring information be provided, orally and in writing, about alternative efficacious methods of treatment of breast cancer); Mich. Comp. Laws § 333.17513 (requiring doctor to inform breast cancer patients, orally and in writing, about alternative methods of treatment of the cancer).

These reproductive health disclosure laws do not violate the First Amendment by regulating some speakers but not others. The same is true of the FACT Act. Contrary to Petitioners' argument, Pet'rs' Br. 31-39, regulations that apply to pregnancy centers are not *ipso facto* viewpoint discrimination. Even assuming that all pregnancy centers oppose abortion, "[t]hat petitioners all share the same viewpoint regarding abortion does not in itself demonstrate that some invidious content- or viewpoint-based purpose motivated the issuance of the [regulations]." *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 763 (1994). As the Court recognized in *McCullen*, 134 S. Ct. at 2532, a legislature faced with a limited problem may reasonably enact a limited solution. "When selecting among various options for combating a particular problem, legislatures should be encouraged to choose the one that restricts less speech, not more." *Id.* Thus, *McCullen* held that a buffer zone law did not discriminate by viewpoint, even though it applied only to abortion clinics, and not to other healthcare facilities. *Id.* In other contexts as well, the Court recognizes that "policymakers may focus on their most pressing concerns." *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1668 (2015). The Court has "accordingly upheld laws – even under strict scrutiny – that conceivably could have restricted even greater amounts of speech in service of their stated interests." *Id.*

Further, so long as disclosure laws simply require a commercial speaker to provide "purely factual and uncontroversial information," they are subject to less

exacting scrutiny. *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985); *accord Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 249-50 (2010). By their nature, these laws compel regulated entities to convey messages they likely would not otherwise speak, and that are often contrary to the success of the entity.[28] Yet because disclosure regulations normally have only a "minimal" effect on First Amendment interests, they need only be "reasonably related to the State's interest." *Zauderer*, 471 U.S. at 651.

The straightforward *Zauderer* analysis should apply to this case, and under that test the California FACT Act easily survives review. Pregnancy centers are commercial speakers,[29] and the FACT Act

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[28] *See, e.g.*, 15 U.S.C. § 1333 (labeling requirements for cigarettes, including "Smoking can kill you"); La. Rev. Stat. Ann. § 27.249 (requiring casinos to post notices about resources for compulsive gamblers); S.C. Code Ann. § 40-83-30 (requiring non-lawyers who provide immigration services to post notices that they are not lawyers).

[29] *Amici* agree with the United States that *Zauderer* should apply regardless of whether the regulated entity charges for services. *See* Br. Amicus Curiae of United States Supporting Neither Party at 20 [hereinafter SG Brief]. There is no dispute that pregnancy centers provide commercially valuable services to their clients, and the First Amendment inquiry should not turn on whether a medical clinic charges directly for its services, offers them subject to insurance or government reimbursement, or funds them through corporate or individual third party donations. Such a rule would threaten to insulate pro bono service providers from regulation, and thus jeopardize the ability of governments to protect the most vulnerable of their residents from unsavory or unsafe practices.

disclosures are purely factual statements that relate to their actual or perceived practice of medicine.[30] The disclosure for licensed facilities states that public programs offer free or low-cost reproductive health care services – an undisputed fact – and provides a county telephone number for accessing those services. This notice directly advances the State's "strong interest in protecting a woman's freedom to seek medical and counseling services in connection with her pregnancy." *Madsen*, 512 U.S. at 767. The disclosure for unlicensed clinics is even simpler, merely informing clients that the clinic is not a licensed medical facility. This kind of requirement to disclose professional status survives any level of scrutiny. *See Riley v. Nat'l Federation of the Blind of N. C., Inc.*, 487 U.S. 781, 799 n.11 (1988); *Evergreen Ass'n, Inc. v. City of New York*, 740 F.3d 233, 249 (2d Cir.), *cert. denied*, 135 S. Ct. 435 (2014); *Centro Tepeyac v. Montgomery Cnty.*, 722 F.3d 184, 189-90 (4th Cir. 2013).

Finally, there is no merit to the United States' suggestion that a different standard should apply here because abortion is "controversial."[31] As used in *Zauderer*, the word "uncontroversial" modifies "information" and refers to the facts required by the disclosure. It is these *facts* that must be uncontroversial – or

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[30] This provides an independent basis for upholding the disclosures, which are "reasonable . . . regulation by the State" of "the practice of medicine," *Casey*, 505 U.S. 884, both with respect to licensed practitioners and to unlicensed ones who are deceiving patients about their qualifications.

[31] *See* SG Br. at 24 (describing federal statutes requiring written or posted disclosures).

objectively accurate – not the broader subject of the law. *See Discount Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 569 (6th Cir. 2012) ("[W]hether a disclosure is scrutinized under *Zauderer* turns on whether the disclosure conveys factual information . . . not on whether the disclosure emotionally affects its audience or incites controversy."). The logic of *Zauderer* does not depend on whether the subject of the law is controversial; a pregnancy center has the same "minimal" interest in withholding information about the scope of services it provides, or whether the state offers free services elsewhere, as any other speaker who is offering commercially valuable goods or services to the public. *See Zauderer*, 471 U.S. at 651. Accordingly, this Court should not adopt a more stringent standard for factual disclosures merely because they may occur in a broader context that carries political sensitivities.

Amici urge the Court to maintain a consistent standard for evaluating mandatory disclosures by facilities that serve pregnant patients. The same standard should apply, regardless of whether it is imposed on providers who offer abortions or those who do not. And the standard should not change based on the perceived political sensitivity of the disclosure. Such a test is not only unwarranted for commercial speech but would put courts in the untenable position of deciding which topics are too politically sensitive for regulation. The United States' proposed rule is unworkable at best, and creates more constitutional problems than it solves.

Further, the FACT Act survives constitutional review, regardless of the level of scrutiny applied. As *amici*'s records demonstrate, pregnancy centers frequently deceive pregnant women and impede their ability to see other service providers. Pregnant women have a short period of time to make life-altering decisions, "[a]nd the more [they] know, the better decisions can be made." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 578 (2011). The FACT Act disclosures advance California's compelling interests in combating consumer deception, protecting public health, and promoting informed decision-making, and they should be upheld.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

DENNIS J. HERRERA
City Attorney
CHRISTINE VAN AKEN
YVONNE R. MERÉ
MATTHEW GOLDBERG
MOLLIE M. LEE
Counsel of Record
CITY ATTORNEY'S OFFICE
City Hall Room 234
One Dr. Carlton B. Goodlett Pl.
San Francisco, CA 94102
Telephone: (415) 554-4290
mollie.lee@sfcityatty.org
Attorneys for the City and County of San Francisco

BARBARA J. PARKER
City Attorney
MARIA BEE
ERIN BERNSTEIN
MALIA MCPHERSON
OFFICE OF THE OAKLAND CITY ATTORNEY
1 Frank H. Ogawa Plaza
Oakland, CA 94612
Attorneys for the City of Oakland

Solicitor ANDRE M. DAVIS
SUZANNE SANGREE
BALTIMORE CITY LAW DEPARTMENT
100 North Holliday Street
Room 109
Baltimore, MD 21202
(443) 388-2190
Attorneys for the City of Baltimore

ZACHARY W. CARTER
Corporation Counsel
for the City of New York
100 Church Street
New York, NY 10007
Attorney for the
City of New York

JAMES R. WILLIAMS
County Counsel
COUNTY OF SANTA CLARA
70 W. Hedding Street, East Wing
9th Floor
San Jose, California 95110
Attorney for the County of
Santa Clara, California

MICHAEL N. FEUER
City Attorney
JAMES P. CLARK
THOMAS P. PETERS
BLITHE SMITH BOCK
SHAUN DABBY JACOBS
OFFICE OF THE LOS
ANGELES CITY ATTORNEY
200 N. Main Street,
7th Floor
Los Angeles, California
90012
Attorneys for the
City of Santa Clara

No. 16-1140

In The
Supreme Court of the United States

National Institute of Family and Life Advocates, D/B/A NIFLA, et al.

Petitioners,

v.

Xavier Becerra, Attorney General, et al.

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* FOR THE SCHARPEN FOUNDATION, INC., ADVOCATES FOR FAITH & FREEDOM, AND NATIONAL PRO-LIFE ALLIANCE IN SUPPORT OF PETITIONERS

Robert H. Tyler
Counsel of Record
Tyler & Bursch, LLP
24910 Las Brisas Road
Suite 110
Murrieta, CA 92562
(951) 600-2733
rtyler@tylerbursch.com

Counsel for Amici Curiae

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INTRODUCTION

Pursuant to this Court's Rule 37(1), Amici Curiae will present critical information to this Court that has not already been brought to the Court's attention by the parties. This pertinent information arises from a parallel case litigated in the Riverside County Superior Court, State of California. The evidence presented herein is directly relevant and applicable to this Court's analysis of the California Reproductive FACT Act (the "Act").

INTEREST OF AMICI CURIAE[1]

I. THE SCHARPEN FOUNDATION

The Scharpen Foundation ("Scharpen") successfully challenged the Act in the case entitled *The Scharpen Foundation v. Becerra*, Superior Court of California, County of Riverside, Case Number RIC 1514022. On November 25, 2015, Scharpen filed its lawsuit to challenge the constitutionality of the Act under the free speech clause of article I, section 2 [2] of

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[1] Consistent with this Court's Rule 37.6, *Amici Curiae* state that this brief was not authored in whole or in part by counsel for any party, and no person or entity other than The Scharpen Foundation, Inc., Advocates for Faith & Freedom, Inc., National Pro-Life Alliance, and its counsel made a monetary contribution to the preparation or submission of this brief. Petitioners' blanket consent to amicus briefs is on file with this Court, and Respondents have consented to the filing of this brief.

[2] California Constitution, article 1, section 2, provides:

> "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press."

the California Constitution.[3] The California Attorney General, Xavier Becerra (formerly Kamala Harris), answered and represented the state defendants.

Judge Gloria Trask of the Riverside County Superior Court tried Scharpen's free speech claim at a bench trial on October 18, 2017. After considering the evidence discussed below, Judge Trask ruled that on its face, the Act violates Scharpen's freedom of speech under the California Constitution. Judge Trask issued a permanent injunction barring the Attorney General from enforcing the Act against Scharpen. A copy of the Judgment and Statement of Decision will be attached as Exhibits "A" and "B" respectively to *Amici Curiae's* Request for Judicial Notice should the Clerk of this Court authorize such lodging as provided in this Court's Rule 32(3). A letter has been submitted to the Clerk and served on all parties, describing the material proposed for lodging and the reasons why this Court should and can consider the non-record information.[4]

On December 21, 2017, the California Attorney General filed an appeal of the Superior Court's judgment to the Fourth District Court of Appeal of California. This Court's decision will have a direct

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[3] Scharpen also claimed the Act violated its state constitutional rights to freedom of assembly and free exercise of religion under the California Constitution. These claims were resolved in favor of the Defendant on a motion for judgment on the pleadings.

[4] *Amici* also seek to lodge additional evidence from *The Scharpen Foundation v. Becerra*. This brief will cite to the Request for Judicial Notice in anticipation that the Clerk will authorize the lodging of this relevant and admissible evidence under Rule 32(3).

impact upon the proceedings and arguments pending in the California Court of Appeal as this Court's interpretation of the First Amendment is instructive to California Courts.[5] Furthermore, this Court's decision will likely have a direct impact on the injunction from enforcement of the Act on Scharpen.

Scharpen is licensed by the California Department of Public Health to operate a community clinic in the County of Riverside.[6] Scharpen is a 501(c)(3) non-profit, faith-based pregnancy care center that provides services to women and their unborn children to advance its religious belief that life is a gift from God. Scharpen engages in a number of medical and non-medical activities to carry out its religious mission, including pregnancy testing and limited obstetrical ultrasounds. It also communicates pregnancy options and provides medical referrals, emotional support, information on sexually transmitted diseases, information on birth control, and resources for additional pregnancy and post-pregnancy needs beyond the clinic.

It provides these services and information to women with the goal of holistically serving their

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[5] *See Gabrielli v. Knickerbocker*, 12 Cal.2d 85 (Cal. 1938) (explaining that, absent cogent reasons, California courts do not depart from the construction placed by the United States Supreme Court on a similar provision of the federal constitution).

[6] All relevant foundation regarding the nature and purpose of The Scharpen Foundation is included in the Declaration of Scott Scharpen filed in Support of Plaintiff's Trial Brief in *The Scharpen Foundation v. Becerra*, which is attached as Exhibit "C" to the Proposed Request for Judicial Notice.

medical, emotional, spiritual, and material needs. Scharpen's mission is to equip women to be able to choose parenting or adoption, rather than abortion. Consistent with its religious and non-profit nature, Scharpen provides these services completely free of charge and never asks clients for donations. Also consistent with its religious commitments, Scharpen believes that abortion is wrong and has never referred, nor would it ever refer, a client to have an abortion. For these reasons, The Scharpen Foundation opposes the Act's disclosure requirements because the disclosures contravene the entire purpose for the Scharpen Foundation's existence.

II. ADVOCATES FOR FAITH & FREEDOM

Advocates for Faith and Freedom ("Advocates") is a California-based non-profit law firm dedicated to protecting First Amendment liberties. Advocates seeks to protect the right to freedom of speech that is so integral to the fabric of our Nation by ensuring that the government may not compel private speakers to deliver a viewpoint-based message. The right ultimately implicated in this particular case is one of the most dearly held rights Americans possess, as well as one of the most fundamental. The resolution of this case in favor of NIFLA is therefore of great importance to Advocates due to the impact it will have upon future cases involving compelled speech that will undoubtedly arise across the country.

III. NATIONAL PRO-LIFE ALLIANCE

National Pro-Life Alliance is a national non-profit corporation dedicated to advocating for life. Members

of the National Pro-Life Alliance lobby both elected officials and candidates for office to support and pass legislation advancing the pro-life cause. This is done through grass-roots lobbying efforts, research, and publications.

SUMMARY OF ARGUMENT

The state court proceedings in *The Scharpen Foundation v. Becerra* revealed significant factual information that is directly relevant to the U.S. Supreme Court's analysis of the Act. While multiple cases were filed in federal court challenging the Act, none of those cases engaged in significant discovery. Instead, those cases challenged the Act solely based upon the face of the Act and the legislative history. In *The Scharpen Foundation v. Becerra*, significant discovery and a stipulation of facts were completed prior to a bench trial that provided evidence of the discriminatory intent and discriminatory impact of the Act.

The *Scharpen* trial revealed that the Act applies to only 67 clinics, and 66 (or 98.5%) of those are pro-life clinics. The legislative history of the Act shows that this result was intentional, as the Act's true purpose was to force pro-life pregnancy centers to promote abortion. Another significant finding of the *Scharpen* trial court was that the State itself had not made any reasonable effort to inform women of the information within the Act before compelling pro-life clinics to dispense the State's desired message. Based on this evidence, the Act amounts to an impermissible viewpoint-based regulation of speech because it targets clinics that speak from a pro-life viewpoint. As

a viewpoint-based regulation, the Act is *per se* unconstitutional. However, even if this Court applies the strict scrutiny test, the Act still fails.

ARGUMENT

I. EVIDENCE ADMITTED IN *THE SCHARPEN FOUNDATION v. BECERRA*

During 2016 and 2017, Scharpen and the Attorney General exchanged hundreds of pages of documents and the Attorney General deposed Scott Scharpen as Plaintiff's "person most knowledgeable." Almost all of the documents propounded by the parties were admitted into evidence at trial. In addition, Scharpen and the Attorney General stipulated to the underlying facts regarding the impact and applicability of the Act, exempted clinics, and the legislative record.[7]

A. Impact of the Act

The disclosure required by the Act regarding abortion is applicable exclusively to "licensed covered facilities" whose primary purpose is providing family planning or pregnancy-related services. Cal. Health & Safety Code section 123471(a). A "licensed covered facility" is defined by the Act as a facility "licensed under Section[8] 1204 or an intermittent clinic operating under a primary care clinic pursuant to

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[7] The Stipulation is attached as Exhibit "D" to the Proposed Request for Judicial Notice, subject to this Court's Rule 32(3).

[8] Unless otherwise indicated, all statutory references are to the California Health & Safety Code.

subdivision (h) of Section 1206...." Section 1204 states that clinics are eligible for licensure if they are "a tax-exempt nonprofit corporation that is supported and maintained in whole or in part by donations, bequests, gifts, grants, government funds or contributions..." Section 1206 applies to clinics licensed under Section 1204 that have "separate premises from the licensed clinic and are only open for limited services of no more than 30 hours a week."

Therefore, a "licensed covered facility" only includes tax-exempt nonprofit corporations, as opposed to for-profit entities. The Act's definition of "licensed covered facilities" excludes all for-profit obstetrician-gynecologist practices and for-profit abortion clinics, including Family Planning Associates' 23 for-profit abortion clinics in California.[9] Of California's 2,000[10] employed obstetrician-gynecologists, only those that provide services under a non-profit clinic are subject to the Act.

California's Office of Statewide Health Planning and Development ("OSHPD") publishes annual lists of all licensed covered facilities under Sections 1204 and 1206.[11] In December 2016, there were 1,379

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[9] *See* "23 Convenient Locations" www.fpawomenshealth.com/20-convenient-locations (last visited Jan. 9, 2018).

[10] *See* "Occupational Employment Statistics" www.bls.gov/oes/current/oes291064.htm (last updated May 2016).

[11] All relevant foundation regarding the methodology and statistics on primary care clinics is included in the Declarations of Nada Higuera and Christine Torres filed in Support of

licensed covered facilities in California. However, the Act exempts two groups from the 1,379 licensed covered facilities:

> (1) Clinic directly conducted, maintained, or operated by the United States or any of its departments, officers, or agencies.
>
> (2) Licensed primary care clinic that is enrolled as a Medi-Cal provider and a provider in the Family Planning, Access, Care, and Treatment ("F-PACT") Program.

Section 123471(c).

The Act's applicability is further narrowed to licensed covered facilities "whose primary purpose is providing family planning or pregnancy-related services." Section 123471(a). However, the Act does not define the term "primary purpose." Does 90% of services constitute a primary purpose? Or 51%? The Act is not clear on how to conclude that a licensed covered facility's primary purpose is providing family planning or pregnancy-related services. For purposes of discerning the clinics subject to the Act in this brief, Scharpen used a 51% threshold. In other words, if over half of a clinic's services are family planning or pregnancy-related, they are considered to have a primary purpose of providing family planning or pregnancy-related services.

Plaintiff's Trial Brief in *The Scharpen Foundation v. Becerra*, which are attached as Exhibit "F" to the Proposed Request for Judicial Notice.

Of the 1,379 licensed covered facilities in California, only 67 clinics provided family planning or pregnancy-related services at least 51% of the time in comparison with their overall services and were not exempt. As a result, only these 67 clinics are subject to the Act.[12] All but one of the 67 clinics (98.5%) are pro-life organizations, also known as "crisis pregnancy centers" or "CPCs." The other organization is the "California Prostitutes Education Project," which is an HIV/AIDS prevention organization.[13]

In sum, the Act only applies to clinics that are tax-exempt non-profit corporations, excluding for-profit entities, and the Act only applies to clinics that have a "primary purpose" of providing "family planning or pregnancy-related services" and are not Medi-Cal and F-PACT providers. Out of 1,379 total licensed covered facilities in California, only 67 clinics provide at least 51% of the subject services and are not exempt, and 66 of the 67 clinics (98.5%) are pro-life organizations who exist to prevent abortions. In the end, the Act distinctly targets less than 5%[14] of nonprofit clinics to

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[12] At trial, Scharpen used an even lower threshold of 10% and found that the Act would only be applicable to 89 clinics, of which 79 are pro-life clinics. For this *Amici* brief, Scharpen is using a 51% threshold, deriving the figures from the same methodology and information in the Declarations of Nada Higuera and Christine Torres, attached as Exhibit "F" to the Proposed Request for Judicial Notice.

[13] *See* "California Prostitutes Education Project" www.calpep.org (explaining organization's mission) (last visited Jan. 9, 2018).

[14] 1,379 licensed covered facilities divided by 67 clinics to which the Act applies equals 4.8%. The percentage would likely be dramatically smaller if "for profit" clinics were also included in

dispense the State's preferred message, a message that contradicts the pro-life purpose for 66 of the 67 clinics.

B. The Act's Legislative History

The original content of the notice prior to legislative amendment began with the following:

> "You have the right to decide whether to have a child. In California, every pregnant woman has the right to decide whether to have a child or to obtain abortion care."[15]

This notice fit the true purpose of the Act, which, as explained by the Legislature, was to advance California's "proud legacy of reproductive freedom and funding forward thinking programs."[16] The insidious threat to this "proud legacy" and "forward thinking," is the "nearly 200 licensed and unlicensed clinics known as crisis pregnancy centers (CPCs) in California whose goal is to interfere with women's reproductive rights."[17] The problem the Act was designed to address is that CPCs "aim to discourage and prevent women from seeking abortions."[18]

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this calculation – further evidencing the targeting of this uniquely distinguished pro-life group of crisis pregnancy centers.

[15] Assem. Chiu First Amnd. AB 775, 2015-2016, March 26, 2015, attached as Exhibit "G" to the Proposed Request for Judicial Notice.

[16] Hr'g on Assemb. B. No. 775 Before the Assemb. Comm. on Health, Reg. Sess., 3 (Cal. 2015-2016), JA38–39.

[17] *Id.* at 40.

[18] *Id.* at 42.

The legislative history notes that most CPCs are affiliated with NIFLA, "a network of life-affirming ministries in every community across the nation in order to achieve an abortion-free America."[19] The Legislature also cites a report by UC Hastings College of Law, which explains that CPCs are pro-life "largely Christian belief-based" organizations that "do not offer services that conflict with pro-life pregnancy options, like abortion referrals or procedures."[20]

The reason for the Act's exemption of all primary care clinics enrolled as Medi-Cal and F-PACT providers is explained in the legislative history, namely because Medi-Cal already covers abortion and considers it part and parcel with family planning:

> "[A] licensed primary care clinic that is both a Medi-Cal provider and a Family PACT provider offers the full continuum of ... pregnancy-related services ... and abortion services. Under Family PACT, a patient is covered for comprehensive clinical family planning services ... Thus, the entire spectrum of services, as specified in the notice, will be provided by a Medi-Cal and Family PACT provider."[21]

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[19] *Id.*

[20] Hr'g on Assemb. B. No. 775 Before the Sen. Comm. On Health, Reg. Sess., 5-6 (Cal. 2015-2016), attached as Exhibit "H" to the Proposed Request for Judicial Notice.

[21] Hr'g on Assemb. B. No. 775 Before Assemb. Comm. on Judiciary, Reg. Sess., 8-9 (Cal. 2015-2016), JA67–68.

C. The State's Fictitious Efforts to Inform Women of Free and Low Cost Abortion Services

In an attempt to justify the constitutional burden imposed by the Act, the Attorney General argued at trial in *Scharpen* that a myriad of governmental efforts to get the Act's information to pregnant women on a timely basis have fallen short, making the Act necessary to supplement the State's efforts.[22] Judge Trask summarized the evidence in her Statement of Decision:

> The Attorney General offered a number of declarations and exhibits. They describe those steps the State has taken [] to educate women regarding the availability of low cost public contraceptive, prenatal, and abortion services. While the educational steps taken by the State are described as "myriad" by the Attorney General, they are actually quite minimal. And while the evidence is voluminous, it describes very little. And even those few entities making an effort to inform women of the availability of services appear nearly as loathe as Scharpen Foundation to specifically use or post the word "abortion".[23]

The only example of a State agency's active effort to notify women was a 12-week "marketing campaign"

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[22] Trial Tr., *The Scharpen Foundation v. Becerra*, attached as Exhibit "I" to the Proposed Request for Judicial Notice.

[23] Statement of Decision, attached as Exhibit "B" to the Proposed Request for Judicial Notice.

in 2015 conducted by the County of Alameda that included large notices about the availability of free pregnancy tests posted on the sides of buses.[24] The Attorney General admitted that this bus campaign was the only active advertising of any pregnancy services a State agency has conducted. *Id.* at 24:18–25.

The other 1,000+ pages submitted by the State were printed pages from various county websites with "completely passive" information on pregnancy services.[25] After reviewing all the documents, Judge Trask's conclusion was that "the word 'abortion' or 'abortion services' only appeared twice in 1000 [and] 300 pages."[26] Judge Trask found the absence of the word significant, as "[t]he elephant in the room is the word 'abortion.'"[27] Trask explained that the State wants "Scharpen to say the word 'abortion,' but the State does not" use the word itself in its advertising.[28] Judge Trask found that "the State's very modest efforts at delivering information to its target audience regarding the availability of services, including abortion services, do not establish the necessity of compelling private citizens to 'supplement' those efforts."[29]

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[24] Trial Tr. at 24, Exhibit "I."

[25] Statement of Decision at 6, Exhibit "B."

[26] Trial Tr. at 37, Exhibit "I."

[27] *Id.* at 36.

[28] *Id.* at 29.

[29] Statement of Decision at 14, Exhibit "B."

II. THE ACT IS VIEWPOINT-BASED AND THUS UNCONSTITUTIONAL

The Act amounts to an impermissible viewpoint-based regulation of speech because it targets clinics that speak from a pro-life viewpoint. This is evidenced by the purpose of the Act to target pro-life clinics and the effect of the almost exclusive applicability of the Act (over 98%) to pro-life clinics. As a viewpoint-based regulation, the Act is *per se* unconstitutional. However, even if this Court applies the strict scrutiny test, the Act still fails.

A. The Act is Viewpoint Discriminatory Because it Targets Pro-Life Clinics

A fundamental principle of the First Amendment is that the government may not regulate speech "because of the speaker's specific motivating ideology, opinion, or perspective ..." *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 820 (1995) (citing *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 46 (1983)). Such viewpoint-based speech restrictions, i.e., those "based on hostility—or favoritism—towards the underlying message expressed," are impermissible under the First Amendment. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 386 (1992); *see also Perry*, 460 U.S. at 46 (holding that the government cannot "suppress [or compel] expression merely because public officials oppose the speaker's view"). The test for viewpoint discrimination is whether "the government has singled out a subset of messages for disfavor based on the views expressed." *Matal v. Tam*, 137 S. Ct. 1744, 1750 (2017).

In *Sorrell*, this Court reviewed a Vermont statute restricting pharmaceutical companies and similar entities from using prescriber-identifying information obtained from pharmacists for marketing purposes. *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 566 (2011). The Court held that the statute amounted to an unconstitutional viewpoint regulation that targeted pharmaceutical manufacturers and their agents. *Id.* at 565. The Court looked to the legislative history of the statute, explaining that the findings of the Vermont Legislature "confirm that the law's *express purpose and practical effect* are to diminish the effectiveness of marketing by manufacturers of brand-name drugs. *Id.* (emphasis added). Just as the 'inevitable effect of a statute on its face may render it unconstitutional,' a statute's stated purposes may also be considered." *Id.*

In the legislative history, the Vermont Legislature explained that marketing representatives, in particular those who promote brand-name drugs, convey messages that "are often in conflict with the goals of the state." *Id.* at 580. The legislative history showed that the Legislature "designed [the statute] to target those speakers and their messages for disfavored treatment." *Id.* This Court stressed that a measure which appears viewpoint neutral on its face can still have the unconstitutional purpose to suppress the speech of a particular viewpoint. *Id.* at 564–565.

Here, pro-life pregnancy centers are being regulated because of their specific pro-life viewpoint. Just like in *Sorrell* where the legislative history specifically stated that the law was aimed at

regulating pharmaceutical manufacturers, the Act's legislative history states that its express purpose is to regulate crisis pregnancy centers that "do not offer services that conflict with pro-life pregnancy options."[30] Although on its face the Act appears to be viewpoint neutral, the legislative history shows that the Act was intentionally designed to target pro-life CPCs in order to advance the State's pro-abortion viewpoint. The message of the drug manufacturers in *Sorrell* "was often in conflict with the goals of the state" while here, the message of CPCs threaten California's "proud legacy of reproductive freedom and funding forward thinking programs."[31]

The practical effect of the Act also shows that it was drafted in tandem to achieve this discriminatory result. By defining "licensed covered facilities" to include only tax-exempt nonprofit corporations, the Legislature intentionally excluded all for-profit obstetrician-gynecologist practices and for-profit abortion clinics. The Legislature further limited the applicability of the Act to licensed covered facilities whose primary purpose is to provide family planning or pregnancy-related services. The Legislature then included an exemption for Medi-Cal and FPACT providers because Medi-Cal covers abortion and considers it part and parcel with family planning. CPCs such as The Scharpen Foundation are not part of Medi-Cal and FPACT programs because they are

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[30] Hr'g on Assemb. B. No. 775 Before the Sen. Comm. On Health, Reg. Sess., 5-6 (Cal. 2015-2016), attached as Exhibit "H" to the Proposed Request for Judicial Notice.

[31] Hr'g on Assemb. B. No. 775 Before the Assemb. Comm. on Health, Reg. Sess., 3 (Cal. 2015-2016), JA38–39.

pro-life, and they refuse to provide abortions or referrals for abortions.

The practical effect of the Act is that of the 1,379 licensed covered facilities in California, only 67 clinics would be subject to the Act and not exempt from providing the Act's disclosure. All but one (an HIV prevention organization) of the 67 clinics required to comply with Act are pro-life. Thus, no abortion providers are required to comply with the Act. The Act's apparent compliance with the requirement of facial neutrality does not mask its targeted discrimination. The Act steps into the highly politically charged abortion debate, and then exempts clinics that provide abortions. The fact that for-profit abortion providers are not required to inform women of free or low cost abortions available elsewhere, or of their potential eligibility for free or low cost prenatal care, is further evidence of the real motive behind the Act. That is impermissible viewpoint discrimination. "In its practical operation," the Act "goes even beyond mere content discrimination, to actual viewpoint discrimination." *Sorrell*, 131 S. Ct. at 565 (quoting *R.A.V. v. St. Paul*, 505 U.S. at 391.

The case of *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) also demonstrates how a facially neutral ordinance can discriminate based on religious viewpoint.[32] Although

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[32] Although this Court has limited its review of this case to the First Amendment's Free Speech Clause, *Lukumi* supports *Amici Curiae's* position that the Act is also clearly in violation of the Free Exercise Clause because it is neither neutral nor generally applicable, and it substantially burdens Petitioners' and Scharpen's free exercise of religion.

Lukumi dealt with the Free Exercise Clause rather than the Free Speech Clause, *Lukumi* is nonetheless instructive here.

In *Lukumi*, a church practicing the Santeria faith challenged three city ordinances that prohibited its ritual slaughter of animals. *Id.* at 525–28. Although the city contended that the ordinances were motivated by the government's interest in preventing cruelty to animals, the Supreme Court struck down the ordinances. *Id.* To determine whether the ordinances were enacted to target the Santeria religion, this Court went beyond the text of the laws at issue and examined the legislative history and the practical applicability of the ordinances. *Id.* at 540.

The Court analyzed the ordinances' various prohibitions, definitions, and exemptions, and concluded that the ordinances were "gerrymandered" with care to proscribe religious killings of animals by Santeria church members, but to exclude almost all other animal killings. *Id.* at 542. The Court explained that "careful drafting ensured that, although Santeria sacrifice is prohibited, killings that are no more necessary or humane in almost all other circumstances are unpunished." *Id.* at 536. The exemptions included kosher slaughter, slaughter by licensed food establishments, slaughter for the purpose of food consumption, and so on. *Id.* The Court found that the ordinances were so riddled with exceptions exempting all other killings except those practiced by Santeria adherents, indicating that the real rationale behind the prohibitions was an unconstitutional suppression of religion. *Id.* ("the

burden of the ordinance, in practical terms, falls on Santeria adherents but almost no others").

Even though the Act likewise states that it has a viewpoint-neutral objective, i.e., to provide information to women regarding time sensitive pregnancy decisions, the Legislature carefully drafted the Act to ensure that only 67 clinics must provide this information, and 98.5% of those clinics are pro-life. The exemption of for-profit abortion clinics, for-profit obstetrician-gynecologist, and 95% (1,312 of 1,379) of licensed covered facilities in California shows that the Legislature exempted almost all other places a women would likely go if she were pregnant. The burden of the Act thus falls on pro-life clinics but almost no others. The stated objective of the Legislature to provide women information is thus contradicted by the vast exemptions of the Act.

Indeed, the legislative history accurately reflects the Act's true purpose, which is to target pro-life "crisis pregnancy centers" that do not provide or refer for abortions. The original content of the notice also shows that the Act was about promoting the State's message that women have "a right to decide whether to have a child."[33] To pro-life pregnancy centers, this is akin to suggesting to women that it is acceptable to murder their unborn child. Although this hostility toward "life affirming ministries" is masked on the face of the Act, it is manifest in the Act's legislative

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[33] Assem. Chiu First Amnd. AB 775, 2015-2016, March 26, 2015, attached as Exhibit "G" to the Proposed Request for Judicial Notice.

history and almost exclusive applicability to pro-life pregnancy centers.

B. Viewpoint Discrimination is *Per Se* Unconstitutional

A viewpoint restriction negatively impacts all the values that underlie and inform the First Amendment. The Court stated in *Matal v. Tam*, 137 S. Ct. 1744 (2017) that preventing expressive ideas "strikes at the heart of the First Amendment." *Id.* at 1749. Therefore, a law found to discriminate based on viewpoint is an "egregious form of content discrimination," which is "presumptively unconstitutional." *Id.* at 1766 (Kennedy, J., concurring) (citing *Rosenberger*, 515 U.S. at 829-830).

In *Matal*, the Court addressed the constitutionality of a statutory provision "prohibit[ing] the registration of a trademark 'which may disparage ... persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute.'" *Id.* at 1753 (quoting 15 U.S.C. § 1052(a)). The U.S. Patent and Trademark Office ("PTO") applied the statute to reject proposed marks if the mark could be considered "disparaging in the context of contemporary attitudes..." *Id.* at 1754. At issue in the case was the PTO's rejection of an application to register the mark "The Slants," the name of a musical band, which the PTO judged to be an ethnic slur offensive or derogatory to Asian–Americans. *Id.* at 1751. The Court ruled that the statute was per se unconstitutional as a viewpoint restriction.

Although the speech compelled by the Act is distinguishable from the hate speech restriction in *Matal*, the principal that a government regulation may not favor one speaker over another is analogous. The government must abstain from regulating speech when the specific motivating ideology, opinion, or perspective of the speaker is the rationale for the restriction. Here, the State is regulating the speech of crisis pregnancy centers based on the centers' pro-life ideology.

A recent decision by the Fourth Circuit is instructive here. In *Greater Baltimore Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Baltimore*, No. 16-2325, 2018 WL 298142, at *1 (4th Cir. Jan. 5, 2018), the Fourth Circuit invalidated an ordinance requiring limited-service pregnancy centers to post disclaimers that they did not provide or make referrals for abortions. That Court explained that the particularly troubling aspects of the ordinance were "(1) that the ordinance applies solely to speakers who talk about pregnancy-related services but not to speakers on any other topic; and (2) that the ordinance compels speech from pro-life pregnancy centers, but not other pregnancy clinics that offer or refer for abortion." *Id.* at 6. The Fourth Circuit explained the following:

> A speech edict aimed directly at those pregnancy clinics that do not provide or refer for abortions is neither viewpoint nor content neutral. Especially in this context, content-based regulation "raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace."

> *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 116 (1991). We do not begrudge the City its viewpoint. But neither may the City disfavor only those who disagree.

Id. The court struck down the ordinance as an impermissible viewpoint regulation of speech.

The Act likewise attempts to drive the pro-life viewpoint from California pregnancy centers. By means of the Act, California has radically skewed the public debate over abortion in favor of abortion providers by forcing pro-life pregnancy centers to recommend or refer clients to facilities that provide the very services to which they religiously object. Thus, the Act is per se unconstitutional as a viewpoint restriction on speech.

III. THE ACT FAILS STRICT SCRUTINY

If the Court declines to find that viewpoint regulations such as the Act are *per se* unconstitutional, the Court should nonetheless apply strict scrutiny as argued in the Petitioners' Opening Brief at page 39. Due to the First Amendment's robust protection of freedom of speech, laws requiring groups or individuals to convey a message dictated by the government are "subject to exacting First Amendment scrutiny"; the government cannot "dictate the content of speech absent compelling necessity, and then, only by means precisely tailored." *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.* 487 U.S.

781, 798, 800 (1988).[34] The Act does not pass this rigorous test.

A. The Act Serves No Compelling Interest

Defendants bear the difficult burden of demonstrating that the Act is one of the "rare" instances in which a law mandating viewpoint-based speech meets the "demanding standard" of strict scrutiny. *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2738 (2011).

Here, the government's mere invocation of the promotion of public health through the Act's required notice is insufficient to meet the demands of strict scrutiny. In fact, the argument that the Act serves the compelling interest of informing pregnant women that they might be eligible for free or low cost pregnancy-related services is undermined by the extent of the Act's exemptions. *F.C.C. v. League of Women Voters of California*, 468 U.S. 364, 396 (1984) (exemptions "undermine the likelihood of a genuine [governmental] interest").

Additionally, the legislative history of the Act mentions that its author believes that pregnancy resource centers engage in "intentionally deceptive advertising and counseling practices [that] often confuse, misinform, and even intimidate women from

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[34] The Free Exercise Clause is also applicable and would essentially subject the Act to strict scrutiny. *See Lukumi*, 508 U.S. 531 (holding that a law which is not neutral and of general applicability must be justified by compelling governmental interest and must be narrowly tailored to advance that interest if it burdens religious practice).

making fully-informed, time-sensitive decisions about critical health care."[35] As support, the report only cites a publication of NARAL, a longtime abortion advocacy and partisan group, and a report by the University of California, Hastings College.[36] The legislative history is wholly lacking in any scientific methodology and fails to substantiate its alleged findings with any information that can be objectively evaluated.

Moreover, the command of the Act is not to prohibit pregnancy centers from engaging in false or misleading speech, but to make them speak a government message promoting state funded abortion services. Thus, even if the alleged deceptive practices helped motivate enactment of the Act, the Act itself does not pinpoint this problem as something to be remedied.

B. Compelling Scharpen to Speak the Government's Message is Not the Least Restrictive Means of Advancing the Act's Asserted Interests

It is not enough under strict scrutiny for the government to identify a compelling interest. The government must also show it has adopted the *least restrictive means* of advancing its alleged interests. This is no easy task for the government. *See Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2780 (2014) ("The least-restrictive-means standard is

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[35] Hr'g on Assemb. B. No. 775 Before the Assemb. Comm. on Health, Reg. Sess., 6 (Cal. 2015-2016), JA38–39.

[36] *Id.* at 7.

exceptionally demanding.") (citation omitted). Indeed, there can be little doubt that the government has not chosen the least restrictive means to further its goal of advising women in California of the availability of low cost or free abortions.

One obvious way the State could choose to advance its goals, without having to compel pro-life pregnancy centers to speak a viewpoint-based message contrary to its purpose, is for the State to disseminate the message itself. As this Court has noted in compelled speech cases, the government itself may "communicate the desired information to the public without burdening a speaker with unwanted speech." *Riley*, 487 U.S. at 800. In this case, that would mean informing citizens about the scope of services offered at various facilities through a public advertising campaign. *See Evergreen Ass'n v. City of New York*, 740 F.3d 233, 250 (2d Cir. 2014) (noting that New York City could "communicate [the Government] message through an advertising campaign").

There is no legitimate evidence, if any at all, that justifies an argument that the State has reasonably attempted to inform women about the availability of free or low cost abortions. The "only evidence of an active effort to educate women was a 12-week project in Alameda County in 2015, [wherein] [s]igns were posted on buses advertising a 'Free Pregnancy Test' with a phone number."[37] The rest of the 1,300 plus documents submitted by the Attorney General were printed pages from various county websites that

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[37] Statement of Decision at 7, Exhibit "B."

"merely described [services offered by the county] as 'family planning' or by a similar euphemism. The word 'abortion' appear[ed] on only 2 county websites." *Id.* at 6. Even assuming, *arguendo*, that women remain unaware that the State funds abortion, the State's very modest efforts at delivering that information do not establish the necessity of compelling pro-life clinics to supplement those efforts.

The State, which "controls public education from K-12, community colleges, State Universities, the UC system, and which controls the funding of the services at issue" can communicate its message through a variety of means.[38] It can use media, including radio and television spots, social media and government internet sites, billboards, notices placed in printed publications, brochures in state and local governmental offices, and so forth. It can even do a bus campaign like it did in the County of Alameda, only instead of advertising free pregnancy tests, it can advertise abortion services. In today's media saturated culture, the list is all but endless. In sum, the government has at its disposal a plethora of means to communicate its own message without forcing pregnancy centers to point the way to the abortion clinic. "The Act compels the clinic to speak words with which it profoundly disagrees when the State has numerous alternative methods of publishing its message."[39]

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[38] *Id.*

[39] *Id.* at 15.

CONCLUSION

For the foregoing reasons, this Court should uphold and protect the fundamental right to the freedom of speech guaranteed by the First Amendment and reverse the decision of the Ninth Circuit Court of Appeals.

Respectfully submitted,

ROBERT H. TYLER
Counsel Of Record
TYLER & BURSCH, LLP
24910 LAS BRISAS ROAD
SUITE 110
MURRIETA, CA 92562
(951) 600-2733
rtyler@tylerbursch.com

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IN THE

Supreme Court of the United States

NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES, D/B/A NIFLA, ET AL.,

Petitioners,

V.

XAVIER BECERRA, ATTORNEY GENERAL, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR SOCIAL SCIENCE RESEARCHERS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

Steven A. Zalesin
Counsel of Record
Derek Borchardt
Zachary Kolodin
PATTERSON BELKNAP WEBB & TYLER LLP
1133 Avenue of the Americas
New York, NY 10036
(212) 336-2000
sazalesin@pbwt.com
Attorneys for *Amici Curiae*

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are social science, public health, and clinical researchers who have spent decades conducting and publishing research about reproductive medical services, including prenatal care, abortion, and contraception. This includes research on crisis pregnancy centers—nonprofit organizations whose mission is to persuade women to forgo abortion. *Amici* believe that the Court's resolution of this matter should be informed by valid and credible research that relates to women's reproductive healthcare. As explained in this brief, this research highlights the importance of equipping women with the information necessary to facilitate access to healthcare resources.

A full list of *amici* is attached as an appendix to this brief.

SUMMARY OF ARGUMENT

Amici respectfully submit that this Court should consider the issues presented in this case in light of certain social science and public health research that underscores the importance of equipping women with the information necessary to facilitate access to healthcare resources.

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[1] Petitioners have filed a blanket consent to the filing of amicus briefs, and Respondents have consented to the filing of this brief.

Overwhelming evidence from social science research demonstrates that the vast majority of women who decide to have an abortion are sure about their choice and want to avoid delay in obtaining care. For these women, however, crisis pregnancy centers ("CPCs")—nonprofit organizations whose mission is to persuade women to forgo abortion—may serve as a hurdle in access to care. Research shows that CPCs in many cases portray the services they provide in a potentially misleading way, and as such, we believe that there is a risk that women may visit certain CPCs based on misconceptions. Furthermore, irrespective of the reason women may visit a CPC, research has shown that many CPCs disseminate inaccurate medical information, which may risk causing harm.

We support the disclosure requirements at issue in this case, both in order to mitigate the aforementioned risks and to reduce the barriers facing women who wish to access family planning services, abortion, and prenatal care. Extensive research has documented the financial and logistical barriers that women face when accessing reproductive healthcare, including lack of insurance. The substantial cost of abortion for uninsured women is a particularly high hurdle. For states like California that have expressed a public policy interest in making abortion accessible, ensuring access to insurance for abortion patients is therefore essential. The Reproductive FACT Act effectuates this public policy interest through the requirement that all covered pregnancy-related facilities—CPCs and other covered facilities alike—disclose to patients that they may be eligible for free or

subsidized care through their county social services office.

The benefits of such a disclosure may carry over to women who want to carry their pregnancies to term as well as to women who want an abortion. Early access to prenatal care may provide important health benefits, and California has a variety of public programs designed to help women connect with and finance such care. Although most CPCs market themselves as providing healthcare services, they typically do not offer prenatal care or connect women with these public programs.

ARGUMENT

I. Research shows that crisis pregnancy centers provide inaccurate or potentially misleading information regarding abortion and contraception.

CPCs are nonprofit organizations established with the primary aim of persuading women to forgo abortion.[2] While the full number of CPCs in the United States is unknown, prior estimates, which *amici* believe are likely low, range from 2,500 to 4,000 centers across the country, compared to an estimated 1,671 abortion providers.[3] CPCs have

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[2] *See, e.g.*, Kimberly Kelly, *In the Name of the Mother: Renegotiating Conservative Women's Authority in the Crisis Pregnancy Movement*, 38:1 SIGNS: J. OF WOMEN IN CULTURE AND SOC'Y 203, 205 (2012) (ethnographic study of the CPC movement).

[3] *See* Aziza Ahmed, *Informed Decision Making and Abortion: Crisis Pregnancy Centers, Informed Consent,*

existed since the 1970s, but the sector has experienced exponential growth in recent decades.[4]

CPCs "have been widely criticized by advocacy groups and others for deceptive practices, misrepresenting their services, creating the appearance that they are comprehensive reproductive health clinics, and providing false and misleading medical information."[5] And although social science and public health research to date is limited, studies have confirmed that some CPCs (a) portray the services offered at their centers in a potentially misleading way, and (b) disseminate inaccurate information about reproductive health.

First, some CPCs market their services to pregnant women and other women of reproductive age without disclosing in advance that they do not provide abortion or contraception. A recent study of the websites of CPCs in Georgia found that, while almost all of the assessed CPC websites advertised

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and the First Amendment, 43:1 J. L., MED. & ETHICS 51, 51 (2015) (citing sources); Rachel K. Jones & Jenna Jerman, *Abortion Incidence and Service Availability in the United States, 2014*, 49:1 PERSPS. ON SEXUAL & REPROD. HEALTH 17, 22 (2017), *available at* https://www.guttmacher.org/journals/psrh/2017/01/abortion-incidence-and-service-availability-united-states-2014.

[4] Kelly, *supra* note 2, at 210, 212.

[5] Andrea Swartzendruber et al., *Sexual and Reproductive Health Services and Related Health Information on Pregnancy Resource Center Websites: A Statewide Content Analysis*, 28:1 WOMEN'S HEALTH ISSUES 14, 15 (2018).

pregnancy testing and options counseling (98% and 84%, respectively), over half of the websites—58%—lacked a notice that they did not provide or refer for abortion, and 89% lacked a notice that they did not provide or refer for contraception.[6] A study of North Carolina CPCs, which relied on phone calls and "secret shopper" visits (*i.e.*, visits by researchers posing as potential clients in order to collect data), found that 44% of the CPCs surveyed told clients that they offer counseling on abortion and its risks, while 59% disclosed that they did not provide or refer for abortions.[7]

Second, CPCs have been found to provide inaccurate and misleading medical information about abortion and contraception. For example, even though the possibility of a relationship between abortion and breast cancer has been thoroughly debunked,[8] 16% of the CPCs visited in the North Carolina study warned women of a link between abortion and breast cancer, and 11% made such claims on their websites.[9] Similarly, the study of Georgia CPC websites found that 8% of websites reviewed linked abortion to

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[6] *Id.* at 16.

[7] Amy G. Bryant & Erika E. Levi, *Abortion Misinformation from Crisis Pregnancy Centers in North Carolina*, 86 CONTRACEPTION 752, 753 (2012).

[8] *See* Swartzendruber, *supra* note 5, at 16 (citing sources); Bryant & Levi, *supra* note 7, at 754 (same); Joanne D. Rosen, *The Public Health Risks of Crisis Pregnancy Centers*, 44:3 PERSPS. ON SEXUAL & REPROD. HEALTH 201, 201 (2012) (same).

[9] Bryant & Levi, *supra* note 7, at 753.

breast cancer.[10] Such CPCs persist in making these claims in the face of overwhelming evidence to the contrary: in 2003, more than 100 of the world's leading experts who study pregnancy and breast cancer risk "concluded that having an abortion or miscarriage does not increase a woman's subsequent risk of developing breast cancer."[11]

The inaccurate information provided by CPCs does not stop at unfounded claims about breast cancer. The North Carolina study also found that counselors at 21% of CPCs visited warned women of a phony link between abortion and infertility.[12] In fact, medical evidence has clearly disproved the alleged link.[13]

CPCs often warn of adverse mental health consequences of abortion, such as "post-abortion syndrome." According to the North Carolina study, 26% of the CPCs visited claimed a link between abortion and mental health risks and 31% made such claims on their websites.[14] The study of Georgia CPC websites found that 36% of the websites reviewed claimed that abortion leads to mental health problems.[15] In point of fact, "post-abortion syndrome" is not supported by credible medical

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[10] Swartzendruber, *supra* note 5, at 16.

[11] Abortion, Miscarriage, and Breast Cancer Risk: 2003 Workshop, Nat'l Cancer Inst., https://www.cancer.gov/types/breast/abortion-miscarriage-risk.

[12] Bryant & Levi, *supra* note 7, at 753-54.

[13] *See id.* at 754 (citing sources).

[14] *Id.* at 753-54.

[15] Swartzendruber, *supra* note 5, at 16.

research, nor recognized by the American Psychological Association or the American Psychiatric Association.[16] Indeed, according to the American Psychological Association's Task Force on Mental Health and Abortion, "[t]he best scientific evidence published indicates that among adult women who have an unplanned pregnancy the relative risks of mental health problems is no greater if they have a single first-trimester abortion than if they deliver that pregnancy."[17] And a causal link between multiple abortions and mental health harms has not been established.[18]

Beyond abortion, CPCs have also been found to provide incorrect medical information about contraception, often inaccurately downplaying its efficacy. For example, 78% of CPC websites surveyed in Georgia that contained information about condoms included "statements that seemed to be designed to undermine confidence in condom effectiveness or false statements about condom effectiveness."[19] Of the CPCs visited in North

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[16] *See* Bryant & Levi, *supra* note 7, at 754; Rosen, *supra* note 8, at 202.

[17] APA TASK FORCE ON MENTAL HEALTH AND ABORTION, REPORT OF THE APA TASK FORCE ON MENTAL AND ABORTION 4 (2008), *available at* http://www.apa.org/pi/wpo/mental-health-abortion-report.pdf.

[18] Swartzendruber, *supra* note 5, at 19.

[19] *Id.* at 17

Carolina, 26% conveyed that condoms are ineffective.[20]

Although research on how women respond to potentially misleading portrayals of services offered or inaccurate medical information is still developing, two recent studies suggest that some women may misunderstand the services offered by CPCs. In a recent study of women at Nebraska abortion clinics, 15% of women surveyed reported that they had previously contacted a CPC, while 12% reported that they had only contacted a CPC before presenting at the abortion clinic.[21] Furthermore, these women mentioned CPC staff when asked to identify persons "providing healthcare and with whom [they] discussed the pregnancy," underscoring the need for clear and accurate information about CPCs' intentions and services.[22] In addition, a recent qualitative study into the barriers to abortion care that drive women to travel long distances for an abortion found that four out of 29 women pointed to encounters with CPCs as having impeded their access to care.[23]

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[20] Bryant & Levi, *supra* note 7, at 753. *See also* Katelyn Bryant-Comstock et al., *Information about Sexual Health on Crisis Pregnancy Center Web Sites: Accurate for Adolescents?*, 29 J. OF PEDIATRIC & ADOLESCENT GYNECOLOGY 22, 23-24 (2016).

[21] Valerie French et al., *Influence of Clinician Referral on Nebraska Women's Decision-to-Abortion Time*, 93 CONTRACEPTION 236, 238-39 (2016).

[22] *Id.* at 241.

[23] *See* Jenna Jerman et al., *Barriers to Abortion Care and Their Consequences for Patients Traveling for Services:*

More broadly, research suggests that women want to know what treatment is available at a facility before they seek care there. Specifically, one survey found that more than 80% of women found it somewhat or very important to know about a hospital's religiously motivated restrictions on care.[24] Research also shows that women expect to receive the full range of reproductive health services whether or not the facility where they seek health care has a religious affiliation.[25]

Based on the research that has been conducted to date, *amici* believe there is a risk that some women may visit certain CPCs with a misconception about which services are provided and which are not, and while there, may receive scientifically and medically inaccurate information. Such findings indicate that patient interests are served by disclosures about limitations on care, and information that may connect them with the care they seek.

Qualitative Findings from Two States, 49:2 PERSPS. ON SEXUAL & REPROD. HEALTH 95, 98 tbl. 2 (2017).

[24] *See* Lori R. Freedman et al., *Religious Hospital Policies on Reproductive Care: What Do Patients Want to Know?*, 218:2 AM. J. OF OBSTETRICS & GYNECOLOGY 251 (2018).

[25] *See* Maryam Guiahi et al., *Are Women Aware of Religious Restrictions on Reproductive Health at Catholic Hospitals? A Survey of Women's Expectations and Preferences for Family Planning Care*, 90 CONTRACEPTION 429 (2014).

II. Research demonstrates that the vast majority of women who decide to have an abortion are sure about their decision, and want to avoid delay in obtaining care.

CPCs claim that their goal is to present "abortion-minded" or "abortion-determined" women with information and counseling intended to change their minds about their pregnancy decision. They claim that drawing women into CPCs will have a beneficial effect on their decision-making by promoting alternatives to abortion. In addition, they claim that by dissuading women from choosing abortion, they will prevent abortion-related regret.[26]

Contrary to this premise, research shows that women who present for an abortion are confident in their decision.[27] Indeed, the research demonstrates

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[26] *See, e.g.*, Impacted by Abortion, Care-Net, https://www.care-net.org/impacted-by-abortion (providing resources to cope with "post-abortion pain" and promote "post-abortion recovery"); Susie Meister, *How my job talking women out of abortions made me pro-choice*, Vox (May 26, 2016), https://www.vox.com/2016/5/26/11760670/crisis-pregnancy-center (describing the practices of a particular CPC, including that the author was "directed to tell women that studies show they will regret an abortion for the rest of their lives").

[27] Lauren J. Ralph et al., *Measuring Decisional Certainty Among Women Seeking Abortion*, 95:3 CONTRACEPTION 269 (2017) (based on a survey of over 300 women in Utah family planning facilities, finding that the level of uncertainty in abortion decision making is comparable to or lower than other health decisions); Mary Gatter et al., *Relationship Between Ultrasound Viewing and Proceeding to Abortion*, 123:1 OBSTETRICS &

that women deciding whether to have an abortion are less conflicted than those making other common healthcare decisions.[28] And, once the decision is made, they are unlikely to change their minds. One study found that, among women in Utah who were confident in their decision to have an abortion, 95% were no less certain after they surpassed the state's mandatory three-day waiting period.[29]

Research also demonstrates that women who have decided to have an abortion want to do so without delay. For example, 94% of medication abortion patients said it was very important to them to have an abortion early in pregnancy.[30] In fact, most abortion patients, including 52% of those obtaining abortions in the first trimester, said they would have preferred to have had an abortion earlier, but

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GYNECOLOGY 81 (2014) (based on a sample of over 15,000 women, finding that 85% of the women presenting at California abortion clinics were confident and clear about the decision to have an abortion, and among these, viewing an ultrasound image of the fetus had no effect on the ultimate decision to have an abortion).

[28] Ralph, *supra* note 27, at 276 (finding that women were less conflicted about the decision to have an abortion than were all genders regarding reconstructive knee surgery, as well as compared to men deciding on prostate cancer treatment options).

[29] Sarah C.M. Roberts et al, *Do 72-hour Waiting Periods and Two-Visits Requirements for Abortion Affect Women's Certainty? A Prospective Cohort Study*, 27:4 WOMEN'S HEALTH ISSUES 400 (2017).

[30] Daniel Grossman et al., *Effectiveness and Acceptability of Medical Abortion Provided Through Telemedicine*, 118:2 OBSTETRICS AND GYNECOLOGY 296 (2011).

financial limitations (or lack of knowledge about pregnancy) caused delay.[31]

Furthermore, women who have had an abortion overwhelmingly continue to believe they made the right decision after the abortion.[32] In one study of post-abortion emotions that women experience, more than 95% of women reported that the abortion was the right decision at all points over the three years following the abortion, and the feeling of decisional rightness tended to increase over time.[33]

Neither does abortion have a negative effect on women's mental health. Recent studies and systematic reviews of the literature have found that, contrary to claims made by abortion opponents, abortion does not cause depression, suicidal ideation, anxiety, or other mental health harms.[34]

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[31] Lawrence B. Finer et al., *Timing of Steps and Reasons for Delays in Obtaining Abortions in the United States*, 74:4 CONTRACEPTION 334 (2006).

[32] Corinne H. Rocca et al., *Decisional Rightness and Emotional Responses to Abortion in the United States: A Longitudinal Study*, 10:7 PLOS ONE (2015), *available at* http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0128832.

[33] *Id.* at 7.

[34] See, e.g., Vignetta E. Charles et al., *Abortion and Long-Term Mental Health Outcomes: A Systematic Review of the Evidence*, 78:6 CONTRACEPTION 436, 439–448 (2008); Susan A. Cohen, *Still True: Abortion Does Not Increase Women's Risk of Mental Health Problems*, 16:2 GUTTMACHER POL'Y REV. 13, 13–14 (2013).

III. Research shows that women face financial and logistical burdens when accessing abortion, and lack of access to insurance may contribute to delays.

For women paying out of pocket, abortion is expensive, with the median cost ranging from $490 to $1,750, depending on the timing of the procedure.[35] Such costs would consume 24% to 85% of the monthly income of a family of four living at the federal poverty line—a level that exceeds the monthly income of nearly half of abortion patients. For states like California that have expressed a public policy interest in making abortion accessible, ensuring access to insurance for abortion patients is therefore essential. The notice required of all licensed covered facilities under the FACT Act (the "signage requirement")—which provides information about how to access public programs that provide "free or low-cost access to comprehensive family planning services, (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women"—effectuates this important state policy.[36]

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[35] Sarah C.M. Roberts et al., *Out-of-Pocket Costs and Insurance Coverage for Abortion in the United States*, 24:2 WOMEN'S HEALTH ISSUES e211, e214 (2014). Other studies have found similar cost increases over time. *See, e.g.*, Ushma D. Upadhyay et al., *Denial of Abortion Because of Provider Gestational Age Limits in the United States*, 104:9 AM. J. OF PUB. HEALTH 1687 (2014).

[36] CAL. HEALTH & SAFETY CODE § 123472(a)(1).

A. Lack of financial resources delays access to abortion.

For women who cannot use insurance to pay for their abortions, the need to pay out of pocket is a significant barrier, leading some woman to forgo payment of other bills.[37] For more than half of women paying for an abortion out-of-pocket, these costs were equivalent to more than one-third of monthly personal income, and this was closer to two thirds among those receiving later abortions.[38] Lack of financial resources is associated with longer delays in obtaining an abortion, which may result in a woman being unable to obtain an abortion at all due to exceeding the gestational limit for her state or care provider.[39] Indeed, among women denied an abortion because their pregnancies had advanced beyond the provider's gestational limit, the need to raise funds to pay for the procedure was the most commonly reported reason for delay.[40]

Such hardships are especially challenging because the most common reasons that women seek abortions are financial.[41] As referenced above, nearly half of abortion patients live below the federal poverty level

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[37] Rachel K. Jones et al., *At What Cost? Payment for Abortion Care by U.S. Women*, 23:3 WOMEN'S HEALTH ISSUES e173 (2013).

[38] Roberts et al., *supra* note 35, at e214.

[39] Upadhyay et al., *supra* note 35, at 1689.

[40] *Id.*

[41] M. Antonia Biggs et al., *Understanding Why Women Seek Abortions in the United States*, 13:29 BMC WOMEN'S HEALTH 1, 5-6 (2013).

(*i.e.*, $24,600 annual income for a family of four), and three in four live below 200% of the poverty line.[42] In such circumstances, missing one day of work—much less two—means losing wages that an individual or family can ill-afford to forgo.

When women face delays in obtaining an abortion, the logistical and financial burdens they face multiply. On average, a woman must wait at least a week between when she attempts to make an appointment and when she receives an abortion.[43] Additionally, in many cases, personal circumstances—such as the need to arrange for childcare or transportation, or to raise money to pay for the procedure—may cause additional delays.[44]

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[42] JENNA JERMAN ET AL., CHARACTERISTICS OF U.S. ABORTION PATIENTS IN 2014 AND CHANGES SINCE 2008, 7 (2016), *available at* https://www.guttmacher.org/sites/default/files/report_pdf/characteristics-us-abortion-patients-2014.pdf.

[43] The median is seven days, while the average is 10 days. Moreover, poorer women wait two to three days longer than the typical woman. *See* Finer et al., *supra* note 31, at 338, 343.

[44] *See* Liza Fuentes et al., *Women's Experiences Seeking Abortion Care Shortly After the Closure of Clinics Due to a Restrictive Law in Texas*, 93:4 CONTRACEPTION 292 (2016) (finding, in the context of the HB2-related clinic closures, that women who had to arrange transportation or could not take time off of work on the day of the next available appointment were delayed even further); *see also* Sarah C.M. Roberts et al., *Utah's 72-Hour Waiting Period for Abortion: Experiences Among a Clinic-Based Sample of Women*, 48:4 PERSPS. ON SEXUAL & REPROD. HEALTH 179, 185 (2016) (finding that having to raise additional funds was a reason for waiting longer than the required 72-hours).

Delays also have the effect of increasing the cost of an abortion. Abortion in the first trimester is substantially less expensive than in the second trimester: the median price of a surgical abortion at 10 weeks is $508, while the cost rises to $1,195 at week 20.[45] Another study found that abortion (up to 14 weeks) is $490, compared to $750 for weeks 14 to 20, and $1,750 after week 20.[46] The rising cost of abortion as gestational age increases poses a profound challenge to the affordability of the procedure for lower-income women. As one Utah woman explained: "I knew the longer it took, the more money it would cost . . . . We are living paycheck to paycheck as it is, and if I [had] gone one week sooner, it would have been $100 less."[47]

Moreover, delays raise the cost of each step of obtaining an abortion—not just the cost of the procedure. For example, one recent study found that Utah's mandatory waiting period caused 47% of women having an abortion to miss an extra day of work.[48] More than 60% were negatively affected in

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[45] Rachel K. Jones et al., *Differences in Abortion Service Delivery in Hostile, Middle-Ground and Supportive States in 2014*, WOMEN'S HEALTH ISSUES (forthcoming 2018), *available at* http://www.whijournal.com/article/S1049-3867(17)30536-4/pdf.

[46] Roberts et al., *supra* note 35. Other studies have found similar increases over time. *See, e.g.*, Upadhyay et al., *supra* note 35 at 1687.

[47] Roberts et al., *supra* note 44, at 184.

[48] Jessica N. Sanders et al., *The Longest Wait: Examining the Impact of Utah's 72-Hour Waiting Period for Abortion*, 26:5 WOMEN'S HEALTH ISSUES 483, 485 (2016).

other ways, including increased transportation costs, lost wages by a family member or friend, or being required to disclose the abortion to someone whom they otherwise would not have told.[49] And because many clinics do not offer second-trimester abortions, a woman who has been delayed into the second trimester will typically be required to travel farther to obtain an abortion, thereby incurring additional travel and related costs, such as lost wages.[50]

As discussed above, sometimes women are delayed past the point in time at which a state or clinic no longer permits abortion. Denial of abortion services due to exceeding gestational limits has serious consequences. When women are denied wanted abortions, they are less likely to be employed, and more likely to fall below the poverty level—even though they are more likely to receive increased levels of public assistance.[51] They are also less likely to achieve aspirational plans for the coming year.[52]

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[49] *Id.*; *accord* Deborah Karasek et al., *Abortion Patients' Experience and Perceptions of Waiting Periods: Survey Evidence Before Arizona's Two-Visit 24-hour Mandatory Waiting Period Law*, 26:1 WOMEN'S HEALTH ISSUES 60 (2016).

[50] Rachel K. Jones & Jenna Jerman, *How Far Did US Women Travel for Abortion Services in 2008?*, 22:8 J. OF WOMEN'S HEALTH 706 (2013).

[51] Diana Greene Foster et al., *Socioeconomic Outcomes of Women Who Receive and Women Who Are Denied Wanted Abortions in the United States*, 108:3 AM. J. OF PUB. HEALTH 407 (2018).

[52] Ushma D. Upadhyay et al., *The Effect of Abortion on Having and Achieving Aspirational One-Year Plans*, 15:102 BMC WOMEN'S HEALTH 1 (2015).

And they are more likely to remain in relationships with partners who subject them to physical violence.[53]

B. Women Face Difficulties in Obtaining and Using Insurance Coverage for Abortion.

Research shows that women seeking abortion face hurdles in obtaining insurance coverage, even when public programs are available. In Massachusetts, where public insurance covers abortion, some women still paid out of pocket for abortion because they were uninsured. Most commonly, uninsured women reported that they either (a) had applied for insurance but not yet been approved; (b) faced challenges in navigating the enrollment process; or (c) had difficulty recertifying eligibility.[54] Also in Massachusetts, women who had been referred to subsidized insurance programs at the time they were seeking abortion widely reported that the application process was confusing—with younger women reporting the highest levels of confusion with the process.[55]

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[53] Sarah C.M. Roberts et al., *Risk of Violence from the Man Involved in the Pregnancy after Receiving or Being Denied an Abortion*, 12:144 BMC MEDICINE 1 (2014).

[54] Amanda Dennis et al., *A Qualitative Exploration of Low-Income Women's Experiences Accessing Abortion in Massachusetts*, 25:5 WOMEN'S HEALTH ISSUES 463 (2015).

[55] Danielle Bessett et al., *Out of Time and Out of Pocket: Experiences of Women Seeking State-Subsidized Insurance for Abortion Care in Massachusetts*, 21:S3 WOMEN'S HEALTH ISSUES S21 (2011).

Lack of insurance, or problems with insurance, may lead to delay. In a study comparing women who received an abortion with those who were denied an abortion because of gestational limits, women commonly cited "insurance problems" as a factor delaying their abortions, including administrative and logistical problems like having to determine whether the procedure was covered among women with insurance, or waiting for Medicaid-based coverage where available.[56] In a study focused on California women, women who had second trimester abortions were more likely to report trouble with insurance coverage as a factor causing delay than first trimester patients.[57] More generally, in states where public insurance includes coverage for abortion, residents are less likely to report cost as a reason for delay.[58]

Given these difficulties, delays related to insurance coverage, and burdens exacerbated by delays, California has a compelling interest in informing women that public programs exist, and how they can access them.

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[56] Upadhyay et al., *supra* note 35, at 1689, 1691.

[57] Eleanor A. Drey et al., Risk Factors Associated with Presenting for Abortion in the Second Trimester, 107:1 OBSTETRICS & GYNECOLOGY 128 (2006). One confounding factor noted by the authors is that second trimester patients may also have been more likely to need insurance, because the cost of the procedure rises with gestational age. Id.

[58] Sarah C.M. Roberts et al., *Out-of-Pocket Costs and Insurance Coverage for Abortion in the United States*, 24:2 WOMEN'S HEALTH ISSUES e211 (2014)

IV. Research demonstrates the importance of early entry into prenatal care, but CPCs in California do not assist women in accessing prenatal care.

Of course, some women who visit CPCs do not want abortions, but rather seek assistance with respect to pregnancies they plan to carry to term.[59] These women go to CPCs to obtain pregnancy tests, ultrasounds, and other services. Studies to date indicate that CPCs typically do not provide onsite prenatal care.[60]

Early entry into prenatal care can facilitate behaviors that are important for birth, infant, and child outcomes. For example, early enrollment in prenatal care may identify and treat key health issues, prevent harms to the fetus from ongoing use of medications that are not safe during pregnancy, and provide links to key services and supports that have been shown to improve birth outcomes.[61]

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[59] *See* Kimberly Kelly, *Evangelical Underdogs: Intrinsic Success, Organizational Solidarity, and Marginalized Identities as Religious Movement Resources*, 43:4 J. OF CONTEMP. ETHNOGRAPHY 419, 423 (2014); Katrina Kimport et al., *The Prevalence and Impacts of Crisis Pregnancy Center Visits among a Population of Pregnant Women*, CONTRACEPTION (forthcoming Mar. 2018), *abstract available at* http://www.contraceptionjournal.org/article/S0010-7824(17)30262-7/fulltext.

[60] Kimport et al., *supra* note 59.

[61] *See* What is prenatal care and why is it important, Eunice Kennedy Shriver Nat'l Inst. of Child Health and Human Dev., https://www.nichd.nih.gov/health/topics/pregnancy/conditioninfo/prenatal-care (observing that prenatal care can help ensure the medications women

Although prenatal care confers these benefits, women may not know that they are eligible for pregnancy-specific coverage, and bureaucratic hurdles to enrolling can be a deterrent.[62] Among the measures found to facilitate earlier entry into prenatal care is "presumptive eligibility." "Presumptive eligibility" means that states may allow certain providers (such as local health departments, community health centers, and hospitals) to determine temporary eligibility for Medicaid, and to provide prenatal care while the

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take are safe); *see also* Nancy E. Reichman et al., 8:2 REV. ECON. HOUSEH. 171 (June 2010) (finding that first-trimester prenatal care appears to decrease maternal postpartum smoking by approximately five percent); Ralitza Gueorguieva et al., *Length of Prenatal Participation in WIC and Risk of Delivering a Small for Gestational Age Infant: Florida, 1996-2004*, 13:4 MATERNAL & CHILD HEALTH J. 479 (July 2009) (finding that enrollment in WIC and Medicaid-funded prenatal services was associated with reduced incidence of low birth weight); Nancy E. Reichman & Julian O. Teitler, *Timing of Enhanced Prenatal Care and Birth Outcomes in New Jersey's HealthStart Program*, 9:2 MATERNAL & CHILD HEALTH J. 151 (June 2005) (finding that initiating prenatal care in the first or second trimester was associated with a 1-day advantage in gestational age); Victoria Lazariu-Bauer et al., *A Comparative Analysis of Effects of Early Versus Late Prenatal WIC Participation on Birth Weight: NYS, 1995*, 8:2 MATERNAL & CHILD HEALTH J. 77 (June 2004) (finding that infants born to WIC participants who enrolled in prenatal care early were heavier than those who enrolled late).

[62] Sarah C.M. Roberts &, Cheri Pies, *Complex Calculations: How Drug Use During Pregnancy Becomes a Barrier to Prenatal Care*, 15 MATERNAL & CHILD HEALTH J. 333 (2011).

application is being processed.[63] As a consequence, patients can enroll in coverage and obtain care on the spot, instead of having to wait for coverage, and make additional visits to a health care facility when coverage is approved.[64] Presumptive eligibility has been shown to lead to increased use of prenatal care, and certain beneficial outcomes, such as smoking cessation.[65]

Based on publicly accessible information provided by California's Department of Health Care Services, CPCs generally do not enroll women who want to continue their pregnancies into presumptive eligibility insurance so that they can receive subsidized prenatal care.[66] The FACT Act's signage

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[63] Joyce M. Piper, *Presumptive Eligibility For Pregnant Medicaid Enrollees: Its Effects on Prenatal Care and Perinatal Outcome*, 84:10 AM. J. PUB. HEALTH 1626 (1994).

[64] *Id.*

[65] Marian Jarlenski et al., *Medicaid Enrollment Policy Increased Smoking Cessation Among Pregnant Women But Had No Impact On Birth Outcomes*, 33:6 HEALTH AFFS. 997 (2014).

[66] This conclusion was derived by cross-referencing a directory of pregnancy service providers provided by *amicus curiae* HeartBeat International ("HeartBeat") with California's list of providers that are eligible to enroll women in presumptive eligibility. HeartBeat is a 501(c)(3) organization that "serves approximately 2,400 pro-life centers, maternity homes, and non-profit adoption agencies in over 50 countries—making Heartbeat the world's largest such affiliate network." *Amicus Curiae* Brief of HeartBeat International at 1. Among other services, HeartBeat provides a "Worldwide Directory of Pregnancy Help," which lists 357 service providers in

requirement thus makes use of an opportunity to connect women with coverage at the time and place that they are seeking pregnancy-related services—an opportunity that might otherwise be missed. Indeed, neither petitioners nor their *amici* have identified whether CPCs use any other means to inform women how to obtain insurance coverage for pregnancies that they plan to continue.

CONCLUSION

We respectfully request the Court consider the issues presented in this case in light of the social science and public health research discussed above.

Dated: February 27, 2018

Respectfully submitted,

Steven A. Zalesin
Counsel of Record
Derek Borchardt

California alone, of which 71 are HeartBeat affiliates. Only 4.2% of service providers listed, and 8.4% of HeartBeat affiliates are eligible to enroll women into presumptive eligibility insurance so that they can receive subsidized prenatal care. *Compare* Worldwide Directory of Pregnancy Help, HeartBeat International, https://www.heartbeatinternational.org/worldwide-directory (filtered for California as of Feb. 25, 2018), *with* Find a Qualified Provider to Enroll, California Department of Health Services, http://www.dhcs.ca.gov/services/medi-cal/eligibility/Pages/Find-a-Qualified-Provider-to-Enroll.aspx (as of Feb. 25, 2018).

Zachary Kolodin
PATTERSON BELKNAP
WEBB & TYLER LLP
1133 Avenue of the Americas
New York, NY 10036
(212) 336-2000
sazalesin@pbwt.com

Attorneys for *Amici Curiae*

APPENDIX

AMICI CURIAE[1]

M. Antonia Biggs, PhD
University of California, San Francisco

Kelly Blanchard, MSc
Ibis Reproductive Health

Robert Blum, MD, MPH, PhD
John Hopkins Bloomberg School of Public Health

Claire Brindis, DrPH
University of California, San Francisco

Katelyn Bryant-Comstock, MPH
Duke Center for Global Reproductive Health

Carrie Cwiak, MD, MPH
Emory University, School of Medicine

Diana Greene Foster, PhD
University of California, San Francisco

Lori Freedman, PhD
University of California, San Francisco

Matt Freeman, DNP, MPH

Valerie French, MD, MAS

---

[1] Institutional affiliations provided for identification purposes only. The views expressed in this brief do not necessarily reflect the views of amici's affiliated institutions.

Liza Fuentes, DrPH
Guttmacher Institute

Maria Gallo, PhD
Ohio State University

Laurie Gaydos, PhD
Emory University, Rollins School of Public Health

Caitlin Gerdts, PhD, MHS
Ibis Reproductive Health

Daniel Grossman, MD
University of California, San Francisco

Kelli Hall, PhD
Emory University, Rollins School of Public Health

Luciana Hebert, PhD
University of Chicago

Kristine Hopkins, PhD
University of Texas at Austin

Jenna Jerman, MPH
Guttmacher Institute

Rachel K. Jones, PhD
Guttmacher Institute

Theodore Joyce, PhD
Baruch College and Graduate Center of the City University of New York

Megan Kavanaugh, DrPH
Guttmacher Institute

Kimberly Kelly, PhD
Mississippi State University

Katrina Kimport, PhD
University of California, San Francisco

Missy Kottke, MD, MPH, MBA
Emory University School of Medicine

Erika Levi, MD, MPH
Albert Einstein College of Medicine

Lisa Harris, MD, PhD
University of Michigan

Anna Newton-Levinson, MPH
Emory University, Rollins School of Public Health

Nadine Peacock, PhD
University of Illinois at Chicago, School of Public Health

Joseph E. Potter, PhD
University of Texas at Austin

Sarah CM Roberts, DrPH
University of California, San Francisco

Corinne Rocca, PhD, MPH
University of California, San Francisco

Roger Rochat, MD
Emory University, Rollins School of Public Health

Joanne Rosen, JD, MA
John Hopkins Bloomberg School of Public Health

Jessica Sales, PhD
Emory University, Rollins School of Public Health

John Santelli, MD, MPH
Columbia University Mailman School of Public Health

Amanda Jean Stevenson, PhD
University of Colorado, Boulder

Debra Stulberg, MD
University of Chicago

Andrea Swartzendruber, PhD, MPH
University of Georgia

Terri-Ann Thompson, PhD
Ibis Reproductive Health

Janet Turan, PhD, MPH
University of Alabama at Birmingham

Abigail Norris Turner, PhD
Ohio State University

Ushma Upadhyay, PhD, MPH
University of California, San Francisco

Kari White, PhD, MPH
University of Alabama at Birmingham

Sharon Wilsnack, PhD
University of North Dakota

Laurie Schwab Zabin, PhD
John Hopkins Bloomberg School of Public Health

No. 16-1140

In the Supreme Court of the United States

NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES, D/B/A NIFLA, ET AL., PETITIONERS

v.

XAVIER BECERRA, ATTORNEY GENERAL OF CALIFORNIA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE STATES OF TEXAS, ALABAMA, ARKANSAS, GEORGIA, IDAHO, KANSAS, LOUISIANA, MICHIGAN, MISSOURI, MONTANA, NEBRASKA, NEVADA, OHIO, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, WEST VIRGINIA, WISCONSIN, AND THE COMMONWEALTH OF KENTUCKY, BY AND THROUGH GOVERNOR MATTHEW G. BEVIN, AND PAUL R. LEPAGE, GOVERNOR OF MAINE, AS AMICI CURIAE IN SUPPORT OF PETITIONERS

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

SCOTT A. KELLER
Solicitor General
Counsel of Record

HEATHER GEBELIN HACKER
BETH KLUSMANN
Assistant Solicitors General

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
scott.keller@oag.texas.gov
(512) 936-1700

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INTEREST OF AMICI CURIAE

Amici are the States of Texas, Alabama, Arkansas, Georgia, Idaho, Kansas, Louisiana, Michigan, Missouri, Montana, Nebraska, Nevada, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Utah, West Virginia, and Wisconsin, the Commonwealth of Kentucky, and the Governor of Maine.[1] Approximately 29 states, including many of the amici States, have laws requiring a physician to provide certain information to a patient when obtaining informed consent to perform an abortion procedure.[2] The Ninth Circuit treated these types of laws as similar to the California law at issue in this case, but the amici States write to clarify that these laws are significantly different in dispositive ways.

Planned Parenthood of Southeastern Pennsylvania v. Casey held that state laws requiring certain information as part of obtaining a patient's informed

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[1] No counsel for any party authored this brief, in whole or in part, and no person or entity other than amici contributed monetarily to its preparation or submission. The parties received timely notice of filing and consented to the filing of this brief. *See* Sup. Ct. R. 37.

[2] *See* Ala. Code § 26-23A-4; Ariz. Rev. Stat. § 36-2153; Ark. Code § 20-16-1703; Fla. Stat. § 390.0111(3); Ga. Code § 31-9A-3; Idaho Code § 18-609; Ind. Code § 16-34-2-1.1; Iowa Code § 146A.1; Kan. Stat. § 65-6709; Ky. Rev. Stat. § 311.725; La. Stat. § 40:1061.10; Mich. Comp. Laws § 333.17015; Minn. Stat. § 145.4242; Miss. Code § 41-41-33; Mo. Stat. § 188.027; Neb. Rev. Stat. § 28-327; N.C. Gen. Stat. § 90-21.82; N.D. Cent. Code § 14-02.1-02; Ohio Rev. Code § 2317.56; Okla. Stat. tit. 63, § 1-738.2; 18 Pa. Stat. and Cons. Stat. § 3205; S.C. Code § 44-41-330; S.D. Codified Laws § 34-23A-10.1; Tenn. Code § 39-15-202; Tex. Health & Safety Code § 171.012; Utah Code § 76-7-305; Va. Code § 18.2-76; W. Va. Code § 16-2I-2; Wis. Stat. § 253.10.

consent for abortion procedures—even information designed to encourage the woman to carry the pregnancy to term—are constitutional. 505 U.S. 833, 884 (1992) (plurality op.). In this context, a State has dual sufficient interests: protecting the health of the patient as well as protecting unborn life. *Id.* at 882-84. These interests create a compelling state interest that outweighs any First Amendment interest of the physician in that context.

By contrast, California's law applies outside the context of obtaining a patient's informed consent for an abortion procedure. This law requires medical facilities to give non-medical information unrelated to services they provide, diminishing the importance of any state interest in comparison to the First Amendment rights of those compelled to speak the State's message.

Amici are also well positioned to explain that States have a host of alternative means available to disseminate the information that the California law requires certain licensed medical facilities to provide, as well as the regulatory authority to address any actual instances of misrepresentation.

SUMMARY OF ARGUMENT

The Ninth Circuit erred by equating California's law with other state laws requiring doctors to obtain informed consent from a patient before performing an abortion procedure. *Casey* did not uphold all laws connected to an "abortion-related disclosure," as the Ninth Circuit termed both California's law and other States' informed-consent laws. Rather, *Casey* approved laws that regulate how a doctor must obtain a patient's informed consent before performing an abortion procedure. In other words, state laws that require a doctor to give a patient information to assess the risks and consequences of an abortion procedure that the doctor will soon perform are valid under *Casey*.

The informed-consent law at issue in *Casey* is significantly different than California's law here. California's law requires licensed medical facilities—including those that do not perform abortions or prescribe all forms of contraception—to nevertheless notify individuals about state-subsidized contraceptives and abortion offered by *other* doctors and facilities. California's law thus has nothing to do with giving a patient information to assess the risks and consequences of a procedure a doctor in a certain medical facility is about to perform. Given this crucial distinction, the constitutional analysis for these laws is different.

I. Informed consent is a specific part of the physician-patient relationship where the State's interest in regulation is compelling. If informed consent is lacking, the physician may be legally liable. The State's interests in public health, regulating the medical profession, and protecting patient autonomy justify regulation of the informed-consent process, and many States do just that.

A majority of States also regulate informed consent in the context of abortion. Aside from the fact that it is permissible for States to regulate informed consent generally, *Casey* upheld informed-consent requirements for abortion in particular. *Casey* approved such requirements, even when they included information not strictly related to the procedure, because of the unique nature of the decision to have an abortion and its consequences.

Casey also permits States to require that information be given during the informed-consent process expressing a State's preference for childbirth. This is because of the other strong state interest supporting informed-consent regulations for abortion: a State's recognized interest in protecting unborn life.

II. In contrast, California's law requiring licensed medical clinics that do not perform abortions or offer contraception to post information about state-subsidized contraception and abortion cannot be justified by the dual state interests supporting regulation of informed consent for abortion. California's law does not relate to informed consent for abortion because it applies to medical facilities where abortions are not performed. It also does not further the State's interest in protecting unborn life; rather, giving information as to where one might obtain a subsidized abortion has the opposite effect. Thus, California's law is not similar to abortion-informed-consent laws upheld in *Casey*, and the Ninth Circuit erred in treating it as such. Moreover, California has other means available to achieve its goals of preventing medical clinics from giving misleading information to patients and making women aware of state-subsidized alternatives.

ARGUMENT

I. *Casey* Held that Informed Consent for Abortion Is a Context Where States May Constitutionally Require Physicians to Give Certain Information to Patients.

A. It is well established that States may regulate professional conduct, even when it involves speech.

The authority of States to regulate professional conduct, including that of the medical profession, is well established. *E.g.*, *Dent v. West Virginia*, 129 U.S. 114, 122 (1889). "States have a compelling interest in the practice of professions within their boundaries, and that as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions." *Goldfarb v. Va. State Bar*, 421 U.S. 773, 792 (1975).

A particular area of medical practice that is heavily regulated by States without running afoul of the First Amendment is informed consent:

> The doctor-patient relationship has long been conducted within the constraints of informed consent to the risks of medical procedures, as demanded by the common law, legislation, and professional norms. The doctrine itself rests on settled principles of personal autonomy, protected by a reticulated pattern of tort law, overlaid by both self- and state-imposed regulation. Speech incident to securing informed consent submits to the long history of this regulatory pattern.

Tex. Med. Providers Performing Abortion Servs. v. Lakey, 667 F.3d 570, 585 (5th Cir. 2012) (Higginbotham, J., concurring).

Regardless of the level of scrutiny applied, the State's interest in protecting public health and the patient's ability to assess a procedure's risks and consequences is sufficient in the context of informed consent to justify government regulation.

B. Informed consent is a specific aspect of medical practice where physician discretion is routinely limited by law.

While informed consent is a routine part of contemporary medical practice and ethics, it is fundamentally a legal requirement. Before the early 1900s, treatment was often left to the discretion of physicians with little involvement of the patient. Eventually, the courts began to recognize that a patient should be able to assess a procedure's risks and consequences, and that failing to obtain a patient's consent for a medical procedure should result in legal liability. *E.g.*, *Schloendorff v. Soc'y of N.Y. Hosp.*, 105 N.E. 92, 93 (N.Y. 1914) (Cardozo, J.); *Pratt v. Davis*, 79 N.E. 562 (Ill. 1906); *Mohr v. Williams*, 104 N.W. 12 (Minn. 1905).

Because a physician who fails to properly obtain informed consent before performing a medical procedure is legally liable, States routinely set legal requirements for informed consent. Many States require a doctor to provide certain information to patients before performing medical procedures.[3] *See, e.g.*, Del. Code tit. 18,

[3] The federal government also regulates informed consent in various contexts. *See, e.g.*, 38 C.F.R. § 17.32 (informed consent requirements in veterans' health facilities); 21 C.F.R. § 50.25 (informed consent requirements in human subject research).

§ 6852; Ga. Code § 31-9-6.1; Haw. Rev. Stat. § 671-3; La. Stat. § 40:1157.1; Minn. Stat. § 144.651; N.Y. Pub. Health Law § 2805-d; N.C. Gen. Stat. § 90-21.13; Ohio Rev. Code § 2317.54; Tex. Civ. Prac. & Rem. Code §§ 74.103, 74.105; Vt. Stat. tit. 12, § 1909; Wash. Rev. Code § 7.70.050; Cal. Code Regs. tit. 22, § 70707(b)(4), (5); Wis. Admin. Code DHS § 94.03.

Some States regulate informed consent requirements for participation in experimental treatments or clinical trials. *See, e.g.*, Cal. Health & Safety Code § 24173 (informed consent for experimental treatment requires explanation of risks, benefits, ability to withdraw, source of funding, and material stake of the investigator in the outcome, among other items); Ind. Code § 25-22.5-1-2.1 (experimental treatment requires informed consent and that a physician "personally examine[]" the patient); 55 Pa. Code § 5100.54 (research must be conducted in compliance with federal regulations on human subjects and a copy of the regulations must be made available to patients); N.D. Admin. Code 33-07-01.1-36 (experimental psychiatric treatment requires hospital to make available federal regulations regarding human subject protection).

Some States also regulate informed consent for particular treatments and procedures. *See, e.g.*, Ala. Code § 22-13-70 (breast cancer treatment); Fla. Stat. § 458.324 (breast cancer treatment); Haw. Rev. Stat. § 671-3(c) (mastectomy); Md. Code, Health-Gen. § 20-114 (breast implants); *id.* § 20-113 (breast cancer treatment); La. Stat. § 40:1103.4 (same); Me. Stat. tit. 24, § 2905-A (same); Mich. Comp. Laws § 333.17013 (same); Mont. Code § 37-3-333 (same); N.Y. Pub. Health Law § 2404 (same); Tex. Civ. Prac. & Rem. Code § 74.107 (hysterectomy); Cal. Code Regs. tit. 22, §§ 70707.1, 70707.3 (sterilization).

Beyond establishing the content of the information a doctor must provide, States regulate other aspects of informed consent. Some specify when consent expires and who may give consent. *See, e.g.*, Cal. Health & Safety Code § 24178(c) (surrogate informed consent can be obtained from persons unable to consent and who do not express dissent or resist); Or. Rev. Stat. § 421.085(2) (inmates are not permitted to participate in medical or psychiatric research); 14-472 Me. Code R. ch. 1, Pt. A § XI.H.3 (individuals between 12 and 18 must give informed consent, if able, to experimental mental health research); 10A N.C. Admin. Code § 28A.0306(b)(3) (informed consent for research subjects may not exceed six months); 25 Tex. Admin. Code § 404.153(9)(F) (informed consent to mental health treatment can be withdrawn by non-compliance or resistance); Wis. Admin. Code DHS § 94.03(1)(f) (informed consent for certain conditions may not exceed 15 months).

In short, the process of informed consent for medical procedures is highly regulated. It is a context where legal liability and the State's interest in public health provide a compelling governmental interest in regulating the medical profession, and this outweighs physician discretion in this context. Thus, informed consent is an area the States may regulate—even down to precise things physicians must tell patients before performing particular procedures—without violating the First Amendment.

C. The dual state interests—in protecting patient health as well as unborn life—implicated in the specific context of an abortion procedure make it distinct from other medical procedures.

1. At a minimum, abortion may be regulated to the same extent as other medical procedures:

> Whatever constitutional status the doctor-patient relation may have as a general matter, in the present context it is derivative of the woman's position . . . . On its own, the doctor-patient relation here is entitled to the same solicitude it receives in other contexts. Thus, a requirement that a doctor give a woman certain information as part of obtaining her consent to an abortion is, for constitutional purposes, no different from a requirement that a doctor give certain specific information about any medical procedure.

Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 884 (1992) (plurality op.).[4] Just as some States have chosen to require specific information to obtain informed consent for breast-cancer treatment and hysterectomy, a majority of States have decided to regulate the informed-consent process for abortion. *See supra* p.1 n.2.

2. But abortion is unlike other medical procedures in ways that support an even stronger basis for state regulation of informed consent: "Abortion is inherently different from other medical procedures, because no other procedure involves the purposeful termination of a po-

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[4] All citations to *Casey* in this brief are to the controlling joint plurality opinion.

tential life." *Harris v. McRae*, 448 U.S. 297, 325 (1980). As *Casey* explained:

> Abortion is a unique act. It is an act fraught with consequences for others: for the woman who must live with the implications of her decision; for the persons who perform and assist in the procedure; for the spouse, family, and society which must confront the knowledge that these procedures exist, procedures some deem nothing short of an act of violence against innocent human life; and, depending on one's beliefs, for the life or potential life that is aborted.

505 U.S. at 852.

The Court has repeatedly recognized the gravity of the abortion decision and the State's interest in ensuring it is fully informed: "The decision to abort, indeed, is an important, and often a stressful one, and it is desirable and imperative that it be made with full knowledge of its nature and consequences." *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 67 (1976). "Whether to have an abortion requires a difficult and painful moral decision .... It is, however, precisely this lack of information concerning the way in which the fetus will be killed that is of legitimate concern to the State. The State has an interest in ensuring so grave a choice is well informed." *Gonzales v. Carhart*, 550 U.S. 124, 159 (2007) (internal citation omitted).

Thus, this Court has affirmed a State's ability to regulate the informed-consent process to ensure that patients can adequately assess the risks and consequences of the abortion procedure—rejecting First Amendment challenges to these laws. *Id.* at 159-60; *Casey*, 505 U.S. at 882-85; *see also Danforth*, 428 U.S. at 67. As *Casey* held: "To be sure, the physician's First

Amendment rights not to speak are implicated, but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State. We see no constitutional infirmity in the requirement that the physician provide the information mandated by the State here." 505 U.S. at 884 (internal citations omitted).

Informed-consent laws in the context of abortion would satisfy any level of scrutiny given the gravity of the state interests involved. While the physician's First Amendment interests may be the same no matter what medical procedure is at issue, in the context of abortion, the State's interest in regulating the consent process is even more pronounced. Not only does the State have a strong interest in protecting public health, but as this Court has recognized, the State also has a distinct interest in "protecting the life of the fetus that may become a child." *Gonzales*, 550 U.S. at 146; *see Casey*, 505 U.S. at 846; *Roe v. Wade*, 410 U.S. 113, 162 (1973) ("[T]he State does have an important and legitimate interest in preserving and protecting the health of the pregnant woman . . . and [] it has still another important and legitimate interest in protecting the potentiality of human life. These interests are separate and distinct.").

3. The distinct state interest in protecting unborn life alone justifies government regulation regarding informed consent for abortion—including government regulation that would not necessarily be required for informed consent of other medical procedures: "The government may use its voice and its regulatory authority to show its profound respect for the life within the woman." *Gonzales*, 550 U.S. at 157. The unique implications of the abortion procedure have also been acknowledged by this Court as a basis for permitting the State to regulate abortion in ways that express its preference for childbirth. *See Harris*, 448 U.S. at 324 (upholding

the Hyde Amendment); *Maher v. Roe*, 432 U.S. 464, 474 (1977) (upholding the exclusion of abortion from Medicaid because the government may "make a value judgment favoring childbirth over abortion").

The recognized state interest in protecting fetal life coupled with the already strong state interest in public health creates a uniquely compelling interest that outweighs any potential First Amendment interests in this specific context unless the information compelled is false or misleading. *Casey*, 505 U.S. at 882.

In fact, *Casey* specifically upheld abortion-informed-consent requirements regarding information about fetal development and adoption, despite arguments that this information has no direct relation to the woman's health:

> We also see no reason why the State may not require doctors to inform a woman seeking an abortion of the availability of materials relating to the consequences to the fetus, even when those consequences have no direct relation to her health . . . . [I]nformed choice need not be defined in such narrow terms that all considerations of the effect on the fetus are made irrelevant . . . . In short, requiring that the woman be informed of the availability of information relating to fetal development and the assistance available should she decide to carry the pregnancy to full term is a reasonable measure to ensure an informed choice, one which might cause the woman to choose childbirth over abortion.

Id. at 882-83.

A State can use its regulatory authority to require information about fetal development to be shown to a patient precisely because of the State's interest in pro-

tecting unborn life. Informed-consent laws that include information regarding fetal development also provide significant information about the consequences of the abortion procedure.

* * *

State regulation of the informed-consent process for abortion is justified by the combined state interests of protecting public health and unborn life. Informed consent involves a physician giving information to a patient about the risks and consequences of undergoing a particular procedure. The risks and consequences unique to abortion procedures may be part of informed-consent requirements without violating the First Amendment, even if that information expresses a State's interest in encouraging childbirth.

II. California's Licensed-Clinic Requirements in the "Reproductive FACT Act" Differ in Important Ways from Laws Regulating the Informed Consent a Doctor Must Obtain from a Patient Before Performing an Abortion.

A. The California law at issue in this case differs significantly from other States' abortion-informed-consent laws. Among other things, the California law at issue requires licensed medical facilities that provide prenatal care or family planning services to provide a notice to all clients stating that California has programs providing free or low-cost access to other family planning services, explicitly including abortion, and listing a phone number for the county social services office. Pet. App. 80a; Cal. Health & Safety Code §§ 123471(a), 123472(a). The Ninth Circuit pretended that California's law was the legal equivalent of other States' abortion-informed-consent laws by incorrectly labeling in-

formed-consent laws at a higher level of generality—"abortion-related disclosure." *NIFLA v. Harris*, 839 F.3d 823, 837-38 (9th Cir. 2016).

But not all "abortion-related disclosure" laws involve informed consent. Informed consent is required specifically so that the patient can assess the risks and consequences of a procedure that a doctor is seeking to perform. Mandating provision of information by a doctor seeking to perform such a procedure is at the core of informed-consent requirements. In contrast, a State's desire to compel clinics to disseminate information about the availability of state funding for procedures those clinics do not perform has nothing to do with allowing a patient to assess the risks and consequences of a medical procedure about to be performed.

Additionally, abortion procedures differ markedly from the services offered by Petitioners—pregnancy tests, ultrasounds, referrals, and health care consultations, Pet. App. 91a-92a, 93a—which involve little, if any, risk. California's notice requirement does not function to make patients aware of the risks or consequences of these medical services.

Thus, as demonstrated by both the nature of the services provided and the information required to be disclosed, the California law at issue is not an informed-consent law like the law in *Casey*. California is compelling medical clinics to disseminate information about state-subsidized procedures the clinics do not provide—rather than regulating the information about the procedure a patient is about to obtain from a doctor.

B. Moreover, there are a host of alternative means available for California to further its asserted interest in disseminating information about its state-subsidy program without compelling private speech.

Namely, California itself could engage in government speech to promote its own state program. *See, e.g., Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 800 (1988) (State can publish financial information of charitable entities and enforce antifraud laws, rather than compelling speech from fundraisers); *see also 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 507 (1996) (State could promote temperance through taxation, regulation, and education, rather than banning certain speech); *Linmark Assocs., Inc. v. Twp. of Willingboro*, 431 U.S. 85, 97 (1977) (Township could promote integrated housing through an educational process and inducements to homeowners, rather than banning certain speech).

California has not hesitated to spend millions on public awareness campaigns on everything from e-cigarettes[5] and eating more fruits and vegetables,[6] to fighting stigma against mental illness[7] and conserving

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[5] *See* Alexandra Sifferlin, *California Launches Campaign Against E-Cigarettes*, Time (Mar. 23, 2015), http://time.com/3754051/california-e-cigarette-ads/ [https://perma.cc/4TGE-2EEB].

[6] *See* Foerster SB, et al., *California's "5 a day—for better health!" campaign: an innovative population-based effort to effect large-scale dietary change*, Am. J. Prev. Med. 1995 Mar.-Apr.; 11(2): 124-31, abstract available at https://www.ncbi.nlm.nih.gov/pubmed/7632448 (last accessed Jan. 15, 2018).

[7] *See* Rand Corp., *California Mental Health Stigma-Reduction Campaign Creates Economic Benefits for the State*, Apr. 14, 2016, https://www.rand.org/news/press/2016/04/14/index1.html [https://perma.cc/56ZH-VHST].

water.[8] California's campaign on driving safely through work zones even won an award.[9] Raising awareness about subsidized health services may be accomplished just as easily as raising awareness about avoiding sugary beverages[10] without using unwilling clinics as a conduit.

California separately claims an interest in preventing "misinform[ation]" from being given by medical clinics that do not perform abortions. Pet. App. 7a. But those clinics are already regulated by the State through licensing. Pet. App. 91a; Cal. Health & Safety Code §§ 1204, 1225-45. Licensed clinics are required to adhere to state-mandated standards. Cal. Health & Safety Code § 1240. If there is evidence of wrongdoing on behalf of any of the medical clinics, California may unquestionably enforce those standards through the power of its regulatory authority, like any other State. But enforcing standards does not necessitate a blanket requirement compelling medical clinics to advertise state-subsidized services they do not provide.

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[8] *See* Cal. Dep't of Water Res., *About Save Our Water*, http://saveourwater.com/about-save-our-water/ [https://perma.cc/K6GB-NXKY].

[9] *See* Jon Ortiz, *Caltrans $6 million public-awareness campaign wins national award*, Sacramento Bee, Oct. 14, 2015, http://www.sacbee.com/news/politics-government/the-state-worker/article39181968.html [available at https://perma.cc/UV6C-D7GX (screenshot view)].

[10] *See* Cal. Dep't of Pub. Health, *Rethink Your Drink*, https://www.cdph.ca.gov/Programs/CCDPHP/DCDIC/NEOPB/Pages/RethinkYourDrink.aspx [https://perma.cc/9D3E-LRJ4].

CONCLUSION

The judgment of the United States Court of Appeals for the Ninth Circuit should be reversed.

Respectfully submitted.

STEVE MARSHALL
Attorney General of
Alabama

LESLIE RUTLEDGE
Attorney General of
Arkansas

CHRISTOPHER M. CARR
Attorney General of
Georgia

LAWRENCE G. WASDEN
Attorney General of
Idaho

DEREK SCHMIDT
Attorney General of
Kansas

M. STEPHEN PITT
General Counsel to the
Governor of Kentucky

JEFF LANDRY
Attorney General of
Louisiana

BRENT DAVIS
Chief Counsel to the
Governor of Maine

KEN PAXTON
Attorney General of
Texas

JEFFREY C. MATEER
First Assistant Attorney
General

SCOTT A. KELLER
Solicitor General
Counsel of Record

HEATHER GEBELIN HACKER
BETH KLUSMANN
Assistant Solicitors General

OFFICE OF THE
ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
scott.keller@oag.texas.gov
(512) 936-1700

BILL SCHUETTE
Attorney General of
Michigan

JOSHUA D. HAWLEY
Attorney General of
Missouri

TIM FOX
Attorney General of
Montana

DOUG PETERSON
Attorney General of
Nebraska

ADAM PAUL LAXALT
Attorney General of
Nevada

MICHAEL DEWINE
Attorney General of
Ohio

MIKE HUNTER
Attorney General of
Oklahoma

ALAN WILSON
Attorney General of
South Carolina

MARTY J. JACKLEY
Attorney General of
South Dakota

HERBERT H. SLATERY III
Attorney General and
Reporter, Tennessee

SEAN D. REYES
Attorney General of
Utah

PATRICK MORRISEY
Attorney General of
West Virginia

BRAD SCHIMEL
Attorney General of
Wisconsin

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In the Supreme Court of the United States

NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES, dba NIFLA, *et al.*,
Petitioners,

v.

XAVIER BECERRA,
Attorney General of California, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF 13 WOMEN AND THE CATHOLIC ASSOCIATION FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Andrea Picciotti-Bayer
Counsel of Record
The Catholic Association Foundation
3220 N Street NW, Suite 126
Washington, DC 20007
(571) 201-6564
amariepicciotti@gmail.com

Counsel for Amici Curiae

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

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INTERESTS OF *AMICI*[1]

Amici 13 women, listed and described below, include direct and indirect beneficiaries of the free services provided by not-for-profit pregnancy resource centers and medical clinics in the state of California and across the United States. They attest to the dignified care and hope that women and their children receive at such centers and clinics.

Amici, The Catholic Association Foundation (TCA), is a lay organization dedicated to being a faithful voice for the Catholic Church in the public square. Catholics have played a leading role in founding and running pregnancy centers across the country. The Catholic Church in the United States sponsors the Gabriel Project[2], a parish-based ministry that brings hope to pregnant women in crisis, and Project Rachael[3], a diocesan-based network of specially trained priests, religious counselors, and laypersons who respond to and care for those who have procured an abortion. These ministries work with the centers and clinics in

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[1] All parties received timely notice of the intention to file this *amicus* brief and consented to its filing. No counsel for a party authored this brief in whole or in part. The Catholic Association Foundation contributed the costs associated with the preparation and submission of this brief. All statements made by *amici* 13 women are on file with counsel for *amici curiae*.

[2] For information about Gabriel Project, *see* http://www.gabrielproject.us/index.html

[3] For information about Project Rachel, *see* http://www.usccb.org/issues-and-action/human-life-and-dignity/abortion/project-rachel/index.cfm and http://hopeafterabortion.com/

their communities to offer care and support to women in need.

Amici strongly oppose any civil sanctions that would impede the ability of licensed and unlicensed pregnancy centers in the state of California to provide free support and services to women and their children.

ANGELA JOZWICKI grew up in a household "with a lot of screaming" and turned to drugs when she was fourteen years old. Although she had sporadic periods when she was "clean," Angela was unable to stop using for years. When she was twenty-two years old, Angela discovered she was pregnant. "I knew in my heart that a baby would stop me from having drugs, but I wasn't ready." Angela had an abortion. "It was June 1, 2006. I will never forget that date." "I used abortion to avoid getting better."

Struggling with addiction and other health concerns, Angela never thought that motherhood was a possibility. "I was taught that you get married, buy a house, and you have a baby. Because I did not see that in my future, I never thought I would have a baby." In October 2015, Angela sensed something was different about her body and bought a pregnancy test from a dollar store. The test was positive. Because Angela was still using drugs, she made another appointment to have another abortion. She asked the baby's father to drive her to the clinic when the day for the appointment came. When Angela called him that morning, he did not answer his phone. Angela kept calling, but he never answered or showed up. Angela believes that "God showed up." "I decided that I would keep that baby."

Because of her addiction and the circumstances of her pregnancy, Angela felt that she could not turn to her family for support. Angela started "calling a bunch of numbers of places that help pregnant women." Soundview Pregnancy Services in Centereach, New York, answered her call and encouraged Angela to come in. At her first visit to the center, staff showed Angela her growing child on an ultrasound. Every subsequent week, Angela met with Barbara, a staff member at the center, and the two watched videos about pregnancy and childcare and spoke about how Angela was doing. When it came time for Angela to deliver, Barbara went to the hospital to be there for Angela. "I did not think that she would come, but she was there."

Staff at the center helped Angela enroll in the Women, Infant and Children supplemental nutrition program (WIC)[4] and get in touch with New York's Department of Social Services for financial assistance during her pregnancy and after childbirth. Angela plans to begin working again once her son Cameryn is old enough to start preschool. In the meantime, Angela and her son are living with Angela's mother. Though Angela and her mom have had a strained relationship, counselors at the center have met with the women and

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[4] The United States Department of Agriculture offers a special supplemental nutrition program for Women, Infants, and Children (WIC) that provides federal grants to states for supplemental foods, health care referrals, and nutrition education for low-income pregnant, breastfeeding, and non-breastfeeding postpartum women, and to infants and children up to age five who are found to be at nutritional risk. *See* https://www.fns.usda.gov/wic/women-infants-and-children-wic.

slowly helped bring the mother and daughter together for the sake of a loving and supportive home for Cameryn.

Angela continues to attend weekly sessions at the center and benefits from parenting courses and supportive counsel as she struggles with both single parenting and staying clean. "I always thought that people were fake, but they are genuine. This is who they really are. They will help me to raise my son to be genuine." Looking forward to life now, Angela credits the center with giving her "support so that I don't turn back to drugs."

BRENDA COE and her husband were introduced by a mutual friend to Krystal, a single mother in a crisis pregnancy. Krystal already had a two-year-old son and felt unable to raise another child in her circumstances. Krystal had visited the Pregnancy Help Center in Torrance, California, to confirm her pregnancy, and while there, spoke with counselors about adoption. After meeting the Coes, Krystal asked them to adopt her baby.

The center was a resource to Krystal throughout her pregnancy, and Brenda accompanied Krystal there regularly. Brenda came with Krystal to ultrasounds and helped her interview the obstetrician she eventually selected, who also volunteered at the center. Brenda and her husband were present at the child's birth. Brenda remarks that they were "overjoyed" with the prospect of "walking with Krystal during her pregnancy." The staff at the pregnancy center supported all of them throughout the pregnancy and adoption process. Brenda and her husband stay

connected to Krystal by exchanging pictures and speaking over the phone.

Brenda is grateful for the assistance Krystal received at the center. "I think birth parents should be encouraged to be the best God wants them to be so that their adopted children can find them in a strong place." In Brenda's experience, "women are not being forced into not having an abortion, but are being shown that they have options and resources to choose life. The center removes a 'crisis' a woman is facing so that they can make a positive, life-affirming choice."

BROOKE NORTH found healing at the Hope Pregnancy Center in Pontiac, Illinois, after decades of trauma and abuse. At the age of eleven, Brooke was put into the foster care system following years of physical abuse by her father. She had been in and out of several foster homes and endured multiple occasions of physical, sexual, and emotional abuse during her childhood. As an adult, Brooke suffered an even more horrific experience: She was kidnapped and sexually assaulted over a two-week period until her abductor was captured and imprisoned.

When Brooke discovered in mid-2015 that she was pregnant, she enrolled in WIC for assistance. The local WIC agent referred Brooke to the Hope Pregnancy Center to "get the stuff you need." Brooke never considered an abortion as something she wanted or needed. "They opened up the center to help moms in need. They do not pressure you not to get an abortion if you want one. But they are there to help women *have* their children." Brooke had two great needs when expecting her first child: someone to listen to her and

infant necessities. At the center, both of Brooke's needs were met.

Center staff listened and lent a supportive hand. As part of the center's "Earn while you Learn" or "Hope program," Brooke received "mommy bucks" each time she attended a counseling session or class. With her "mommy bucks," Brooke obtained diapers, wipes, clothes, and even things for herself during and after pregnancy. When she needed something but did not have enough to buy it, she was never denied.

Brooke continued to visit the center after her son Keetan was born in April 2016. In addition to basic childcare items, Brooke wanted an ExerSaucer jumper for her son as he was becoming more mobile. Although the center did not have one when she inquired, she received a call shortly afterwards that they had a brand-new saucer and would hold it for her until she could arrange to pick it up at the center.

A year later, Brooke met the man who would become her husband. The couple married in February 2017 and were expecting a child. Brooke returned to the center, this time with her husband. With the center's newly acquired ultrasound machine, Brooke and her husband were "allowed to see their baby" at the center. Brooke still has the ultrasound pictures they received that day.

Becoming a new father was daunting for Brooke's husband, but center staff encouraged him by pointing out the "perks" of being a dad. They also explained the different stages of Brooke's pregnancy. Brooke notes that "everything that I was in, he was always offered to be a part of." Recognizing Brooke's husband's desire to

become better informed, staff taught him how to burp a baby and how to change a baby using a doll. They provided him with a series of pamphlets entitled "Beginning of Fatherhood" and encouraged him to join Brooke in reading the "Pregnancy week by week" book they had given the couple. After so much preparation, Brooke remarks of her husband, "I think that he is a pro."

Brooke and her husband were nervous about parenting two children so close together in age. Christy, a client coach at the time, offered encouragement. Of Christy's support, Brooke says, "She got me in a positive state where I was confident enough to take care of both of my children." In October 2017, Brooke had a little girl, Kathy. Not yet two, Brooke's son Keetan "is the best big brother ever. It is all because Christy taught me how to make him a part of this new baby."

The center offered so much more than information about pregnancy and motherhood to Brooke; staff offered genuine friendship. "When I told them that I got a job or was expecting another baby, they were excited." Brooke says matter-of-factly:

> There should be more of them across the country. There are so many people struggling and the center is the one place that is the 'go to' to guarantee success as a parent. They help with referrals, vouchers. I would like pregnancy centers to be all over the place. It is not just for the parents, but the kids. The people who donate their time and money help not just women but their children. The people at the

center are the sweetest, most caring, full-of-energy people.

Brooke credits the Hope Pregnancy Center in Pontiac, Illinois, for helping her to overcome her traumatic childhood and to grow as a strong woman, wife, and mother.

CRISTINA HURTADO was a teenager who could not afford a pregnancy test when she found the Care Pregnancy Resource Center in Visalia, California, nine years ago. She was relieved to find a place that offered free and confidential tests as she was afraid to take one by herself. As she waited, a staff member at the center sat with Cristina, and the two discussed what Cristina would do if the test were positive. Cristina was nervous, but having someone by her side helped. The test was negative, but Cristina continued to visit the center for its other programs.

Years later, when Cristina discovered that she was pregnant, she was not as scared. She knew that the center would be there for her and that she could "take advantage of their support." Cristina took parenting classes at the center and received individual counseling on preparing for motherhood with Vera, one of the center's staff. "Vera was always friendly to me. I knew that she would not judge me and I felt comfortable with her. The pregnancy and parenting classes helped answer all of my questions."

When it was time for her baby to be born, Cristina asked Vera to accompany her during labor. It was a natural thing to have Vera there along with Cristina's godmother and the baby's father. Vera was family. The center also made things easier by providing

Cristina with a diaper bag, diapers, wipes, shampoo, formula, and strollers. "Pretty much everything that I did not have access to I got from them." Staff at the center and even other clients provided "so much information" to Cristina about her pregnancy and her baby's development. Cristina credits these connections with helping her "to be a good mother."

Cristina recently saw a friend at the center who was pregnant and considering having an abortion. "I knew she was in great hands." After learning about the resources available throughout her pregnancy and beyond, Cristina's friend decided against the abortion. According to Cristina, "the more [my friend] learned and became educated, the more she was committed to having her child."

Cristina credits the center with having an incredibly positive presence in her life. "I think that if I would not have found the center, my life would have been a disaster. I came to the center looking for a pregnancy test and I found so much more. If you look at who I was when I first went to the center and now, I am a totally different person."

EBONY HARRIS was a bright and vivacious 26-year-old when she suddenly faced the most troubling and confusing news of her life: She was unexpectedly pregnant. Gripped by anxiety and uncertainty, Ebony resolved that her own future well-being mandated quick and decisive action. She would have an abortion; nobody had to know. Ebony scheduled the abortion at a clinic but left with an uneasy feeling. The clinic's staff was cold and harsh, offering no counsel and no information about the procedure apart from its price – just pressure. One staff member told Ebony, "The cost

of raising the child will be far more expensive than the cost of an abortion." Ebony did not meet with a doctor or nurse and was not informed of any other option.

After hearing about the Greater Baltimore Center for Pregnancy Concerns through the radio, Ebony met with Linda, one of its coordinators. Ebony was surprised when the first thing Linda did was hug her. This was the first time anyone had shown Ebony any compassion or support while she faced this situation. Linda advised Ebony that the center did not perform or refer for abortions, but offered many other services, all free of charge, including sonograms, pregnancy tests, prenatal classes, post-natal classes, and material support such as diapers, formula, clothes, and toys. According to Ebony, "Linda was warm, gentle, and supportive." Ebony was also surprised to see jars of baby food, diapers, and baby formula sitting on a table. Ebony requested a sonogram, saw and heard her child's heartbeat for the first time, and received information about the development of her child. Ebony referred to this meeting as:

> . . . educational and very informative, something the clinic did not do. I am not pro-life and I am not pro-choice. I am pro-information. People should be properly educated before making a decision. The abortion clinic did not offer any education, counseling, or support. The clinic had a cold attitude. It felt like someone was trying to make a sale.

After Ebony left the center, she still leaned toward having an abortion. Linda unequivocally stated that "either way, the center will be there for her." After much deliberation, Ebony decided to give birth to her

son, and Linda kept her promise. Center staff visited Ebony at her house and brought baby clothes, diapers, wipes, food, toys, and even a stroller. The staff helped her beyond merely caring for her baby. When Ebony had to move to a new apartment, she had no curtains, and even if she could have afforded them, she "would not have been able to hang them herself." Staff took Ebony to the store, bought her the curtains, carried a ladder up three flights of steps, and installed them for her.

Ebony spoke in no uncertain terms: "[The center] has only been a help to me. I have taken and referred other people, and they have been helped too. [The center] has been a blessing." Today, Ebony flourishes not just as a mother, but as an author, speaker, workshop instructor, home educator, and publisher. She credits the center with giving her an authentic and informed choice during a desperate moment in her life and for helping her to grow into an accomplished and empowered woman.

JUDITH DOWNES is a 70-year-old woman and a committed pro-lifer. Since 1984, Judith has volunteered at Alternatives Pregnancy Center in Denver, Colorado. The center took on a more profound role in Judith's life five years ago when she began post-abortion counseling for an abortion she had undergone over 40 years earlier.

Judith was living in Virginia in the mid-1970s and thought her life was perfect: She had been married for six and a half years and had a beautiful two-and-a-half-year-old. She anxiously anticipated welcoming another child to the family. But one day, Judith's husband came home from a business trip and told her that he

did not want to be married anymore. Judith was eleven weeks pregnant. "As far as I knew at that time, there was no one I could consult with on how I should make a decision." Concerned about being a single mother with "no safety net" and "no one to turn to," Judith called her doctor's office. The office offered Judith no information about her options or the support available to her during her pregnancy or as a single mother. They simply referred Judith to a nearby abortion clinic. Judith felt confused and hopeless, and pressured by her husband, who brought her to the abortion clinic. Judith recounts that after her abortion she was left with "confusion" and "crippling shame and grief" that affected every area of her life.

Motivated by her own horrible experience with abortion, Judith got involved with Alternatives as a volunteer. But she didn't realize how much she still suffered from her own abortion. Despite having seen counselors and psychologists throughout her adult life, it was not until she met with her friend Maureen, executive director at Alternatives, that Judith saw the role her abortion had played in her life. "I still recall when Maureen said so simply, 'Judy, abortion is really hard on women.'"

At Maureen's suggestion, Judith set up an appointment to meet with Nicole, the post-abortion counselor at the center. At first, Judith was doubtful. "I was very put off because she was so young. I needed someone who was an expert." But as the two spoke, Judith found Nicole to be "the kindest, most patient person in my life." Judith and Nicole met individually for an hour every week for many months. Through counsel with Nicole, Judith finally began to "connect

the dots." "I suffered with abusive relationships as a form of punishing myself, thinking that it was something I deserved for having aborted that child."

Trained now as a post-abortion group leader, Judith has led groups of women of all ages, including specific groups of women between the ages of 55 and 65 who have procured abortions. During the 13-week long sessions, Judith has seen women "come in struggling, broken and confused and then move into freedom, acceptance and peace." Women are able to "share with each other, hear each other's stories, cry with each other and be there for each other." Judith feels very strongly that "I would not have been able to come to this level of healing without Alternatives. Alternatives is motivated toward good and healing, based in love and concern." Judith would love to "shout from the rooftops" that there are places for women who have chosen an abortion to go to in order to confront their grief and "come out of the darkness."

LAURA WU thought she had met her soul mate. While working as a full-time teacher and studying at night for a master's degree, Laura and her boyfriend spoke about marriage and the names of their future children. But when Laura told her boyfriend that she was pregnant, he was angry. "He told me, 'It is either me or this child. If you chose this child, you will do it alone. You won't have your parents to support you. What kind of mother would you be to bring a child into this world if his father did not want him?'" Laura initially agreed to abort their child, but quickly changed her mind. An aunt of Laura's volunteered at Boro Pregnancy Crisis Center in Queens, New York, and encouraged Laura to call for an appointment.

At Laura's initial appointment, she went through the center's "options counseling" where Laura received information about adoption, abortion education, and single parenthood. Laura chose to continue with her pregnancy.

Although staff at the center told her about assistance through WIC, Laura was deemed ineligible because of her teaching salary. The expense of welcoming her daughter, however, was significant. For each appointment Laura attended at the center, she was awarded "points" which she could trade in for material help such as a bassinet or a car seat. "For me that was hope. Just knowing that they were there if I needed them was a big, big help."

Laura's parents and faith community offered great support during the pregnancy. Another important presence in her life was Vince, a New York Police Department officer and Laura's high school sweetheart. After Laura's baby Hannah was born, Laura and Vince got married. Two years later, Vince formally adopted Hannah. The center continued to play a significant role in Laura's life, helping her grieve the end of her relationship with her daughter's father, the death of Laura's own father, and the challenges of marriage and parenting. "All of my healing, just feeling that I could do this is because of [the center]. Had they referred me to an abortion clinic, I don't know how I would have reacted. [They] gave me the hope I needed to know that I could do this alone. And they did not make me feel alone. Instead they gave me counsel for four years at no cost."

When her family moved from Queens to Long Island, Laura visited a local church that was running

a "diaper drive" for a local pregnancy resource center that was opening. Laura contacted the center's executive director to inquire about volunteering. Laura was "hired on the spot" to be a receptionist at Soundview Pregnancy Services and later was trained as a counselor.

"I was initially intimidated in sharing my story." Undaunted, she has been the first point of contact for women who call the center concerned about whether they can handle the responsibility of motherhood. "It helps to see someone who has had the same experience and connection there from the beginning. It is such a blessing to give back." Laura also gives talks to youth groups and local colleges about boundaries in dating and to "let them know that there is someplace other than Planned Parenthood that is there to help."

LINDSEY SAMELSON was pursuing a successful career in real estate and home construction when she discovered she was pregnant. A relationship with a tattoo-covered welder whom she met and supervised on worksites was certainly unexpected. Despite his checkered past, Lindsey was drawn to the love and affection he showed his nieces and nephews and dreamed of parenting with him.

Lindsey was excited at the pregnancy, but also scared. How was she was going to tell her parents? Before she did so, Lindsey wanted to confirm her pregnancy in a medical setting. Unsure about whether her health insurance would cover the cost of an early stage ultrasound, Lindsey googled "free ultrasounds." The search turned up a pregnancy resource center in town.

The baby's father accompanied Lindsey to the appointment, where he was made to feel welcome. "It didn't have that sterile hospital feel. It was warm, inviting." A receptionist handed Lindsey an intake form with questions about the pregnancy. Filling out the questionnaire, Lindsey "never felt pressured. It never felt like they were invading." After Lindsey's pregnancy was confirmed, she was given a "goodie bag" with prenatal vitamins and a folder of information about pregnancy.

Lindsey had a baby girl. The couple eventually wed and shortly thereafter learned that they were expecting another child. The joy of a second baby was magnified by the couple's reconciliation with Lindsey's parents. They are now expecting their third.

For her second pregnancy, Lindsey chose a midwife who performed routine ultrasound exams only after 12 weeks of gestation. Anxious to know that her baby was developing well, Lindsey again set up an appointment for a free ultrasound. She and her husband went together to the Colorado Springs Pregnancy Center for the exam.

Staff stayed in touch and called her shortly after she gave birth both times to make sure that Lindsey had all she needed. Lindsey observes, "The centers are trying to create a space that is joyful for what is a crisis for so many people. It did not feel sterile. The people there were happy to see my baby. They did not treat me like I was a burden. They truly and deeply cared that we were there."

Lindsey's career in real estate and construction is flourishing. She is currently seeking out opportunities

to volunteer in pro-life causes, citing her positive experience with the pregnancy centers as an impetus.

MELISSA LEACH walked into Hope Pregnancy Center in Pontiac, Illinois, to confirm a suspected pregnancy. Sure enough, Melissa was pregnant. The real surprise was that she was nineteen weeks along. The advanced stage of the pregnancy, plus the fact that Melissa was an older mother at thirty-five, made her visit to the center critically timely. While Melissa's doctor performed a range of tests to confirm her pregnancy was advancing well, the center offered a network of support.

Melissa never considered terminating her pregnancy, but did have serious financial concerns. Jayna Vromen, program coordinator at the center, offered suggestions and resources to address these worries during Melissa's very first visit to the center. Melissa also began parenting classes where she discussed parenting her new baby as well as her two older, out-of-state children.

Only nine weeks after her first visit to the center, Melissa went into labor, just short of twenty-nine weeks pregnant. She gave birth by an emergency c-section. Her son was immediately transferred to a nearby hospital's neonatal intensive care unit, while Melissa tried to recover quickly. Melissa returned to the center a few days after her son's birth for a previously scheduled appointment with the news of her son's premature birth. Jayna and Sarah Brummitt, the center's director, immediately went to work. They loaded a diaper bag with preemie clothes, diapers, wipes, and sensitive-skin laundry detergent. Sarah filled Mellissa's gas tank so that Mellissa would not

have to worry about the cost of driving back and forth to the hospital to see her son.

Since his birth, Melissa's son has undergone several surgeries and is steadily growing. His doctors believe that he will soon be ready to go home. Melissa has already set up a "pack and play" crib she got using her credits from "Earn while you Learn" classes from the Hope Program at the center. The only thing she lacks is a car seat. Although the center did not have one available when Melissa last stopped by, Sarah said "she would put the word out to get one." Melissa is confident that Sarah will follow through; "I believe that she will because she has always kept her word."

More valuable than the classes and material items Melissa has received from the center is the friendship and family she has found. "It never felt like they were put out. I don't feel like they gave me special treatment. I feel like every woman who walks through those doors gets the same treatment – open, loving, very warm – especially if you don't have any other supports. You just have to be willing to walk through those doors."

NICOLE HOWARD's pregnancy was a crisis. She had four teenage children and was uninsured. Nicole and her husband were not seeking an abortion, but faced high medical costs if Nicole proceeded with the pregnancy and even greater expenses after the baby's birth. Terrified at that prospect, Nicole recalled, "Everyone knows where to get an abortion. Not everyone knows where to get help with being a mother." A friend referred her to the Greater Baltimore Center for Pregnancy Concerns, where

Nicole participated in "Earn as you Learn" classes every other Saturday. Nicole asserted:

> I could not have done it without them. It had been such a long time since I had a newborn. I could go and earn points by taking classes to get wipes, diapers, clothing, lotions . . . I really depended on those items. I could get them every other Saturday. Otherwise, the center does give them away for free every quarter, but I could not wait that long.

Some of the other classes Nicole attended were "Common Care for Infants," "Emotionally Safe Houses for Children," "Advanced Care for Toddlers," and "Safe Sleeping." Nicole still attends classes every other Saturday and has referred others who have also benefitted from them.

Nicole recalled one winter when she ran out of diapers and a snowstorm trapped her at home. She called the center, and staff arranged for diapers to be delivered to her. She states:

> The center is not only instrumental in giving items to support kids, but it supports comradeship. It is a family. Even when women come and go, the center still reaches out to them. We have parties at the center, bring food, bring our children. We get to see each other's children grow up. It also gives our children the opportunity to participate in community service. They can volunteer and give back.

SHALANE TEHOTU and her husband discovered during their second ultrasound that they were expecting a boy. But their excitement was

overshadowed by the worried look on the doctor's face. He said he had found some abnormalities and ordered further studies. Their boy was later diagnosed with Trisomy 13.[5] Doctors encouraged Shalane and her husband to abort.

The couple contacted A Place for Women in Waipio on the island of Oahu, Hawaii. They immediately found counsel and support for their decision to carry their child to term. Dr. Vivien, the center's doctor, helped them to understand their son's medical report, comforted them with her counsel, and took the time to answer all of their questions. The center also introduced them to a family that had gone through the same thing with their baby girl.

Shalane's son, Giovanni, lived for three hours. He was "surrounded by family and friends celebrating him with pictures, hugs, gifts, and love." Giovanni's parents have no regrets that his life was so short. "We have only special memories we will hold in our hearts until we see him again. We went into A Place for Women broken and scared, but we left with life and courage and we are forever thankful."

SHANELLE FELDER knew how her baby's father "would react and how he would want to handle it" before she even told him the news. He told Shanelle,

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[5] Trisomy 13, also called Patau syndrome, is "a chromosomal condition associated with severe intellectual disability and physical abnormalities in many parts of the body . . . Due to the presence of several life-threatening medical problems, many infants with Trisomy 13 die within their first days or weeks of life. Only five percent to ten percent of children with this condition live past their first year." https://ghr.nlm.nih.gov/condition/trisomy-13

"We are going to take the abortion pill." Shanelle did not even know that there was such a thing as a medical abortion.[6] Despite Shanelle's very strong Christian beliefs and opposition to abortion, she felt pressured to go along. Shanelle thought she had no other option.

The baby's father brought Shanelle to a Planned Parenthood clinic in Denver to get the abortion pill. For Shanelle, that day was "really scary and hurtful." After they performed an ultrasound to determine the gestational age, Shanelle brought the pictures to the baby's father in the waiting room. She hoped that he would be moved to reconsider. He was not. Planned Parenthood staff led Shanelle to another consultation room. Shanelle tried to tell the staff person that she was having doubts, "but things just kept progressing." She remembers "how quick it went with the doctor" when he handed her the pills. He ordered her to take them in front of him. "I had no chance to plead with him." Feeling pressured, Shanelle "was looking for any way out, but [was] unable to stand up for myself." She took the pills and "felt doomed."

In a recovery room, Shanelle was given more pills to take the next day. As she left the Planned Parenthood clinic, Shanelle remembers "feeling super uncomfortable" and "hard on myself" for letting someone else dictate her actions. As Shanelle struggled later that day with what to do next, a friend

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[6] The FDA currently approves a regimen for chemical abortions through 70 days gestation. The regimen involves the pregnant woman taking 200 mg of mifeprex and 800 mcg of misoprostol 24 to 48 hours later. *See* https://www.fda.gov/Drugs/DrugSafety/ucm 111323.htm

called her out of the blue. Shanelle confided in her friend what had happened and her overwhelming feeling of helplessness and despair. Her friend sent Shanelle a link that identified doctors who could reverse the effects of the abortion pill.[7] Shanelle was astounded. The staff at Planned Parenthood had presented the abortion pill as something permanent.

Inspired by this "second chance," Shanelle called a nurse in the area who set up an appointment with a local doctor later that evening. The doctor gave Shanelle progesterone injections as part of the reversal procedure.[8] When Shanelle returned for a second injection, she brought the bag of pills given to her in the Planned Parenthood recovery room. This doctor then referred Shanelle to Alternatives Pregnancy Center in Denver, Colorado, to schedule an ultrasound. Shanelle anxiously called the center to set up the ultrasound appointment. "I had to see if my baby was still alive." She expected to be called in just for an ultrasound exam, but received "much more than I could ever ask for." As she waited for her ultrasound, Shanelle was able to talk and pray with center staff.

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[7] A 24-hour nurse hotline for referrals to physicians specializing in abortion pill reversal is promoted on www.abortionpillreversal.com

[8] The American Congress of Obstetricians and Gynecologists has no guidelines for the use of progesterone injections to reverse the effects of mifeprex, citing the absence of a "body of scientific evidence," *see* https://www.acog.org/~/media/departments/state%20legislative%20activities/2015AZFactSheetMedicationAbortionReversalfinal.pdf. But a growing number of doctors have adopted a medical protocol for reversal established by Abortion Pill Reversal (APR). *See e.g.*, https://lozierinstitute.org/a-second-chance-at-life-reversing-the-abortion-pill/

Shanelle described Whitney, the first Alternatives staff member she met:

> . . . so warm, loving and embracing and was there for me emotionally. She cared enough to cry for me and with me. She was there and talked me through the details of what to do next. She spoke to me about how I felt about the pregnancy. I was on the fence about things. How would I tell [the baby's father] about reversing things? I know we prayed. She asked if I wanted her to be there with me during the ultrasound. I felt that she was my only friend at the time.

Upon seeing her daughter's heartbeat on the ultrasound screen, Shanelle recalls the sensation of "knowing what love is," and the "euphoria of knowing that my child is still alive." Although she was still anxious, it was "amazing to see this baby that still survived."

In subsequent visits to the center, Whitney helped Shanelle garner the courage to tell her parents that she was pregnant. After sharing the news with them, Shanelle "knew that it was ok because it was less of a secret." Shanelle eventually moved from Denver to live with her parents in Florida. Despite having the support of her parents, Shanelle was depressed that her pregnancy was not under more joyful circumstances. Consolation came in the mail.

> Because I was not able to have a baby shower in Denver, [the center] sent me a box with a 'baby shower' inside. I was really depressed, but it touched me. The box had toys, a book, and a

> very nice quilt that we still have to this day – the most thoughtful thing ever – cute burp cloths, and diaper cream. I was overjoyed to get a box.

"My case is a little different in that I did not want an abortion. I was running from an abortion, trying to get away from it." The support Shanelle found at the center gave her the confidence to see that "all of these fears looming over me were all lies."

Two years after her daughter Lillian was born, Shanelle returned the Denver area. One of their first outings was to visit the center.

STEPHANIE KAMANAWA remembers "feeling so offended" as the pastor spoke about abortion healing while she sat as a fairly new member of his church in Oahu, Hawaii. "How dare he talk about that in church." When the sermon was over, however, she walked right up to the pastor's wife and confessed: "I have had two abortions."

Stephanie's first abortion occurred in 1996 when she was only twenty-one years old, living in Maryland. Stephanie was in an abusive marriage. "There was no way that I could support a baby in an abusive marriage. I did not know that keeping my baby at the time was an option. I was trying to solve a problem, but it made more problems. The depth of pain was so deep that I did not have hope. I had no support." In 2001, only five years later, Stephanie again turned to abortion as she discovered she was expecting a baby from a short-lived relationship.

Although now a mother to a beautiful son and married to a loving man, Stephanie continued to feel guilt and emptiness. The pastor's wife referred Stephanie to A Place for Women in Waipio on the island of Oahu, Hawaii. When Stephanie walked into the center, she was taken aback. "It rocked my world that there were people who would not judge me." "Confidential, safe, beautiful, and friendly," the center offered Stephanie, through post-abortion healing sessions, a chance to start anew. "I love to sing and worship God through song. A Place for Women gave me a new voice. After the abortions, I lacked hope to sing."

Today, Stephanie has rediscovered her singing voice and speaks with other women about her abortion "freely, with no shame, no guilt, and no heaviness hanging over me." In the center, Stephanie found incredible support and was able to confront her prior decisions.

> My own personal experience is that they are the real deal. Every step along the way. The women who work there have strong bonds and run with integrity, honesty, love, nurturing, and care. They make sure that there is a comfortable setting. They are confidential and upfront with women who are there. They feel so strongly about telling the truth. It is such a raw and real experience for me. People can always come against them and lie, but I want people to know that the center wants to help, not to hurt.

Stephanie has also connected with her community. Initially, she volunteered at the center, cleaning it once a week. She now works as a youth group director in

her church. "As director of our youth group, I adopted fifty kids to replace the two that I lost."

SUMMARY OF ARGUMENT

Americans respond generously and without fanfare to their neighbors' sudden needs and crises. One crisis that exists each day across the country is the challenge of an unexpected pregnancy. The solution most commonly offered is abortion.[9] While abortion is sold as a quick and easy fix, for many women, it is not the solution they seek. What they want instead is to welcome their child into the world.

Responding to the desire of these women, countless volunteers come to the rescue. Staffed predominantly by women, over two thousand pregnancy resource centers and pregnancy medical clinics across the United States offer alternatives to abortion and post-abortion counseling.[10] In the state of California alone, there are an estimated two hundred such centers and clinics.[11] These centers and clinics offer free services such as pregnancy testing, classes in prenatal development, assistance in enrolling in WIC, Medicaid for pregnancy and delivery care, parenting and spousal

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[9] 652,639 legal, induced abortions were reported in 2014 to the Center for Disease Control from its 49 reporting areas. The abortion rate for that year was 12.1 abortions per 1,000 women aged 15–44 years. *See* https://www.cdc.gov/reproductivehealth/data_stats/abortion.htm.

[10] *See* http://studentsforlife.org/prolifefacts/cpcs/.

[11] *Nifla v. Harris*, No. 16-55249 (9th Cir. Oct. 14, 2016), Slip op. at 7 (citing Assem. Comm. on Health, Analysis of Assembly Bill No. 775 at 3).

classes, and training in basic skills in addition to free essentials like diapers, baby food, formula, and strollers. Radiologists provide ultrasounds, free of cost. Women are offered an authentic choice and the chance to flourish and thrive as mothers, despite their circumstances.

Rather than supporting and promoting these "neighbor-helping-neighbor" efforts, the state of California has enacted a law that purposefully targets pregnancy centers with burdensome requirements that go directly against their mission. California's Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act (the FACT Act)[12] requires a pregnancy medical clinic qualifying as a "licensed covered facility" to hand out a notice that immediate and free or low-cost abortions are available through public programs. Id. § 123472(a)(1). The FACT Act also obliges pregnancy resource centers not meeting this definition to notify women that they are not "licensed as a medical facility by the State of California" and that they have "no licensed medical provider who provides or directly supervises the provision of services." Id. § 123472(b). Refusal to comply with these requirements subjects centers and clinics to civil penalties. Id. § 123473.

California's FACT Act is just one example of a troubling trend of states and cities attacking pregnancy resource centers and medical clinics. The state of Hawaii, for example, recently passed a law requiring medical and nonmedical pregnancy centers to post a disclaimer that Hawaii has free or low-cost "family

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[12] *See* California Assembly Bill No. 775

planning" programs, including abortion.[13] Under this new law, centers in Hawaii must, at a minimum, notify women who enter their centers of these programs and direct them to the state's website for more information. In Illinois, doctors and nurses working at pregnancy centers are required to promote abortion to their pregnant patients.[14] And the city of Baltimore adopted an ordinance that requires pregnancy centers to post signs stating they do not perform abortions.[15] All of these laws are or have been subject to scrutiny in federal courts.[16]

Amici 13 women have voluntarily come forward to publicly share a delicate and private part of their lives regarding the real and lasting support that pregnancy resource centers and medical clinics throughout the country offer women and their families. *Amici* feel as though these centers and clinics are important places that offer women the chance to make an informed choice and improve the circumstances of their lives and the lives of their children.

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[13] *See* Hawaii Senate Bill 501 of the 2017 Hawaii legislative session.

[14] *See* Illinois Health Care Right of Conscience Act, 745 ILCS 70.

[15] *See* Baltimore City Council Ordinance 09-252.

[16] The Fourth Circuit recently struck down the Baltimore ordinance as violating the First Amendment. *See Greater Baltimore Center for Pregnancy Concerns, Inc. v. Mayor and City Council of Baltimore*, No. 16-2325 (4th Cir. Jan. 5, 2018).

ARGUMENT

I. PREGNANCY RESOURCE CENTERS AND MEDICAL CLINICS ARE WARM AND LOVING COMMUNITIES OFFERING VALUABLE AND INFORMATIVE CARE

Amici wish to come forward in response to allegations by the state of California that pregnancy resource centers and medical clinics employ "intentionally deceptive advertising and counseling practices [that] often confuse, misinform, and even intimidate women from making fully-informed, time-sensitive decisions about critical health care."[17] Contrary to the state's unsupported allegations, *amici* experienced valuable and informative care.

Amicus Angela Jozwicki abandoned a life of dependence on drugs after she chose to become a mother. The constant presence of staff at a center in Centereach, New York, strengthens Angela's resolve in ways that she was not able to do on her own.

Amicus Brooke North and her husband were able to see their child for the first time thanks to an ultrasound administered at a center in Illinois. Both young parents received tools to grow as a couple during Brooke's pregnancy and to prepare themselves for welcoming another child into their home.

Amicus Cristina Hurtado received support and counsel at a pregnancy resource center in California that included "so much information" that she was able

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[17] *See* Assem. Comm. on Health, Analysis of Assembly Bill No. 775 at 3.

to "answer all of her questions." She would be "speechless" in response to any claim that centers like the one she attends are "deceptive" and has "never heard anyone say anything negative" about their experiences there.

Amicus Ebony Harris found the center she encountered in Baltimore, Maryland, to be "educational and very informative." In contrast, the abortion clinic she visited first "did not offer any education, counseling, or support." Ebony never felt misinformed or intimidated as the center was clear with Ebony that it did not perform or refer for abortions, though it offered many other services. Even when Ebony was strongly considering an abortion, the center coordinator unequivocally stated that the center would be there for her regardless of her decision.

Amicus Judith Downes, through post-abortion counseling, "connected the dots" between her abortion forty years prior to her tendency to seek abusive relationships. No longer punishing herself, Judith confidently helps other older women who struggle with similar difficulties years after having an abortion.

Amicus Laura Wu participated in "options counseling" at a center in Queens, New York, where she was informed about the choices available to pregnant women. Unlike the pressure to abort from her baby's father, Laura's decision to continue her pregnancy after visiting the center was fully informed and freely made.

Amicus Lindsey Samelson confirmed two pregnancies with free ultrasounds offered at centers in Colorado Springs, Colorado. Although she was

anxious, the centers gave her a strong start to her pregnancies and the confidence to balance motherhood and her professional goals.

Amicus Melissa Leach was able to confirm her advanced pregnancy and receive all of the support she needed in facing the challenges of having a premature baby. When asked to respond to the charge that pregnancy resource centers are deceptive, Melissa flatly retorted that such a claim is "bogus."

Amicus Nicole Howard similarly found her classes at the center in Baltimore extremely informative. Nicole asserts of her pregnancy and motherhood that she "could not have done it without them."

Amicus Shalane Tehotu and her husband were full of anxiety and questions about trisomy 13, the malady afflicting their developing child. When doctors pressured them to abort, the pregnancy resource center in Oahu patiently answered all their questions, provided emotional support, and introduced the couple to another family who had first-hand experience with a pregnancy like theirs.

Amicus Shanelle Felder thought that a chemical abortion could not be reversed once initiated. The Planned Parenthood that gave her the abortion pills failed to provide her with the complete medical picture. At a center in Denver, Shanelle's ultrasound confirmed the success of having progesterone injections to reverse the chemical abortion shortly after taking mifeprex at the Planned Parenthood clinic. Shanelle later benefitted from the emotional support she received at the center as staff helped her to abandon her fears and courageously assume maternity.

Because of her abortions, *amicus* Stephanie Kamanawa felt "disconnected." Through the post-abortion classes offered at the pregnancy resource center in Oahu, Hawaii, Stephanie learned how "to nurture" and "become a better wife and mother" as well as to reconnect with her artistic passion as a singer.

II. PREGNANCY RESOURCE CENTERS AND MEDICAL CLINICS PROVIDE INVALUABLE PERSONAL AND COMMUNITY SERVICES BEYOND PREGNANCY COUNSELING

Pregnancy resource centers and medical clinics in California and throughout the country provide invaluable supports and services beyond pregnancy counseling to women. These life-affirming supports enable women to recognize their worth and dignity as well as empower them to make significant contributions to their communities.

Amicus Angela Jozwicki was able to reestablish a relationship and home with her mother after both women received counseling at the center in Centereach, New York. They both now provide love and support for Angela's child, Cameryn.

Amicus Brenda Coe and her husband welcomed a child into their home after his birth mother received adoption counseling at a pregnancy resource center in California. The birth mother of their child maintains contact with her son. Her and the Coe family's special connection is testament to the generosity of both biological and adoptive parents for the well being of adopted children.

Amicus Brooke North received needed items from a center in Illinois such as diapers and wipes for her newborns using her "mommy bucks." The center even found an ExerSaucer jumper for her baby. In addition to these tangible supports, center staff gave friendship and genuine support. Brooke is so grateful, she has encouraged other friends to seek the center's help and the staff's kindness.

Amicus Ebony Harris describes how volunteers from the center in Baltimore brought baby clothes, diapers, wipes, food, toys, and a stroller to her house. Staff even bought her curtains and installed them for her when she was forced to move to a new apartment.

Amicus Judith Downes received post-abortion counseling and support at a center in the Denver area. Judith, along with other women, were able to meet in a group where they could "share," "hear," and "cry" with one another. Judith credits the center with helping her "get out of the darkness" she experienced as a result of having had an abortion decades ago.

For *amicus* Laura Wu, the decision to reject having an abortion was life-altering, "like a domino effect." Laura reconnected with a loving and supportive man who has since become her spouse and adopted her daughter. "If I had chosen an abortion, I know that I would have been a shell of a person today. I don't think I would ever been able to forgive myself had I given [my daughter's father] what he wanted."

Amicus Melissa Leach received parenting courses and counseling not just to help her with her developing baby, but also to help her better parent her older children. Center staff are providing emotional and

financial assistance to Melissa as she attends to the medical needs of her son who is hospitalized for being born prematurely.

Amicus Nicole Howard experienced material support from the center in Baltimore including mid-snowstorm diaper delivery, post-pregnancy education, and much needed "comradeship" in the early, hard days. She recalls attending parties at the center, bringing food, celebrating, and getting to see her fellow beneficiaries' children grow up. Nicole and her children now participate as volunteers with the center and find joy in serving their local community.

Amicus Shalane Tehotu and her husband celebrated the birth of their son and his short life alongside family and friends thanks to the encouragement they received at a center in Oahu, Hawaii.

Amicus Shanelle Felder not only received a "baby shower in the mail" from the staff at the center in Denver, but the encouragement she needed to reach out to others for help and support so that she "could stand up for myself." Whitney, a center staff member, continues to provide support and counsel to Shanelle as she co-parents with her daughter's father.

Filled with joy and hope, *amicus* Stephanie Kamanawa recovered her singing voice after benefitting from the supports she received at the center. Stronger and filled with a sense of purpose, Stephanie also now leads a youth group for children in her community.

III. PREGNANCY RESOURCE CENTERS AND MEDICAL CLINICS SERVE ALL PEOPLE, FREE OF CHARGE

Amici 13 women have each described their experiences with centers as "free of charge." Many of the women who come to centers are without sufficient resources to get access to basic prenatal care and infant necessities. These centers and clinics offer a loving and generous environment that not only helps to meet the material needs of these women, but also their emotional and spiritual need to feel connected to a community and part of a family.

CONCLUSION

This Court can keep the free and life-enhancing resources of pregnancy resource centers and medical clinics available to women and their families in the state of California and across the country. These centers are an essential resource for women seeking basic information and authentic choice in their moments of need. For this reason, and for those expressed in Petitioners' Brief on the Merits, *amici* request this Court to reverse the Ninth Circuit's refusal to enjoin California's FACT Act.

Respectfully Submitted,

Andrea Picciotti-Bayer
Counsel of Record
The Catholic Association Foundation
3220 N Street NW, Suite 126
Washington, DC 20007
(571) 201-6564
amariepicciotti@gmail.com
Counsel for Amici Curiae

No. 16-1140

IN THE

Supreme Court of the United States

NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES, D/B/A NIFLA, ET AL.,

Petitioners,

v.

XAVIER BECERRA, ATTORNEY GENERAL, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF TWENTY-THREE ILLINOIS PREGNANCY CARE CENTERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

THOMAS BREJCHA JR.
THOMAS G. OLP
THOMAS MORE SOCIETY
19 South LaSalle St.
Suite 603
Chicago, IL 60603
(312) 782-1680

NOEL W. STERETT
Counsel of Record
WHITMAN H. BRISKY
MAUCK & BAKER, LLC
1 N. LaSalle, Suite 600
Chicago, IL 60602
(312) 726-1243
nsterett@mauckbaker.com

Counsel for *Amici Curiae*

QUESTION PRESENTED

Whether compelling nonprofit, pro-life pregnancy centers to disseminate state prescribed information concerning abortion—a procedure they oppose as a matter of conscience and do not offer—violates the Free Speech Clause of the First Amendment.

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A. Pregnancy centers like the Petitioners and *amici* were organized not only as a charitable effort to meet the needs of pregnant women but also as an effort to promote a clearly articulable and exclusively pro-life message. 15

B. Rather than respect rights of conscience and allow room for opposing viewpoints on abortion, California, like Illinois, is targeting centers like Petitioners and *amici* because of their conscientious objections to abortion 17

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INTEREST OF *AMICI CURIAE*[1]

The twenty three *amici curiae* joining in this brief are all nonprofit, pro-life pregnancy centers in Illinois. Like the Petitioners, these centers have been targeted by a viewpoint discriminatory state law designed to force them to promote abortion—a procedure they oppose as a matter of conscience and do not offer. Unlike the Petitioners, however, all health care personnel and health care facilities in Illinois (including the *amici*) are currently protected by an unreported preliminary injunction order issued by the United States District Court for the Northern District of Illinois in *National Institute of Family and Life Advocates ("NIFLA") v. Rauner*, No. 16-C-50310 (N.D. Ill. July 19, 2017).

Because the Illinois district court's injunction is based on this Court's well-established Free Speech principles, principles which were largely disregarded by the Ninth Circuit in Petitioner's case, the *amici* have a significant interest in this Court's reaffirmation of those principles and reversal of the Ninth Circuit's decision.

The names, charitable purposes and services of the twenty three *amici* are set forth below (an asterisk marks centers which are NIFLA members):

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[1] Rule 37 statement: All parties received notice of *amici*'s intent to file this brief and consented. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici*, their counsel, and the One Nation Under God Foundation (an Illinois nonprofit entity not associated with either party) funded its preparation or submission.

Abigail Women's Center* has, since 1996, served approximately 350-400 women a year in the Mendota, Illinois area. The center's mission is to empower individuals to make healthy choices related to sexuality and childbearing, consistent with the sanctity of human life. The center provides free and confidential services, education counsel, support, and encouragement from a Biblical point of view. Services offered include the provision of free pregnancy tests, limited obstetric ultrasounds, Earn While You Learn ("EWYL") classes, pre- and post-abortion counseling, adoption referrals, and material goods such as diapers, wipes, baby food, formula, and clothing for infants, toddlers, and mothers. https://www.abigailwomensclinic.com/

CareNet Pregnancy Services of DuPage County, Inc.* has been in operation since 1981 and serves about 1,000 women a year. The center's mission is to honor and glorify Jesus Christ, the author and creator of life, by bringing His love and compassion to anyone impacted by an unplanned pregnancy. CareNet seeks to prevent unplanned pregnancies and to provide emotional support, spiritual counsel and practical help to anyone dealing with the effects of an unplanned pregnancy. CareNet provides pregnancy tests, ultrasounds, pregnancy information and options consultations, community resource referrals, parenting assistance, spiritual counsel, and abortion recovery services—all services are provided free of charge.
http://carenetdupage.com/

Crisis Pregnancy Center of Eastern Illinois*, operating as **Choices Pregnancy & Health** with locations in Charleston, Mattoon, Paris and Casey, Illinois, has operated since 1985 and serves approximately 350-400 women a year. It is a Christ-centered ministry that acknowledges the absolute worth of all human life and exists to provide accurate information, compassionate care, and practical assistance to those affected by a possible unplanned pregnancy and related issues. The free services offered include pregnancy testing, pregnancy verification for WIC and Medicaid, limited obstetric ultrasounds, pregnancy and fetal development information, education on abortion procedures, side effects and risks. Services also include providing a list of local physicians for prenatal care and other community services, peer-counseling and emotional support, childbirth and prenatal education, parenting and life skills instruction, material items for mother and baby, adoption and foster care information, and post-abortion support counseling for women and couples.
http://choices4pregnancy.com/

Fox Valley Pregnancy Center, Inc.*, operating as **Corbella Clinic** in South Elgin, Illinois, was founded in 1988 and serves over 2,000 men, women and children a year. Its mission is to love the next generation into life by offering positive, hopeful, life-affirming medical services, education and supportive relationships to women and couples experiencing an unexpected pregnancy. The clinic's free services include pregnancy testing, pregnancy verification, ultrasounds, STI/STD testing and treatment, medical and options counseling, prenatal and parenting

education/mentoring, sexual health education, material assistance to expectant mothers, adoption information, and post-abortion healing support. https://www.corbellaclinic.org/

Family Life Center* has been operating in Effingham, Illinois since 1994 and is committed to respecting every woman's privacy, rights, and worth as a person. The center is committed to providing women with the best evidence-based educational material available on pregnancy, prenatal development, the methods and risks of abortion, parenting, relationships, and other family-related topics. The center offers free pregnancy tests, limited obstetric ultrasounds, parenting skills classes, adoption information and referrals, and post-abortion support. The center also provides practical assistance, referrals for medical and social services, baby furniture, and maternity and baby clothing. http://www.familylifepcc.org/how-we-can-help

First Step Women's Center*, formerly known as Lifetime Pregnancy Help Center, has been operating in Springfield, Illinois for nine years and serves approximately 200 women a year. The center's mission is to be the first step for women facing an unplanned pregnancy, to transform their fear into confidence, and to empower them to make healthy life-affirming decisions. The medical services they provide include pregnancy testing, limited ultrasounds, STD testing and treatment, options consultation, and community referrals. http://firststepwomenscenter.org/

The Freeport Pregnancy Center has been operating since 1991 in Freeport, Illinois and serves about 270 women year. It exists to share the good news of Jesus Christ, to provide practical and emotional assistance to teens, women, and men involved in an unplanned or crisis pregnancy. Some of the services offered at the center include limited obstetric ultrasounds, EWYL, pregnancy, parenting, and life skills classes, car seat programs, and bible studies.
http://freeportpregnancycenter.org/

Gianna's House – Pregnancy Resource Center, Inc.* was established in 2005 as a non-medical, pregnancy resource center in Rock Falls, Illinois that provides emotional, spiritual, and practical assistance to pregnant women in making pro-life choices. Gianna's House also freely provides expectant and parenting mothers with diapers, wipes, infant and toddler clothing, and other baby items essential to caring for a child.

Hope Life Center*, also operating as **White Oak Women's Center**, is located in Sterling, Illinois and has provided nonprofit pregnancy support services since 1986. In 2016, it served 167 women. Its mission is to erase abortion from Illinois through effectively serving pregnant and at risk women by transforming their fear of the unknown into confidence in becoming mothers as they honor Jesus Christ. Hope Life Center offers pregnancy options consultations which include pregnancy testing, limited obstetric ultrasound imaging, and STI testing and treatment.
www.whiteoakwomenscenter.com
www.hlcil.org

Hope Pregnancy Center of Livingston County* of Pontiac, Illinois has been operating for more than thirty-one years and served about seventy women in 2017. Its mission is to serve women as ministers of Jesus Christ and advocates for the unborn. The center endeavors to meet the physical and spiritual needs of area families facing challenging life issues and to empower them to choose life by offering them alternatives to abortion. The center freely provides a mentoring program, options counseling, post-abortion support, pregnancy testing, and STD/STI information.
www.pontiachopepc.com

Life Network of Southern Illinois* in Waterloo, Illinois was founded in 1993 with a Christ-centered mission that is committed to upholding the sanctity of human life. The Life Network serves approximately 800-900 women a year. The Life Network's purpose is to provide women with accurate and complete information about prenatal development and abortion. The Life Network provides all its services for free with the goal of helping anyone that finds themselves in difficult life circumstances related to pregnancy. The Life Network also provides women the tools and resources needed to maintain a healthy pregnancy and to provide a safe and healthy environment as their children grow. The medical services it provides include pregnancy testing, limited first trimester ultrasounds, limited STD testing and treatment, options counseling, adoption education, EWYL, childbirth, newborn care and breastfeeding classes, baby resources, a fathers mentoring program, and an abortion recovery program. All medical services are

provided for free under the direction of the Network's licensed medical director and are administered by trained registered nurses.
https://www.mylifenet.org/

Living Alternatives - Pregnancy Resource Center, Inc.*, also operating as **Pregnancy Resource Center** and **Merci's Refuge** has been operating across Central Illinois since 1985 and served about 1,800 women in 2017. Living Alternatives is committed to saving the lives of unborn children by promoting life-affirming options and providing practical assistance while sharing the gospel of Jesus Christ in word and deed, and to minister restoration to those who have been wounded by the trauma of abortion. The center provides free pregnancy testing, ultrasound services, options counseling, mentoring and parenting education programs, adoption support, post-abortion support, STI/STD information, STI testing for chlamydia and gonorrhea, abstinence education, a bereavement program for women facing adverse or fatal diagnoses for their baby, and a residential program (Merci's Refuge). All of the center's services are offered in the context of spiritual growth and development for those who are interested.
http://hopeforafuture.com/

New Life Pregnancy Center*, formerly operating as the **Decatur Crisis Pregnancy Center**, was founded in 1986 and serves about 400 women a year in the Decatur, Illinois area. The center is a Christ-centered ministry committed to upholding the sanctity of human life by demonstrating the love of Christ to those facing unplanned pregnancies

through the provision of spiritual, physical and emotional support and by proclaiming the Gospel. The center provides reliable pregnancy testing with immediate results, confidential pregnancy consultations for women and couples, information on pregnancy options (excluding abortion), referrals for medical services (excluding abortion services), prenatal care, childbirth classes, adoption and financial aid, and a 24 hour help-line. The medical services provided by the center include ultrasound imaging and pregnancy consultation with a qualified physician, STI testing and treatment. The center also offers professional counseling, adoption support, support for women who have miscarried, post abortion trauma peer counseling, parenting life skills and Bible discussion classes, mentoring for mothers and fathers, sexual risk avoidance programs for junior high and senior high school students, and an onsite boutique stocked with items for children newborn to six years old.
http://www.newlifepregnancycenter.com/

Options Now*, formerly Arms of Love Crisis Pregnancy Center and Arms of Love Pregnancy Resource Center, has been operating for twenty five years. The center served about 340 women in the last fiscal year. It provides free pregnancy tests, STD screenings, ultrasounds, pregnancy options education, Christ-centered spiritual care, post-abortion support, adoption referrals, and parenting resources referrals to women in the Godfrey, Illinois area.
http://www.optionsrightnow.com/

Pregnancy Aid-South Suburbs Inc. (PASS) Network for Life* was established in 1983 to assist and empower the greater Chicagoland South suburban communities to reduce or remove the desire for abortion by providing a network of valuable, practical, and confidential care based on four pillars of ministry: prevention (abstinence education); intervention (PASS pregnancy care center; education (abundant life/living well program); and restoration (offering hope and healing). The PASS pregnancy center has served approximately 1400 women and 136 men by providing pregnancy testing and verification, prenatal care referrals, peer advocacy, social service agency referrals, pregnancy and parenting education, baby supplies, discipleship programs, sexual risk avoidance education, and post abortion/trauma recovery groups.
https://passnetworkforlife.org/

Pregnancy Matters* of Carbondale, Illinois has been operating since 1980 and is dedicated to educating, empowering, and encouraging individuals to make healthy choices about their pregnancy and their relationships. It serves approximately 800 women per year. It offers free pregnancy tests, limited obstetric ultrasounds, pre-natal vitamins, pregnancy and parenting classes, and baby and maternity items.
https://pregnancymatters.org/

Pregnancy Resource Center, Inc. of Rushville, Illinois was founded in 1991 and seeks to affirm the value of life by offering men and women alternatives to abortion through compassionate Christ-centered care from the time women suspect pregnancy until

their child enters pre-school. The center strives to build families that can raise healthy children. In addition to free pregnancy tests and obstetrical ultrasounds, the center offers EWYL, parenting and fatherhood classes, as well as material assistance such as diapers, formula, clothing and bedding for families with immediate needs. The center offers an education program teaching parents about healthy pregnancy, prenatal development, and parenting skills. While participating in the program, mothers can earn baby and maternity supplies including diapers, car seats, cribs and much more. http://www.mypregnancyoptions.com/

Relevant Pregnancy Options Center, formerly known as **Crisis Pregnancy Care Center, Inc.** and **Pregnancy Care Center of Highland, Inc.**, has provided options, support, and education to individuals facing an unplanned pregnancy and other vital services since 1994. The center serves approximately 150 men and women a year in the Highland, Illinois area. Its mission is to equip individuals to make informed decisions through compassionate Christ-centered care. The mission is accomplished by giving clients complete, accurate information on all their options, providing a safe, non-judgmental environment, collaborating with local businesses and schools to meet needs (including but not limited to material goods and medical services like ultrasound imaging), and offering ongoing support and education after a decision has been made. The center's services include visits with a client advocate or peer educator.
http://www.relevantoptions.org/

Southside Pregnancy Center, Inc.* located in Oak Lawn, Illinois, has been operating since 1984 years and serves approximately 1,200 men and women a year. The center strengthens families by offering hope and help to those with unplanned pregnancies. The medical services provided include pregnancy testing, limited obstetrical ultrasounds, reproductive health education and pregnancy options information. The family resources provided include maternity and baby supplies, educational classes (including prenatal, Lamaze/childbirth preparation, parenting, life skills, and new dad classes), family and relationship discussion groups, and post-abortion emotional and spiritual support groups.
http://www.southsidepregnancy.org/
https://www.friendsofsouthside.org/

Spoon River Pregnancy Resource Center* of Canton, Illinois has been operating since 2005 and serves approximately 150 women a year. The center provides pregnancy testing, ultrasounds to women who are up to sixteen weeks pregnant, pregnancy and parenting educational classes, and sexual risk avoidance classes in high schools. The center freely provides diapers, baby clothes and other material resources for mothers with infants and toddlers. It also provides fatherhood classes in the local prison using curriculum–"24:7 Dad"–published by the National Fatherhood Initiative.
https://www.spoonriverpregnancycenter.com/

Waterleaf Women's Center* of Aurora, Illinois has been operating since 2009 and serves about 800 women a year. Its mission is to be the chosen destination for women facing an unplanned

pregnancy and to transform their fear into confidence by addressing their physical, spiritual and emotional needs, and by equipping them to make healthy life-affirming decisions. The center provides free pregnancy tests, limited obstetric ultrasounds, STD testing and treatment, material assistance to expectant mothers, and post-abortive counseling. http://www.waterleafwc.org/

We Care Pregnancy Clinic* was founded in 1992 and serves about 500 women a year in the DeKalb, Illinois area. It strives to empower women to make life-affirming choices. It offers free pregnancy testing, ultrasounds to confirm the tests, STI testing and treatment. It also offers nonmedical services including education about all pregnancy options, pregnancy and parenting education, material and other support for mothers and their babies. http://www.wecarepregnancycenter.org/

Women's Care Clinic*, established in 1992 as Help Ministries, Inc., exists to give hope, engage support, promote life-saving options, and share God's plan with moms, dads and babies in Vermillion County, Illinois. On average the clinic serves 450 women a year. It offers free pregnancy tests, ultrasounds, pre-natal education, birthing preparation, breastfeeding education and support, group fellowship, mentoring for fathers, options counseling, post-abortion support, material assistance, community agency and adoption referrals. http://danvillewcc.org/

SUMMARY OF THE ARGUMENT

A woman has a right to choose life for her unborn child. *Roe v. Wade*, 410 U.S. 113, 153 (1973); *see also The Life Ctr., Inc. v. City of Elgin*, 993 F. Supp. 2d 863, 871 (N.D. Ill. 2013) (enjoining a municipal ordinance which inhibited women's access to a pregnancy center's free services as unduly burdensome of "the right of a woman to choose life"). Since *Roe*, pro-life citizens have organized thousands of pregnancy centers like the Petitioners and *amici* to help women exercise their right to choose life and reject abortion by proclaiming the clear message that God loves every woman and child, including those in *utero*,[2] and that He can bring about great good even from the most difficult and unexpected of pregnancies.[3]

Under the Free Speech Clause of the First Amendment, pro-life pregnancy centers cannot be required to agree with or compelled to promote the state's message concerning abortion as a condition of exercising their right to offer charitable services and proclaim an exclusively pro-life message to those in need. And women should not have their ability to receive free pregnancy support and their right to choose life for their child unduly burdened by state efforts to commandeer the mission and message of these centers.

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[2] *John* 3:16; *Luke* 1:41-44.

[3] The value of women and children in crisis pregnancies is a central theme in the Bible. Even the genealogy of Jesus the Messiah in *Matthew* 1:1-16 honors five women—Tamar (*Genesis* 38), Rahab (*Joshua* 2 and 6), Ruth (*Ruth*), Bathsheba (*2 Samuel* 11-12), and Mary—who overcame great obstacles to give birth.

ARGUMENT

I. Pro-life Pregnancy Centers Cannot Be Required to Promote the State's Position on Abortion as a Condition of Exercising Their Right to Offer Free Pregnancy Services and Proclaim an Exclusively Pro-Life Message.

Petitioners' opening brief on the merits more than adequately covers how the California Reproductive FACT Act violates the protections set forth in the Free Speech Clause of the First Amendment. It demonstrates how the Petitioners, like *amici*, are engaged in noncommercial advocacy which is entitled to the fullest protections of the First Amendment. Pet. Brief at p. 40. It also demonstrates how the FACT Act compels speech in a viewpoint discriminatory way in violation of well-established Free Speech principles. *Id.* at 31.

This brief will focus on how failing to reinforce First Amendment protections in Petitioners' case will have a devastating effect on charitable efforts to serve women, particularly those in Illinois—where courts have preliminarily enjoined a recent state law which conditions statutory health care right of conscience protections on compliance with the State's mandate that conscientious objectors to abortion must nevertheless inform women about the "benefits" of abortion and where they can be had. Not only does Illinois's law require *amici* and other conscientious objectors to provide information about abortion providers, they must parrot the state legislature's opinion that abortion has "benefits" even

though *amici* believe that abortion has no benefits and results in the loss of innocent life.

A. Pregnancy centers like the Petitioners and *amici* were organized not only as a charitable effort to meet the needs of pregnant women but also as an effort to promote a clearly articulable and exclusively pro-life message.

As the mission statements of the Petitioners and *amici* make plain, these centers are nearly all religious, nonprofit organizations that exist to provide women with free pregnancy services and information so as to help them choose to give birth and care for their child rather than have an abortion. Their viewpoint and clearly articulable message is succinctly and exclusively pro-life: God loves every woman, man, and child, including those *in utero*, and abortion is harmful and immoral.

These centers communicate their message in both word and deed. Ultrasounds have become one of the most powerful media for the pro-life message. An ultrasound provides parents a window into the womb to reveal their preborn child. If a picture is worth a thousand words, a live ultrasound image of your baby is worth a million. As Laurence Tribe writes,

> Many [people], who can readily envision the woman and her body, who cry out for her right to control her destiny, barely envision the fetus within that woman and do not imagine as real the life it might have been allowed to lead. For them, the life of the fetus becomes an invisible abstraction.

LAURENCE TRIBE, ABORTION: THE CLASH OF ABSOLUTES 5 (Norton 1980). No pro-life pamphlet can communicate the pro-life message and render the invisible visible like an ultrasound.

As argued more fully in Petitioners' brief, these centers have a right to speak or not to speak on the very public issue of abortion under the First Amendment. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (recognizing the right not to speak as equally protected as the freedom to speak under the First Amendment); *Riley v. National Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796-97 (1988) (holding that the Free Speech Clause protects the freedom "of both what to say and what not to say.")

They also have a fundamental right to control the content of their message. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 572-573 (1995). This Court recognized in *Riley* that the content of a speaker's message is "necessarily alter[ed]" when the state "[m]andat[es] speech that [the] speaker would not otherwise make." 487 U.S. at 795. If, as in *Hurley*, a nonprofit parade organizer has a First Amendment right to refuse inclusion of an off-message gay pride float regardless of whether the parade has a "narrow, succinctly articulable message," *id.* at 569, how much more so does a nonprofit pregnancy center committed to a narrow, succinctly articulable pro-life/anti-abortion message have a right to refuse to include and publish the state's pro-abortion messaging.

If the Ninth Circuit's overbroad[4] definition of "professional speech" is upheld and the Free Speech rights of nonprofit pregnancy centers disregarded, a state in which euthanasia is legal could compel nonprofit anti-euthanasia centers—which exist solely to help men and women who struggle with suicidal thoughts choose life and not death—to post information on the availability of state-subsidized euthanasia programs and the "benefits" of assisted suicide as a "legal treatment option."

B. Rather than respect rights of conscience and allow room for opposing viewpoints on abortion, California, like Illinois, is targeting centers like Petitioners and *amici* because of their conscientious objections to abortion.

Following *Roe* in 1973, many states moved to enact health care right of conscience protections.[5] States recognized that if women were to have a constitutional right to abortion, the thousands of health care professionals who have ethical and conscientious objections to abortion must have the right to refuse to participate in any way in the provision of abortion related services. In 1977, Illinois enacted what some called the "gold standard" of conscience protection laws.[6] The Illinois Health Care Right of Conscience Act (IHRCA), states that

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[4] The Cato Institute's amicus brief in support of Petitioners filed on December 26, 2017 addresses the dangerous overbreadth of the Ninth Circuit's definition of "professional speech."

[5] Francis J. Manion, *Protecting Conscience Through Litigation: Lessons Learned in the Land of Blagojevich*, 24 REGENT U. L. REV. 369, 370-72 (2012).

[6] *Id.* at 372.

"people and organizations hold different beliefs about whether certain health care services are morally acceptable," and that no one should "be civilly or criminally liable by reason of his or her refusal to perform, assist, counsel, suggest, recommend, refer or participate in any way in any particular form of health care service which is contrary to the conscience of such" provider. 745 Ill. COMP. STAT. 70/4. The purpose of the law was "to respect and protect the right of conscience of all persons who refuse to . . . act contrary to their conscience or conscientious convictions . . .." *Id.*at § 70/2.

Forty years later, Illinois, like California, determined that conscientious objectors to abortion were no longer deserving of this level of respect or state protection. Instead, Illinois turned the shield into a sword by including the following compelled speech components in the amended IHCRCA:

- *Id.* at § 70/6.1 now provides that it is the "Duty of ... health care personnel [with conscientious objections]" to "inform his or her patient of the patient's ... legal treatment options...and benefits of the treatment options..."

- § 6.1 also imposes an affirmative obligation on health care providers with conscientious objections to develop protocols to ensure that women are informed of all their legal treatment options for their pregnancy and the benefits of each option, including abortion.

- § 6.1 requires providers that do not provide abortions as a matter of conscience to, at a

> minimum, inform women in writing "about other health care providers who they reasonably believe may offer" abortions.

By amending IHRCA to impose these requirements, Illinois, like California decided to impose compelled speech requirements on those who were opposed to providing abortion related services but nevertheless wished to freely serve pregnant women in other ways.

Petitioners' brief at p. 2 covers how the FACT Act targets only centers that "discourage abortion.'" *Amici* point out that Illinois did the same thing by using IHRCA to target pro-life centers and force them to engage in speech and action (referral) contrary to their pro-life principles. Because the California and Illinois share this essential feature, i.e. singling-out pro-life centers in order to force them to carry a pro-abortion message, the *amici* wish only to highlight why the United States District Court of Northern Illinois was right to follow this Court's decisions in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015) and *Matal v. Tam*, 137 S. Ct. 1744, 1750 (2017) rather than the Ninth Circuit's decision (which refused to apply those cases) when it preliminarily enjoined Illinois from enforcing the recent amendment to the IHCRCA.

Unlike the Ninth Circuit which contravened *Reed* and *Tam* when it refused to apply strict scrutiny to the FACT Act despite Respondents' admission that the purpose of the law is to target "crisis pregnancy centers" because of their viewpoint that "discourag[es]" abortion, the Illinois district court

found *Reed* and *Tam* to be dispositive of the level of scrutiny required of the viewpoint discriminatory, compelled speech requirements of the amended IHCRA. The Illinois district court read *Reed* and *Tam* to require strict scrutiny[7] of a viewpoint discriminatory law—even in the context of commercial speech as in *Tam* and certainly in the context of the non-commercial speech of *amici*.

The viewpoint discrimination is particularly egregious under both the California and Illinois statutes. While crisis pregnancy centers are required to provide information on topics such as the "benefits" of abortions and where to obtain them, abortion clinics are not required to provide information on pregnancy centers and the benefits of not having an abortion and the life of the child.

Ultimately, the state of Illinois was enjoined from enforcing its law because it could not answer a fundamental question—why has it targeted only conscientious objectors as those who must disseminate the State's message concerning the availability or benefits of abortion? The same question and lack of a constitutionally permissible answer haunts and dooms the FACT Act.[8]

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[7] Viewpoint discrimination is actually never permissible. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943); *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 835 (1995).

[8] IHCRCA fails even as a content based regulation and as a violation of the unconstitutional conditions doctrine. *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 59-60 (2006) (holding that the government may not force a citizen to choose between free speech and a state benefit).

II. Women Should Not Have Their Ability to Receive Free Pregnancy Support and Their Right to Choose Life For Their Child Unduly Burdened By State Efforts to Commandeer the Mission and Message of Pro-Life Pregnancy Centers.

Far too many women are left to face their pregnancies alone, afraid, and without the information and resources they need to care for themselves and their child. A pregnancy, especially an unexpected one, can be a life-defining crisis fraught with uncertainty and laden with far-reaching consequences. From decades of experience, the *amici* have learned that providing information about alternatives to abortion, offering a free pregnancy test or ultrasound, access to parenting classes, baby clothes, and a kind word or prayer can mean all the difference in the world to an expectant mother, a fearful father, and their unborn child.

To uphold the FACT Act in the face of such well-established Free Speech principles as the prohibitions against compelled speech and viewpoint discrimination would allow states to impose a pro-abortion litmus test on those who seek to assist pregnant women with free pregnancy support services. By limiting the pool of available pregnancy centers to those few that would be willing to promote abortion, California and Illinois are not only violating the autonomy that these centers are constitutionally entitled to have over their own speech, they are also unjustifiably putting thousands of women at risk of losing access to the free pregnancy support and services these centers, in

furtherance of their religious and moral convictions, have long provided. The twenty three *amici* alone help roughly 14,000 women a year in Illinois, and a single center like CareNet distributes an estimated $400,000 in free goods and pregnancy services each year. Thus, California and Illinois seek not only to put their thumb on the scales of our public debate concerning abortion by compelling pregnancy centers' speech, they also, in doing so, deprive women and children of desperately needed services and support.

CONCLUSION

The judgment of the Ninth Circuit should be reversed.

Respectfully submitted,

NOEL W. STERETT
Counsel of Record
WHITMAN H. BRISKY
Mauck & Baker, LLC
1 N. LaSalle, Suite 600
Chicago, IL 60602
(312) 726-1243
nsterett@mauckbaker.com

THOMAS BREJCHA JR.
THOMAS G. OLP
THOMAS MORE SOCIETY
19 S. LaSalle St., Suite 603
Chicago, IL 60603
(312) 782-1680

January 11, 2018

Counsel for *Amici Curiae*

No. 16-1140

In the Supreme Court of the United States

NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES D/B/A NIFLA, ET AL., PETITIONERS,

v.

XAVIER BECERRA, ATTORNEY GENERAL, ET AL.,

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, CALIFORNIA CATHOLIC CONFERENCE, THE CATHOLIC HEALTH ASSOCIATION OF THE UNITED STATES, LUTHERAN CHURCH-MISSOURI SYNOD, CHRISTIAN LEGAL SOCIETY, AND AGUDATH ISRAEL OF AMERICA SUPPORTING PETITIONERS

ANTHONY R. PICARELLO, JR.
JEFFREY HUNTER MOON
MICHAEL F. MOSES
HILLARY BYRNES
United States Conference of Catholic Bishops
3211 Fourth Street, N.E.
Washington, DC 20017

GENE C. SCHAERR
Counsel of Record
MICHAEL T. WORLEY
SCHAERR | DUNCAN LLP
1717 K Street NW, Ste. 900
Washington, DC 20006
(202) 787-1060
gschaerr@schaerr-duncan.com

Additional counsel listed on inside cover

LISA J. GILDEN
The Catholic Health Association of the United States
1875 Eye Street NW
Suite 1000
Washington, DC 20006

KIM COLBY
Christian Legal Society
8001 Braddock Road
Suite 302
Springfield, VA 22151

SHERRI C. STRAND
JAMES W. ERWIN
THOMPSON COBURN LLP
One US Bank Plaza
St. Louis, MO 63101

ABBA COHEN
DAVID ZWIEBEL
MORDECHAI BISER
Agudath Israel of America
42 Broadway
New York, NY 10004

QUESTION PRESENTED

Whether the disclosures required by the California Reproductive FACT Act violate the protections set forth in the Free Speech Clause of the First Amendment, applicable to the States through the Fourteenth Amendment.

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INTRODUCTION AND INTERESTS OF *AMICI*[1]

For *amici*, this case is not principally about abortion. At bottom, it is about the First Amendment right of *all* religious organizations to choose for themselves not only what to say, but "what not to say." *Hurley* v. *Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 573 (1995). If upheld by this Court, the Ninth Circuit's decision would allow governments of all stripes to tell such organizations "what they must say," *Agency for International Development* v. *Alliance for Open Society*, 570 U.S. 205, 211 (2013) (citation and quotation marks omitted), on a range of controversial issues.

This would be devastating to many religious organizations, regardless of their views on abortion or similar issues. For reasons of religious belief, religious organizations are often "countercultural" vis-à-vis the various communities in which they operate: Their beliefs usually lead them to embrace at least some values that clash with the prevailing values of the towns, cities, and states in which they are located—not to mention the values embraced at any given time by the federal agencies with which they interact. Those clashes may turn, not only on disagreements over human sexuality (including abortion), but also on a range of other issues, such as the proper treatment of undocumented immigrants. Such clashes in values can often lead to attempts by governments to impose their own values—and desired messages—on religious organizations.

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[1] No one other than *amici* and their counsel authored any part of this brief or made a monetary contribution to fund its preparation or submission. All parties have consented to its filing in communications on file with the Clerk.

Indeed, this Court has observed that "government *suppression* of speech has so commonly been directed *precisely* at religious speech that a free-speech clause without religion would be Hamlet without the prince." *Capitol Square Review & Advisory Bd.* v. *Pinette*, 515 U.S. 753, 760 (1995) (first emphasis added). That is no less true of government *compulsion* of speech.

The Ninth Circuit's decision would invite and facilitate such compulsion. Accordingly, as the various examples discussed below show, that decision is a wrecking ball aimed at First Amendment rights enjoyed, not just by religiously-affiliated pregnancy centers, but by all institutions of faith. And that is why *amici*—religion-based organizations described in the Appendix—urge the Court to reverse that misguided decision.

STATEMENT

The facts of this case illustrate its implications for all religious institutions.

1. As the Ninth Circuit noted, Petitioners "are three religiously-affiliated non-profit corporations." Pet. 10a. They exist to encourage women not to seek abortions, by "offering information about alternatives to abortion and help pursuing those options." See *McCullen* v. *Coakley*, 134 S. Ct. 2518, 2527 (2014).

California's legislature disagrees with Petitioners' goals. It has concluded that "[m]illions of California women are in need of . . . abortion services[.]" Pet. 6a. The legislature has therefore passed numerous laws making abortion available to more women.[2] Indeed, among the fifty states, California's laws probably do the most to popularize and facilitate abortion.[3]

But these laws expanding access to abortion were apparently not enough. In passing the Reproductive FACT Act[4] the legislature concluded that Petitioners were impermissibly convincing women *not* to have abortions. Indeed, as the Ninth Circuit explained, the legislature concluded that Petitioners' very "existence" hinders the ability of women to get an abortion. Pet. 7a. And the legislature attacked what, for many, is a core religious belief—that one can provide a sufficient

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[2] See, *e.g.*, Assembly Bill 154 (Cal. 2013) (permitting broad category of professionals to perform certain types of abortion).

[3] See Ian Lovett, *California Expands Availability of Abortions*, N.Y. Times (Oct. 9, 2013) ("[T]he new California law goes further"), http://www.nytimes.com/2013/10/10/us/california-expands-availability-of-abortions.html.

[4] See Cal. Welf. & Inst. Code § 123470 *et seq.*

range of pregnancy-related services without providing abortions—as mere posturing. See Pet. 7a.

Attempting to limit the effect of Petitioners' efforts, the legislature singled them out for special burdens. As Petitioners explain in greater detail (at 7–14), the FACT Act requires licensed health care providers that do not offer abortions but do offer pregnancy counseling to display the following message: "California has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women. To determine whether you qualify, contact the county social services office at" that office's telephone number. Cal. Health & Safety Code § 123472(a)(1).

The purpose of these signs could not be clearer: to conscript non-profits that oppose abortion to tell women how they may obtain one. The legislature is thus attempting to undercut the central purpose of these religious non-profits' activities.

2. Petitioners sued under, among other authorities, the Free Speech Clause. But the district court and Ninth Circuit both concluded that the Free Speech Clause was not violated. While it apparently conceded that the disclosures are speech, the Ninth Circuit held (at Pet. 28a–33a) that Petitioners' speech is professional speech and that, despite being content-based, the FACT Act is viewpoint-neutral (Pet. 18a–22a) and, therefore, not subject to strict scrutiny.

SUMMARY OF ARGUMENT

Petitioners have persuasively explained why the "disclosures" required by the FACT Act violate the First Amendment's Free Speech clause. Rather than restate Petitioners' points, *amici* offer (1) an analysis of why that question is of enormous and increasing practical importance to religious institutions generally, and (2) an approach to resolving the question presented that accounts for its effects on non-profit religious institutions of all stripes, yet leaves for another day broader questions about the proper application of the Free Speech Clause in for-profit settings.

I. If affirmed, the Ninth Circuit's resolution of the question presented would have disastrous effects on religious organizations generally. Whether in the context of government-compelled "disclosures" like those in the FACT Act, notifications to employees, or even speech codes, religious institutions are increasingly facing mandates to speak. Worse, these mandates frequently conflict with the institutions' religious beliefs and thus force them to speak *contrary* to those beliefs. Affirming the Ninth Circuit's decision would give a green light to analogous speech mandates in a variety of other settings.

II. The Court could easily resolve this case on the ground that, contrary to the Ninth Circuit's conclusion, the FACT Act constitutes viewpoint discrimination and is therefore subject to strict scrutiny, which it cannot satisfy for all the reasons explained by Petitioners. However, that resolution would lead many governments to believe that, as long as they are just more careful about it, they can still "tell people"—including religious organizations—"what they must say." *Alli-*

ance for Open Society, 133 S. Ct. at 2327. And governmental speech mandates directed at religious institutions would continue to proliferate.

To prevent that result—and the consequent need for years of litigation over the proper application of the Free Speech Clause to speech mandates imposed on religious institutions—*amici* urge the Court to resolve this case on a different and arguably narrower ground: Where, as here, a message the government seeks to compel runs counter to the beliefs of a religious nonprofit subject to a speech mandate, that mandate must satisfy strict scrutiny. As explained in detail below, that approach is compelled by a long line of this Court's precedent. And it would protect religious nonprofits like Petitioners and *amici* from future efforts to compel speech in violation of religious beliefs.

ARGUMENT

I. Governments of all stripes are increasingly trying to coerce institutions of faith to endorse secular ideas that contravene the institutions' religious beliefs.

When it comes to efforts to compel speech by religious institutions, this case is only the tip of the iceberg. Indeed, the Fourth Circuit recently struck down a Baltimore ordinance similar to the FACT Act as applied to a clinic hosted at a local Catholic church. See *Greater Balt. Ctr. for Pregnancy Concerns* v. *Mayor & City Council of Balt.*, 2018 WL 298142 (4th Cir. Jan. 5, 2018). And other governments throughout the Nation increasingly attempt to coerce institutions of faith to communicate ideas that further the government's secular policies but contravene religious beliefs. If it stands, the Ninth Circuit's holding that laws like the FACT Act need only satisfy intermediate scrutiny will accelerate this dangerous trend.

1. For example, a bill passed by the California Legislature just last year (but vetoed by the governor) would have required *all* employers—houses of worship and other religious institutions included—to publish notices in their employee handbooks stating that non-ministerial employees have a right to be free from "any adverse action . . . for their reproductive health decisions[.]" See Assembly Bill 569 (Cal. 2017).

This provision, much like the signs in this case, would clearly compel speech. And the bill's broader purpose, according to its sponsor, was to change the hiring practices of local religious organizations: The sponsor specifically mentioned that the bill would impact the Diocese of Santa Rosa, California and its Parishes, which hire individuals who will act in

accordance with religious teachings.[5] But because the law would have applied to all employers, not just churches, the law would likely have survived a free speech challenge under the Ninth Circuit's logic.

2. The burgeoning effort to compel speech also directly affects religion-based organizations such as religious schools and hospitals. For example, the City of St. Louis has tried to prevent religious schools and other institutions from even *stating* a preference to hire people whose conduct conforms to the institution's central religious tenets. Specifically, the City has forbidden all employers—including houses of worship and other religious institutions—from "mak[ing] any inquiry in connection with prospective employment, which expresses directly or indirectly any preference, limitation, specification or discrimination because of reproductive health decisions[.]" City of St. Louis, Mo., Ordinance 70459 § 2(B)(5) (Feb. 1, 2017).

In response, the Catholic Archdiocesan Elementary Schools have sued the City for the right to state and abide by their religious hiring preferences. In the memorandum supporting summary judgment filed by the City, the City argues that its ordinance does not violate the Free Speech Clause as applied to the Archdiocese and its schools. Further, because the "Archdiocese [schools] will not hire people who have [had] abortions," the city says, the law seeks to protect the

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[5] California Executive Committee on Judiciary, Committee Report, AB569 at 3, https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201720180AB569 (click on link that says "04/21/17- Assembly Judiciary").

Archdiocese's employees and potential employees from "reproductive health discrimination."[6]

In so doing, St. Louis repeats some of the very arguments the Ninth Circuit embraced. For example, the city claims that, because "[n]o viewpoint is being supported or demonized by this Ordinance," the ordinance is viewpoint-neutral.[7] This argument is nearly indistinguishable from the Ninth Circuit's claim that "the Act applies to all licensed and unlicensed facilities, regardless of what, if any, objections they may have to certain family-planning services." Pet. 20a.

Accordingly, if affirmed by this Court, the Ninth Circuit's decision would likely permit and encourage other jurisdictions to compel the speech of all religious organizations—including religious hospitals and schools as well as houses of worship—in the manner that St. Louis is now attempting to do.

3. Other examples come from Iowa and Massachusetts, which now effectively require houses of worship and other religious institutions to address individuals using pronouns contrary to how some religious bodies view sex and gender identity.[8] In Massachusetts, the

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[6] Defendant's Memorandum in Support of Summary Judgment, *Our Lady's Inn* v. *City of St. Louis* at 10, 4:17-10543, Dkt. # 20-2 (E.D. Mo. Oct. 30, 2017).

[7] *Id.* at 9.

[8] Although the Iowa and Massachusetts laws do not specifically single out the use of pronouns based on biological sex as inherently discriminatory, the agency determinations that such conduct is discriminatory are likely to be persuasive in court. See Iowa Code § 216.5 (granting agency extensive power to implement nondiscrimination laws); Mass. Ann. Laws ch. 151B, § 3 (similar).

relevant state guidance document notes that "a religious organization may be subject to" such a requirement whenever it "engages in or its facilities are used for a 'public, secular function'"—which of course is true of almost all houses of worship.[9] Likewise, the Iowa guidance document notes that "[p]laces of worship (e.g. churches, synagogues, mosques, etc.) are generally exempt from the Iowa law's prohibition of discrimination, *unless* the place of worship engages in non-religious activities which are open to the public"—which, again, virtually all houses of worship do.[10]

Such policies conflict with the teachings of some faiths that they should say only true things, including what they view as the truth about how God "made [mankind] at the beginning . . . male and female."[11] For these houses of worship, their members, and their affiliated charities and other institutions, stating that someone's true sex is different from the person's biological sex contradicts this truth regarding human creation. In their view, the law now compels them to affirm something with which they disagree.

Purporting to limit such state policies to a religion-based organization's "secular" activities does not solve the problem. As this Court noted in *Corporation of Presiding Bishop* v. *Amos*, there "is a significant burden on a religious organization" if it has "to predict which

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[9] Mass. Comm'n Against Discrimination, *Gender Identity Guidance* 1, 4 (Dec. 5, 2016), http://www.mass.gov/mcad/docs/gender-identity-guidance-12-05-16.pdf [https://perma.cc/CSW6-G3SN].

[10] Iowa Civil Rights Commission, *Sexual Orientation and Gender Identity: A Public Accommodations Provider's Guide to Iowa Law*, https://icrc.iowa.gov/sites/default/files/publications/2016/2016.sogi_.pa1_.pdf.

[11] *Matthew* 19:4; *Genesis* 1:27.

of its activities a secular court will consider religious." 483 U.S. 327, 336 (1987). Indeed, "fear of potential liability might affect the way an organization carried out what it understood to be its religious mission." *Ibid.* And many church activities—a book club, a bake sale, or a gymnasium as in *Amos*—may appear secular yet represent important parts of the church's religion-based outreach. Perhaps just as important, these "secular" activities fulfill a religious mission to bring greater unity to an American culture whose success hinges on seeking harmony in diversity.[12] And of course, although religious schools and hospitals may provide some services that are also offered by secular institutions, the government has long recognized that they are bona fide religious organizations because of their affiliation with a church or their grounding in a church's religious traditions and beliefs.[13]

4. Another example of an intrusive policy that the Ninth Circuit's approach would allow arises from the current administration's efforts to punish what some call "sanctuary cities," which seek to assist undocu-

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[12] See Robert Putnam, *Bowling Alone: The Collapse and Revival of American Community* (2000). Such outreach is often rooted in express religious teachings. See, *e.g.*, *Luke* 10:25–37 (parable of good Samaritan); Vatican II, *Gaudium et Spes*, No. 29 ("Every form of social or cultural discrimination in fundamental personal rights on the grounds of sex, race, color, social conditions, language, or religion must be curbed and eradicated as incompatible with God's design."); 2 *Nephi* 26:33 (Latter-day Saint) ("[Christ] denieth none that come unto him, black and white, bond and free, male and female; and he remembereth the heathen.").

[13] See, *e.g.*, *Advocate Health Care Network* v. *Stapleton*, 137 S. Ct. 1652 (2017); *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC*, 565 U.S. 171 (2012).

mented immigrants. Many religious institutions, including houses of worship and religious colleges, have religious doctrines urging compassion for immigrants, whether or not the immigrants have proper documentation.[14] And yet, if the administration decided to further pursue its immigration policy goals, religious colleges or houses of worship could well be compelled to disclose to their members and others a government-prescribed message contrary to their religious beliefs about immigration—a message, for example, articulating an obligation to cooperate with immigration authorities. Under the Ninth Circuit's rationale, the administration could readily immunize such a policy from strict scrutiny, and make it subject only to intermediate scrutiny as viewpoint neutral, by also applying the policy to institutions that *support* the administration's policy.

Here again, if the Ninth Circuit's ruling stands, religious organizations will have no free-speech defense to these and many other laws that seek to force such institutions to propagate governmental messages that contradict the institutions' religious beliefs.

5. As these examples show, affirming the Ninth Circuit's ruling would open the door to blatant targeting of religious institutions nationwide. In the future,

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[14] *E.g. Leviticus* 19:34 ("The foreigner residing among you must be treated as your native-born. Love them as yourself, for you were foreigners in Egypt."). Some houses of worship have even declared themselves "sanctuary churches." See, *e.g.*, Southside Presbyterian Church, *The Sanctuary Movement*, http://www.southsidepresbyterian.org/sanctuary.html (detailing the history of the "sanctuary church" movement and claiming the support of approximately 800 congregations).

for example, governments could well try to force religious institutions to promote messages (e.g., "Living a celibate lifestyle can lead to depression. Here are some resources for depression.") that contradict religious teachings on chastity and sexuality.[15] Other compelled messages (e.g., "Studies have shown that children really do not need parents of both genders") could just as easily contradict the belief of some faiths and religiously-oriented institutions that, where possible, children should be raised by both a mother and father.[16]

These sorts of messages are not like traditional commercial disclosures, such as ingredient lists and calorie counts on food labels. Rather, these kinds of compelled "disclosures"—including those at issue in this case—force those on one side of a political or social debate to propagate the views of their opponents, and in a way that is designed to diminish or even neuter the speaker's own views. No religious institution should be required to make these sorts of "disclosures" when they contradict the institution's religious beliefs. But if the decision below is affirmed, more and more governments around the country are likely to target houses of worship and other religious institutions in just that way.

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[15] *E.g.*, 1 *Corinthians* 6:18 ("Avoid immorality. Every other sin a person commits is outside the body, but the immoral person sins against his own body."). Multiple religious traditions teach that a chaste lifestyle leads to happiness for both the individual and others. *E.g.* 3 *John* 1:4 ("Nothing gives me greater joy than to hear that my children are walking in the truth.").

[16] *E.g. Human Sexuality: A Theological Perspective* 17–20 (1981) (Lutheran); *Catechism of the Catholic Church* §§ 1631, 1641, 1653, 1666; *The Family: A Proclamation to the World* (1995) (Latter-day Saint).

II. This Court should hold that the Free Speech Clause does not permit governments to apply even supposedly neutral speech requirements against objecting non-profit institutions of faith without satisfying strict scrutiny.

To prevent such harms to free speech, this Court should hold that the Free Speech Clause requires that the application of "disclosure" laws such as the FACT Act pass strict scrutiny. And the cleanest way to do that here is to hold that a mandate directing an objecting religious non-profit to convey the State's preferred message is *always* subject to strict scrutiny. Alternatively, strict scrutiny is required because, contrary to the Ninth Circuit's conclusion, the FACT Act is based on viewpoint discrimination, not just content. And for all the reasons explained by Petitioners (at 49–57), the FACT Act cannot survive strict scrutiny.

A. A requirement that an objecting religious non-profit convey the State's preferred message should always be subject to strict scrutiny.

Regardless of its targeting of politically-disfavored speech, the FACT Act's compelled speech requirement should be subject to strict scrutiny. The Ninth Circuit attempted to avoid this result in part by holding that Petitioners' government-required speech about abortion is "professional" speech, subject only to intermediate scrutiny. Pet. 28a–29a. But that cannot be correct: Petitioners are all *non-profit* organizations incorporated to pursue *religious* missions that include speech opposing abortion and endorsing alternatives. Pet. 89a–90a. Whatever the standard may be in other circumstances, with other kinds of speakers, it makes no

sense to allow the State to compel speech from institutions like Petitioners without satisfying strict scrutiny.

1. One of the First Amendment's deepest concerns is to protect religious expression from government coercion. Indeed, as this Court has noted, "a free-speech clause without religion would be Hamlet without the prince." *Pinette*, 515 U.S. at 760 (1995). As explained above, religious institutions are frequently countercultural: Owing their allegiance to divine authority, they often find themselves at odds with the norms prevailing in their local communities, or in the broader world.

This Court has accordingly recognized that those institutions are best served (and can best serve their members and society) under guarantees of autonomy, specifically, "an independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff* v. *Saint Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94, 116 (1952). In a long line of cases—many under the Establishment and Free Exercise Clauses—this Court has guaranteed the right of such organizations to determine their own messages without government interference. See, *e.g.*, *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *E.E.O.C.*, 565 U.S. 171, 188 (2012) (holding that anti-discrimination laws cannot be deployed to "depriv[e] [a] church of control over the selection of those who will personify its beliefs").

Other non-profit religious organizations are likewise central to the First Amendment's protections. Even in cases of disagreement about the outer bounds of the religion clauses in the for-profit realm, everyone

agrees that "[t]he First Amendment's free exercise protections . . . shelter churches *and other* non-profit religion-based organizations." *Burwell* v. *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2794 (2014) (Ginsburg, J., joined by Sotomayor, J., dissenting) (emphasis added). Some such organizations exist to serve a religious community. *Ibid.* Others exist to win converts to their religious views, or—like Petitioners—put their religious community's principles to work through service in the world at large. Petitioners thus stand at the intersection of two circumstances in which this Court has always considered constitutional protections most important: they are organizations that are *both* religious and non-profit in nature. See, *e.g.*, *Amos*, 483 U.S. at 344-45 (Brennan, J., concurring) (constitutional concerns at their height with respect to non-profit activities of religious organizations).

2. In light of Petitioners' religious and non-profit character, treating their speech like the ordinary advice of professionals serving clients ignores reality. When religious non-profits speak, they are not merely providing professional services. Rather, they are performing religious functions and conveying messages that they believe hold ultimate significance. Their speech thus lies at the core of the First Amendment's protections.

This Court, moreover, has always held that strict scrutiny applies whenever the government compels types of expression approaching that level of importance. See *Wooley* v. *Maynard*, 430 U.S. 705, 716 (1977) (evaluating whether the State had an "interest . . . sufficiently compelling to justify requiring appellees to display the state motto on their license plates") (citation omitted); see also *Hurley* v. *Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 573

(1995) (explaining that the State "may not compel affirmance of a belief with which the speaker disagrees") (citation omitted). This Court's precedent thus "establishes that private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression." *Pinette*, 515 U.S. at 760.

Moreover, strict scrutiny applies "not only to [compelled] expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid." *Hurley*, 515 U.S. at 573. Even on the State's assumptions, that holding describes the present case perfectly. It follows that strict scrutiny should apply.

The Fourth Circuit recently reached a similar conclusion. In ruling that a Baltimore city ordinance, similar to the FACT Act, is unconstitutional as applied to religious non-profits, that court noted that the ordinance was "antithetical to the very moral, religious, and ideological reasons the [non-profit] exists." *Greater Balt. Ctr. for Pregnancy Concerns* v. *Mayor & City Council of Balt.*, 2018 WL 298142 at *5 (4th Cir. Jan. 5, 2018). The court further held that, unless such institutions enjoy a right "to [not] utter political and philosophical beliefs that the state wishes to have said," "states [could] bend individuals to their own beliefs and use compelled speech as a weapon to run [their] ideological foes into the ground." *Ibid.*

Perhaps California or Baltimore could regulate some kinds of secular, for-profit speakers in the way in which they seek to regulate the institutions in these cases. But absent a showing that the law survives strict scrutiny, neither they nor any other jurisdiction can be allowed to compel speech from religious institutions that disagree with the government's message on

religious grounds. Yet that is what California is doing here: declaring Petitioners a threat to their policy goals and compelling their contrary speech. See *supra* pp. 3–4; Pet.Br. 7–8. The decision below must be reversed for this reason alone.

3. Moreover, the legislative history and text of the FACT Act show that the legislature enacted the law because it disagrees with the religious speech of Petitioners and other religious organizations. The legislature is thus trying to discredit religious speech in favor of its preferred, secular message—that is, it is attempting to "use compelled speech as a weapon to run its ideological foes into the ground." *Greater Baltimore Center, supra,* 2018 WL 298142 at *5. This is unquestionably unconstitutional in the religious setting, whatever the status of analogous secular speech.

A simple analogy explains the unconstitutionality of a state attempting to discredit religious speech. It would be an obvious violation of the Free Speech Clause for a state to mandate that, as a condition of allowing publication of a religious text, a statement be included suggesting sources contradicting that text's core teachings. At a minimum, such a disclaimer would have to survive strict scrutiny. But the Ninth Circuit claims that the FACT Act should receive *intermediate* scrutiny even though it forces Petitioners to preface their religious statements, both orally and in written materials, with government-compelled messages that effectively urge readers to question Petitioners' own statements. This religious targeting violates the First Amendment.

This analogy also illustrates why this Court need not answer in this case questions about whether the First Amendment permits similar regulation of for-

profit speakers. While California may regulate (for example) medical textbooks to ensure adequate training of its doctors, it may not regulate the content of religious texts instructing on how to minister to the sick.

At very least, compulsion of speech from religious non-profits like Petitioners should not be subject to *less* scrutiny than this Court applied to an individual's objection to his State's motto, see *Wooley*, 430 U.S. 705, or to a cultural organization's annual parade, see *Hurley*, 515 U.S. 557. Once again, religious speech is not a First Amendment orphan. *Pinette*, 515 U.S. at 760. Indeed, the conjunction of a highly suspect compelled speech requirement with the highly protected status of religious non-profits makes strict scrutiny all the more appropriate. Cf., *e.g.*, *Employment Div.* v. *Smith*, 494 U.S. 872, 881 (1990).

4. This approach—a safe harbor for non-profit religious institutions under the Free Speech Clause—would allow the Court to protect a substantial swath of clearly protected activity while reserving more difficult issues for future cases. This Court has long distinguished for-profit commercial speech from other types of speech. See, *e.g.*, *Zauderer* v. *Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985). Although *amici* take no position on the legitimacy of that approach, the difference between religious non-profits and ordinary commercial entities—and any differences in the overall content of those entities' speech—would allow the present case to be distinguished from an otherwise-similar controversy involving a purely secular medical practice, or a large publicly-held company. If such a case were ever presented, this Court should address it on its particular facts.

In short, because strict scrutiny protection for religious non-profits makes sense for unique reasons, applying that level of scrutiny to *this* case defers the question of how to review similar laws in other contexts. Cf. *Hobby Lobby*, 134 S. Ct. at 2774 (explaining that the Religious Freedom Restoration Act applied because "[t]he companies in the cases before us are closely held corporations").

For all these reasons, the Court should rule that the Free Speech Clause requires strict scrutiny of any governmental attempt to force Petitioners to convey a government-endorsed message in conflict with their religious belief, simply because they are religious non-profits.

B. The State's action here was viewpoint-based and therefore subject to strict scrutiny for that reason as well.

In any event, there is no question that the FACT Act was intended to—and in fact does—compel groups that convey a politically-disfavored message to convey the State's message as well. And this Court has long held that strict scrutiny applies to "speaker-based laws . . . when they reflect the Government's . . . aversion to what the disfavored speakers have to say[.]" *Turner Broad. Sys., Inc.* v. *F.C.C.*, 512 U.S. 622, 658 (1994). To hold that strict scrutiny applies here, this Court need only apply that well-established rule to the undisputed facts of this case.

The FACT Act particularly targets speakers—including Petitioners—who regularly disseminate messages with which the State disagrees. The whole point of the FACT Act, as the Legislature openly admitted, was to destroy the effectiveness of "'crisis pregnancy centers'" that "'aim to discourage and prevent women

from seeking abortions'" by "'interfer[ing] with women's ability to be fully informed and exercise their reproductive rights.'" Pet. 7a (quoting Assembly Committee on Health, Analysis of Assembly Bill No. 775 at 3). In the State's view, crisis pregnancy centers "'often confuse, misinform, and even intimidate women from making fully-informed, time-sensitive decisions about critical health care.'" Pet. 7a (quoting Analysis of Assembly Bill No. 775 at 3).

Having determined that the speech of crisis pregnancy centers is "confus[ing]" or mistaken, Pet. 7a, the State decided that the most appropriate response was to compel them to convey the State's message as well. In the Ninth Circuit's words, "the Legislature found that the most effective way to ensure that women are able to receive access to family planning services, and accurate information about such services, was to require licensed pregnancy-related clinics . . . to state the existence of these services." Pet. 7a.[17] The State thus elected to make the clinics "an instrument for fostering public adherence to a specific ideological point of view"—namely, the acceptability of abortion as a method of birth control—that Petitioners "find[] unacceptable." *Wooley* v. *Maynard*, 430 U.S. 705, 715 (1977).

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[17] The State's concern that crisis pregnancy centers "misinform" and "intimidate" women is a smokescreen. Pet. 7a. California did not need a new law to address such problems: it already had an extensive regulatory system directed at unfair and deceptive trade practices, which would already be implicated if misinformation or deception were present here. See Cal. Bus. & Prof. Code § 17200 *et seq.* (Unfair Competition Law); Cal. Bus. & Prof. Code § 17500 *et seq.* (False Advertising Law); Cal. Civ. Code § 1770 *et seq.* (Consumer Legal Remedies Act).

Other aspects of the FACT Act underscore that clinics with Petitioners' particular moral perspectives were intended to bear a special burden. For example, the law contains an exception for any "licensed primary care clinic that is enrolled as a Medi-Cal provider and a provider in the Family Planning, Access, Care, and Treatment Program," Pet. 80a, which is the State's system of "reproductive health care" providers. See Cal. Welf. & Inst. Code § 14132. The FACT Act was crafted, in other words, to exempt licensed clinics that are *already* putting out the State's preferred message about abortion. Conversely, the only licensed providers that the FACT Act affects are those that the State believes are *not* adequately communicating the government's message.

The inference can hardly be clearer: The State disliked the speech of certain organizations, and set out to muddy, obscure, and drown it out through legislation. That is clear from the Ninth Circuit's account of the FACT Act, not merely Petitioners' or *amici*'s. But whatever a given policymaker might think about abortion, "freedom of speech prohibits the government from telling people what they must say." *Agency for Int'l Dev.* v. *All. for Open Soc'y*, 570 U.S. 205, 133 S. Ct. 2321, 2327 (2013) (quotes omitted). To target a disfavored category of speakers based on aversion to their speech is the essence of a viewpoint-based restriction on speech, and it calls for strict scrutiny. *Turner Broad.*, 512 U.S. at 658; see also *Reed* v. *Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2230 (2015). The Ninth Circuit gravely erred by applying merely intermediate scrutiny instead.

CONCLUSION

The Ninth Circuit's decision is a judicial wrecking ball that, if affirmed by this Court, would destroy a large swath of First Amendment rights properly enjoyed, not only by religiously-affiliated pregnancy centers, but by all institutions of faith. The decision below should be reversed.

Respectfully submitted,

ANTHONY R. PICARELLO, JR.
JEFFREY HUNTER MOON
MICHAEL F. MOSES
HILLARY BYRNES
United States Conference of Catholic Bishops
3211 Fourth Street, N.E.
Washington, DC 20017

GENE C. SCHAERR
Counsel of Record
MICHAEL T. WORLEY
SCHAERR | DUNCAN LLP
1717 K Street NW, Ste. 900
Washington, DC 20006
(202) 787-1060
gschaerr@schaerr-duncan.com

LISA J. GILDEN
The Catholic Health Association of the United States
1875 Eye Street NW
Suite 1000
Washington, DC 20006

KIM COLBY
Christian Legal Society
8001 Braddock Road
Suite 302
Springfield, VA 22151

SHERRI C. STRAND
JAMES W. ERWIN
THOMPSON COBURN LLP
One US Bank Plaza
St. Louis, MO 63101

ABBA COHEN
DAVID ZWIEBEL
MORDECHAI BISER
Agudath Israel of America
42 Broadway
New York, NY 10004

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APPENDIX: Interests of Particular *Amici*

The United States Conference of Catholic Bishops (USCCB) is a nonprofit corporation, the members of which are the active Catholic Bishops in the United States. USCCB advocates and promotes the pastoral teachings of the U.S. Catholic Bishops in such diverse areas of the Nation's life as the free expression of ideas, fair employment and equal opportunity for the underprivileged, immigration, protection of the rights of parents and children, the sanctity of life, and the importance of education. Values of particular importance to the Conference include the protection of the rights of religious organizations and their adherents under the First Amendment, and the proper development of this Court's jurisprudence in that regard.

The California Catholic Conference is a nonprofit corporation, the members of which are the active Catholic Bishops of the State of California. The Conference promotes the teachings of the Catholic Church and advocates on behalf of the sacredness of all human life, the importance of family life and the education of youth, justice for immigrants, the imprisoned and victims of human trafficking. The Conference supports programs serving people living in poverty and those in need of health care. It also supports the enforcement of state and federal laws protecting the rights of religious organizations.

The Catholic Health Association of the United States ("CHA") is the national leadership organization for the Catholic Church's health ministry. This ministry comprises more than 600 hospitals and 1400 long-term care and other health facilities in all 50 states and the District of Columbia. CHA advances the

Catholic health ministry's commitment to a just, compassionate health care system that protects life. CHA's members could be directly affected if governments could compel religiously-affiliated organizations to convey messages in contravention to their religious beliefs.

The Lutheran Church—Missouri Synod ("the Synod") has some 6100 member congregations with 2,100,000 baptized members throughout the United States. The Synod has two seminaries, ten universities, numerous related Synod-wide corporate entities, hundreds of recognized service organizations, and the largest Protestant parochial school system in America. The Synod steadfastly adheres to orthodox Lutheran theology and practice and has a keen interest in the High Court's fully preserving and protecting all religious liberties and freedom of speech provided under the First Amendment.

Christian Legal Society ("CLS") is an association of attorneys, law students, and law professors, founded in 1961, with attorney chapters and law student chapters nationwide. CLS's advocacy arm, the Center for Law and Religious Freedom, defends freedom of speech, the free exercise of religion, and the sanctity of human life in the courts, legislatures, and public square. CLS has long believed that pluralism, essential to a free society, prospers only when the First Amendment rights of all Americans are protected, including the right not to engage in compelled speech, which is at stake in this case.

Based on its belief that the Bible commands Christians to plead the cause of the poor and needy, CLS encourages and equips its members to volunteer their time and resources to help those in need in their communities. Through its legal aid ministry, CLS provides

resources and training to assist approximately 60 local legal aid clinics nationwide. These clinics represent one category of religious ministries whose work could be adversely affected if states may use compelled speech laws, such as those challenged in this case, to force them to express messages contrary to their religious beliefs.

Agudath Israel of America, founded in 1922, is a national grassroots Orthodox Jewish organization. Among its other functions and activities, Agudath Israel articulates and advances the position of the Orthodox Jewish community on a broad range of legal issues affecting religious rights and liberties in the United States. Agudath Israel regularly intervenes at all levels of government—federal, state, and local; legislative, administrative, and judicial (including through the submission or participation in amicus curiae briefs)—to advocate and protect the interests of the Orthodox Jewish community in the United States in particular and religious liberty in general. We join in this amicus curiae brief because we believe strongly that government should not compel religious organizations to propagate messages that conflict with their religious beliefs, and that the issue at stake in this case could have ramifications in a broad array of contexts that are of concern to religious communities like ours.